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THE
ALL INDIA REPORTER

1931

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1931

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Table No. II—This Table shows serially the pages of other REPORTS, JOURNALS and PERIODICALS with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

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Showing seriatim the pages of INDIN LAW REPORTS, ALLAHABAD SERIES for the year 1931 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 52 and 53 ALLAHABAD.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

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N. B.—Column No. 1 denotes pages of other JOURNALS.

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ALJ)	A. I. R.	ALJ)	A. I. R.	ALJ)	A. I. R.	ALJ)	A. I. R.	ALJ)	A. I. R.
503	1931 *A* 389	624	1931 *A* 674	797	1931 *PC* 229	904	1931 *A* 320	1038	1932 *A* 141
508	" " 386	644	" " 555	800	" " 226	906	1932 " 76	1049	1931 " 727
513	" *PC* 143	645	" " 662	804	" " 245	909	" " 63	1060	" " 548
515	" *A* 356	646	" " 703	808	" " 234	912	1931 " 433	1061	" *Notes*10*b*
522	" " 560	647	" " 420	816	1932 *A* 5	914	1932 " 53	1062	1932 *A* 82
526	" " 366	649	1932 " 33	829	1931 " 706	917	1931 " 512	1064	1931 " 700
528	" " 449	651	1931 " 652	833	" *PC* 263	915	" " 704	1066	" " 743
529	1932 " 92	653	" " 689	835	" *A* 745	946	1932 " 60	1068	1932 " 152
533	1931 " 549	660	" " 394	837	1932 " 114	949	1931 " 752	1071	1931 " 765
536	" " 766	666	" " 649	842	1931 *Notes*7*d*	951	" *Notes*12*a*	1073	1932 " 246
537	" *PC* 186	668	" " 655	844	1932 *A* 30	953	" *A* 574	1076	" " 169
541	" " 28	670	" " 723	847	1931 " 740	961	1932 " 139	1083	" " 138
544	" " 100	673	" " 429	849	1932 " 55	962	1931 " 452	1084	" " 136
550	" " 175	678	" " 580	852	1931 " 735	964	" " 533	1087	" " 154
555	" " 179	680	1932 " 41	854	1932 " 47	966	" *Notes* 5*b*	1089	" " 147
559	" *A* 631	682	1931 " 761	856	1931 " 608	967	" " 12*f*	1092	" " 96
561	" *PC* 182	687	" " 754	858	1932 " 16	968	1932 *A* 65	1094	" " 149
566	" " 162	690	" " 705	862	" " 62	974	1931 " 632	1097	" " 158
571	" *A* 113	692	" " 758	863	1931 " 725	977	" " 562	1098	" " 134
587	" " 434	694	" " 752	865	" " 567	983	" " 767	1102	" " 130
589	" " 668	695	" *Notes* 7*b*	875	" " 597	985	" " 419	1107	" " 151
591	" " 435	697	" *A* 443	878	1932 " 1	986	1932 " 18	1109	" " 83
593	" " 673	711	" " 489	880	" " 2	995	1931 " 667	1112	1931 *PC* 299
595	" " 605	715	" " 490	882	1931 " 748	997	1932 " 108	1116	" " 289
599	1932 " 40	727	" " 659	887	" " 743	999	" " 4	1123	" " 294
601	" " 32	729	" " 466	889	" " 91	1000	1931 " 609	1131	" " 285
603	" " 37	757	" " 499	891	" " 8	1002	" " 712	1136	1932 " 22
606	" " 45	765	" " 717	893	" " 192	1004	1932 " 120	1140	1931 " 279
608	1931 " 392	770	" " 708	894	" " 134	1007	1931 " 657	1143	" " 303
611	" " 665	773	" " 504	895	" " 129	1009	" *PC* 268	1149	1932 *A* 193
614	1932 " 43	777	" " 507	898	" " 355	1015	" *A* 49	1152	1931 " 656
617	1931 " 617	783	" *PC* 196	901	" " 415	1018	" " 685	1155	1932 " 183
622	" " 594	793	" " 224	902	" " 235	1037	1932 " 163	1157	" " 195

Law Reporter 12 Allahabad (*Criminal*)=All India Reporter.

LRA)	A. I. R.	LRA)	A. I. R.	LRA)	A. I. R.	LRA)	A. I. R.	LRA)	A. I. R.
1	1930 *A* 746	33	1931 *A* 1	59	1931 *A* 364	95	1931 *A* 705	147	1931 *A* 355
9	1931 " 8	36	" " 273	64	" " 51	98	" " 712	150	1932 " 28
13	" " 257	40	" " 34	67	" " 141	108	" " 433	154	" " 25
16	" " 13	42	" " 17	69	" " 209	111	" " 366	157	" " 26
18	" " 55	44	" " 263	71	" " 263	113	" " 435	160	" " 58
22	1930 " 489	48	" " 209	75	" " 356	117	" " 609	162	" " 70
25	" " 820	50	" " 362	85	" " 258	134	" " 708	164	" " 71
30	" " 835	54	" " 353	91	" " 555	137	" " 617	168	" " 69
32	1931 " 7	58	" " 630	92	" " 437	144	" *Notes* 7*b*	171	" " 73

Law Reporter 12 Allahabad (*Revenue*)=All India Reporter.

LRA)	A. I. R.	LRA)	A. I. R.	LRA)	A. I. R.	LRA)	A. I. R.	LRA)	A. I. R.
6	1931 *O* 62	82	1931 *O* 144	174	1932 *A* 35	226	1931 *A* 552	312	1931 *O* 382
28	" *A* 200	94	" " 142	177	1930 " 822	231	" " 587	331	" *A* 758
30	1930 " 784	114	" " 316	183	1931 *O* 401	240	" " 760	347	" " 735
35	1931 " 198	120	" " 348	187	" " 343	243	1932 " 92	368	1932 *O* 81
37	" *O* 71	127	1932 *A* 244	193	" " 381	250	1931 *O* 369	373	1931 " 403
41	" " 98	128	" " 245	200	1932 *A* 41	276	" *A* 752	375	" *Notes*6*c*
47	" *A* 205	142	1931 " 452	207	1931 " 582	277	1932 " 40	377	1932 *O* 59
66	" *O* 71	148	" " 238	209	" " 553	280	1931 " 668	380	1931 *Notes*13*b*
67	" " 256	156	" *O* 318	213	" *O* 346	283	" " 605	383	" " 10*e*
75	" " 244	159	" " 271	221	" *A* 547	288	" " 378	409	1932 *O* 135
79	" " 98	162	" " 314	223	" *Notes* 6*e*	303	1932 " 33	428	" *A* 149

Board of Revenue Cases are not included.

15 All India Criminal Reports=All India Reporter

AICrR)	A. I. R.	AICrR)	A. I. R.	AICrR)	A. I. R.	AICrR)	A. I. R.	AICrR)	A. I. R.
1	1931 *A* 3	21	1930 *C* 361	45	1930 *C* 273	61	1930 *C* 443	77	1930 *C* 671
8	1930 *C* 134	25	1931 *A* 10	48	" *B* 370	64	" " 369	80	" *B* 157
13	" " 295	27	1929 *C* 805	51	" *C* 244	66	" *A* 489	82	" *L* 873
16	1931 *A* 14	32	" " 726	56	" *B* 372	68	" *B* 358	84	" " 874
19	1930 *B* 176	35	1930 *B* 354	60	" *C* 360	73	" *L* 877	85	" " 867

Advocate High Court
Jammu & Kashmir
Srinagar.

15 All India Criminal Reports=All India Reporter—(*Concld.*)

AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.		
90	1930	*A*	835	181	1930	*A*	835	273	1930	*M*	863	359	1930	*O*	414	437	1930	*M*	867
92	"	*L*	875	182	"	*C*	276	277	"	"	859	360	"	*L*	895	441	1931	*C*	65
96	"	"	879	187	"	"	274	281	1931	*A*	34	362	1931	*C*	261	443	1930	*L*	954
98	1931	*A*	8	190	"	*P*	504	283	"	"	263	364	1930	"	713	449	"	*M*	1001
101	"	"	257	193	"	*L*	405	286	1930	*L*	345	367	1931	"	10	452	1931	"	18
105	1930	*L*	865	196	"	*P*	507	289	"	"	344	369	"	*R*	81	453	"	*C*	65
109	1931	*A*	13	198	"	*C*	379	290	"	"	344	373	1930	"	335	455	"	*R*	52
112	"	"	55	203	"	*O*	353	291	"	*O*	497	376	"	*M*	873	458	"	*A*	353
116	1930	*L*	453	214	1931	*L*	185	298	"	*L*	314	377	1931	*A*	209	462	"	"	630
118	"	*O*	360	216	1930	"	272	299	"	*O*	406	379	"	"	362	463	"	"	364
121	"	*B*	348	218	"	*P*	159	304	"	*M*	854	383	"	*R*	26	468	"	"	51
125	"	*L*	524	221	"	*C*	645	307	"	*P*	520	385	1930	*C*	636	471	"	"	141
127	"	*M*	505	223	"	*Notes*	25*d*	308	"	"	545	387	1931	*M*	16	473	"	"	209
131	"	*L*	870	224	"	*C*	379	318	"	*L*	337	389	1930	*C*	754	475	"	*L*	132
138	1931	*O*	86	225	1931	*A*	7	322	1931	*O*	113	392	1931	"	178	477	"	"	153
144	"	"	85	226	"	"	1	327	1930	"	403	401	1930	*M*	975	483	"	*O*	116
146	1930	*M*	508	229	"	"	273	328	"	*L*	346	404	"	*L*	886	489	"	"	119
148	"	*C*	442	233	1930	*M*	785	329	"	*R*	355	409	"	*M*	869	496	"	*C*	189
151	"	"	444	235	"	*L*	481	339	"	*P*	509	413	"	*L*	882	499	"	"	345
154	"	*M*	631	237	"	*C*	720	341	"	*Notes*	26*e*	416	"	*R*	360	508	"	*P*	150
156	"	"	448	239	"	*R*	351	344	1931	*R*	89	417	"	*L*	881	513	"	*S*	9
157	"	"	446	246	"	*C*	281	346	"	*O*	80	420	1931	*M*	180	520	"	*PC*	111
160	"	"	507	249	1931	*A*	17	348	1930	"	502	423	1930	*L*	945	522	"	*A*	263
163	"	*P*	505	251	1930	*C*	481	351	"	*C*	711	428	1931	"	24	526	"	"	356
166	"	"	164	260	"	"	486	353	"	"	665	430	1930	*C*	715	536	1930	*S*	315
173	"	"	493	262	"	*O*	408	355	"	*R*	354	433	"	*M*	980	539	1931	*L*	38
176	"	*A*	820	269	"	"	412	356	"	*O*	500	434	1931	"	17	557	"	*P*	86

16 All India Criminal Reports=All India Reporter

AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.		
1	1931	*S*	13	100	1931	*P*	145	241	1931	*A*	708	310	1931	*L*	184	374	1931	*M*	233
5	"	*L*	33	109	"	*L*	18	244	"	"	617	312	"	"	177	378	"	*Notes*	16*e*
14	"	*P*	50	120	"	"	29	251	"	*L*	53	314	"	"	178	381	"	*M*	484
19	"	*A*	258	122	"	*A*	366	253	"	*M*	420	322	"	*B*	195	387	"	*Notes*	9*d*
25	"	"	555	123	"	"	435	256	"	*P*	85	328	"	*M*	429	393	"	*C*	436
26	"	"	437	127	"	*L*	30	258	"	*Notes*	17*c*	329	"	"	770	397	"	*O*	273
29	"	*P*	81	129	"	*R*	1	259	"	*C*	263	330	"	"	233	399	"	*L*	543
36	"	*O*	81	150	"	*L*	25	261	"	*P*	207	331	"	*L*	157	401	"	*C*	401
40	"	*L*	31	154	"	"	27	262	"	*C*	350	333	"	*R*	127	419	"	*M*	439
42	"	"	32	158	"	*A*	609	266	"	*S*	37	338	"	*B*	199	421	1932	*A*	28
44	1930	*C*	437	175	"	*P*	379	268	"	*O*	161	340	"	*L*	405	425	"	"	25
53	1931	*A*	705	189	"	*R*	14	278	"	*L*	536	343	"	*P*	96	428	1931	*L*	353
57	"	*P*	52	190	"	*L*	408	282	"	"	105	345	1930	*Notes*	15*a*	440	"	*Notes*	16*d*
64	1930	*L*	460	205	"	*B*	132	284	"	*M*	422	348	1931	*P*	144	441	1932	*O*	11
68	"	"	664	210	"	*L*	54	289	"	*L*	404	349	"	"	337	461	1931	*L*	527
70	"	"	462	213	"	"	196	291	"	*Notes*	7*b*	352	"	*L*	199	464	1932	*A*	26
71	"	"	463	219	"	"	50	293	"	*R*	51	353	"	*A*	355	467	1931	*L*	468
73	1931	*B*	129	223	"	"	52	295	"	*L*	278	357	"	*L*	523	469	1932	*A*	58
80	"	*N*	38	225	"	*C*	18	299	"	*O*	115	358	"	*P*	337	471	"	"	70
81	"	*A*	712	234	"	*B*	192	301	"	*C*	344	360	"	"	160	474	"	"	71
91	"	*P*	49	237	"	*P*	159	303	"	*Notes*	16*f*	361	"	*M*	236	478	1931	*O*	166
94	"	*L*	200	239	"	*L*	56	305	"	*L*	182	370	"	"	227	486	"	"	385
96	"	*A*	433	240	1930	"	100	308	"	*B*	205	371	"	"	231				

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32 Criminal Law Journal & 129 to 134 Indian Cases=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1931 Lahore.**

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4 Income-Tax Cases=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1931 Madras.**

1931 Criminal Cases=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1931 Nagpur.**

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1931 ALLAHABAD SECTION, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1931 ALLAHABAD
Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

A. I. R. 1931 Allahabad=Other Journals

A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals
1	1931 *Cr C* 1	17	12 *L R ACr* 42	51	130 *I C* 484	95	1930 *A L J* 1141
FB	1930 *A L J* 1481		15 *A I CrR* 249		1931 *Cr C* 123		52 *All* 761
	129 *I C* 258		130 *I C* 626		12 *L R A Cr* 64	99	1930 *A L J* 1524
	15 *A I CrR* 226		32 *Cr L J* 564		32 *Cr L J* 556		130 *I C* 198
	12 *L R ACr* 33		53 *All* 226		15 *A I CrR* 468		52 *All* 901
	32 *Cr L J* 362	18	1930 *A L J* 1420		53 *All* 218	101	1930 *A L J* 1561
	52 *All* 1011		130 *I C* 697	53	1930 *A L J* 1475		131 *I C* 241
2	1931 *Cr C* 2		52 *All* 976		11 *L R ACr* 177		53 *All* 1
	129 *I C* 265	19	132 *I C* 36		14 *A I CrR* 465	103	1930 *A L J* 1494
	32 *Cr L J* 368	20	11 *LRARev* 340		130 *I C* 620		130 *I C* 710
3	15 *A I CrR* 1		14 *R D* 716		1931 *Cr C* 125	104	1930 *A L J* 1555
	1930 *A L J* 1504		132 *I C* 809		32 *Cr L J* 570		131 *I C* 217
	11 *L R ACr* 181	21	1930 *A L J* 1254		53 *All* 148		53 *All* 208
	1931 *Cr C* 3		130 *I C* 13	55	1930 *A L J* 1485	106	1930 *A L J* 1478
	129 *I C* 269	23	1930 *A L J* 1548		15 *A I CrR* 112		130 *I C* 295
	32 *Cr L J* 372		130 *I C* 634		1931 *Cr C* 127		53 *All* 169
	53 *All* 172		52 *All* 991		131 *I C* 246	108	1930 *A L J* 1509
7	1931 *Cr C* 7		4 *I T C* 454		53 *All* 140		130 *I C* 698
	1930 *A L J* 1314	25	1930 *A L J* 1284		32 *Cr L J* 690		53 *All* 5
	129 *I C* 369		130 *I C* 12		12 *L R ACr* 18	112	1930 *A L J* 1599
	12 *L R A Cr* 32		52 *All* 921	57 (1)	1930 *A L J* 559		52 *All* 1027
	15 *A I CrR* 225	26	1930 *A L J* 763		127 *I C* 527		133 *I C* 478
	32 *Cr L J* 313		128 *I C* 1		52 *All* 489	113	129 *I C* 719
	53 *All* 206	28 (1)	1930 *A L J* 1256	57 (2)	14 *R D* 651		1931 *A L J* 571
8	1931 *Cr C* 8		130 *I C* 840		11 *LRARev* 305	124	129 *I C* 554
	15 *A I CrR* 98	28 (2)	11 *LRARev* 300		1930 *A L J* 1469	126	1931 *A L J* 16
	12 *L R A Cr* 9		14 *R D* 654		132 *I C* 42		129 *I C* 551
	1931 *A L J* 891		1931 *A L J* 8		53 *All* 180	128	1930 *A L J* 1592
	32 *Cr L J* 1269		53 *All* 62	59 (1)	1930 *A L J* 453		53 *All* 130
	134 *I C* 834		133 *I C* 319		52 *All* 493		133 *I C* 313
	53 *All* 229	29	15 *R D* 70		127 *I C* 584	129 (1)	1930 *A L J* 1608
9	1931 *Cr C* 9		1930 *A L J* 1281	59 (2)	1930 *A L J* 1157		15 *R D* 77
	133 *I C* 154		130 *I C* 382		128 *I C* 772		129 *I C* 718
	32 *Cr L J* 1006	31	124 *I C* 43	62	1930 *A L J* 1267	129 (2)	1931 *A L J* 895
10	1931 *Cr C* 10	33	1930 *A L J* 1251		130 *I C* 489	131	1931 *A L J* 104
	11 *L R ACr* 187		14 *R D* 656		52 *All* 985		130 *I C* 1
	1930 *A L J* 1422		130 *I C* 292	65	1930 *A L J* 913	134	129 *I C* 716
	15 *A I CrR* 25	34	1931 *A L J* 10		130 *I C* 712		53 *All* 419
	129 *I C* 257		12 *L R ACr* 40		52 *All* 964		1931 *A L J* 894
	32 *Cr L J* 360		15 *A I CrR* 281	71	1931 *A L J* 18	135	...
12	1931 *Cr C* 12		130 *I C* 696		53 *All* 313	136 (1)	129 *I C* 560
	1930 *A L J* 1535		1931 *Cr C* 207		134 *I C* 848		1931 *A L J* 152
	129 *I C* 443		32 *Cr L J* 578	72	1931 *A L J* 13		53 *All* 427
	32 *Cr L J* 311		53 *All* 94		134 *I C* 454	136 (2)	1931 *A I J* 20
13	1931 *Cr C* 13	35	1930 *A L J* 1601	73	1930 *A L J* 1572		132 *I C* 324
	1930 *A L J* 1324	**FB**	53 *All* 65		129 *I C* 734		53 *All* 384
	129 *I C* 444		133 *I C* 428	76	1930 *A L J* 1222	139	1931 *A L J* 1
	15 *A I CrR* 109	38	1930 *A L J* 1594		133 *I C* 142		52 *All* 1032
	12 *L R ACr* 16		133 *I C* 314	83	1931 *A L J* 84		131 *I C* 674
	32 *Cr L J* 312	40	1930 *A L J* 1577		53 *All* 316	141	1930 *A L J* 1520
	53 *All* 223		131 *I C* 599	90	1930 *A L J* 1566		1931 *Cr C* 200
14	1931 *Cr C* 14		52 *All* 1037		130 *I C* 303		130 *I C* 488
	11 *L R ACr* 190	45	1930 *A L J* 1286		53 *All* 133		12 *L R ACr* 67
	15 *A I CrR* 16		132 *I C* 333	91	11 *LRARev* 362		32 *Cr L J* 558
	1930 *A L J* 1437	47	15 *R D* 74		15 *R D* 16		15 *A I CrR* 471
	129 *I C* 441		1930 *A L J* 1307		132 *I C* 815		52 *All* 1018
	32 *Cr L J* 309		131 *I C* 527		1931 *A L J* 889	142 (1)	1931 *Cr C* 208
	53 *All* 215	49	1931 *Cr C* 121	92	1930 *A L J* 1552		129 *I C* 715
16	11 *LRARev* 330		53 *All* 233		131 *I C* 244		32 *Cr L J* 437
	14 *R D* 700		133 *I C* 140		53 *All* 125	142 (2)	1931 *A L J* 26
	132 *I C* 814		32 *Cr L J* 1007	94	1930 *A L J* 1497		135 *I C* 117
17	1931 *Cr C* 33		1931 *A L J* 1015		130 *I C* 695	145	1931 *A L J* 119
	1930 *A L J* 1467	51	1930 *A L J* 1490	95	124 *I C* 764		130 *I C* 708

A. I. R. 1931 Allahabad=Other Journals—(*Contd.*)

A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	OtherJournals
147	1931 *A L J* 206	221	53 *All* 442	269	1931 *Cr C* 429	341	53 *All* 484
	133 *I C* 148	223	130 *I C* 196		33 *Cr L J* 256	347	130 *I C* 301
	53 *All* 500		1931 *A L J* 265		136 *I C* 277	349	1931 *A L J* 266
151	129 *I C* 545	224	129 *I C* 557	273	129 *I C* 267		131 *I C* 877
	1931 *A L J* 153		1931 *A L J* 102		12 *L R A Cr* 36		53 *All* 521
	53 *All* 374	225	124 *I C* 19		15 *A I Cr R* 229	350	1931 *A L J* 159
159	1931 *A L J* 62		1930 *A L J* 1517		1931 *Cr C* 337		131 *I C* 119
	130 *I C* 485	227	1930 *A L J* 1433		32 *Cr L J* 370	351	131 *I C* 253
160	1931 *A L J* 56		129 *I C* 705	275	1931 *A L J* 73		52 *All* 1029
	130 *I C* 702	229	132 *I C* 422		131 *I C* 38		1931 *A L J* 233
162	1931 *A L J* 122		1931 *A L J* 363	276	1930 *A L J* 944	353	1931 *A L J* 304
FB	53 *All* 239	234	124 *I C* 767		128 *I C* 4		12 *L R A Cr* 54
	135 *I C* 119	235	132 *I C* 31		52 *All* 938		131 *I C* 865
183	1931 *A L J* 64		1931 *A L J* 902	277	1931 *A L J* 273		15 *A I CrR* 458
FB	53 *All* 114	237	124 *I C* 756	**FB**	132 *I C* 401		1931 *Cr C* 609
	133 *I C* 307	238	1931 *A L J* 162		53 *All* 334		32 *Cr L J* 814
189	1931 *A L J* 41		131 *I C* 45	294	1931 *A L J* 377	355	131 *I C* 36
FB	52 *All* 844		12 *LRA Rev* 148	**FB**	133 *I C* 129		32 *Cr L J* 670
	131 *I C* 675		15 *R D* 341		53 *All* 612		1931 *Cr C* 611
192	1931 *A L J* 893	242 (1)	1931 *A L J* 100	302	1931 *A L J* 230		53 *All* 461
193	1930 *A L J* 1456		130 *I C* 291		131 *I C* 135		1931 *A L J* 898
	131 *I C* 211	242 (2)	130 *I C* 3	303	131 *I C* 596		16 *A I CrR* 353
196	1930 *A L J* 1435		1931 *A L J* 200	305	129 *I C* 264		12 *L R ACr* 147
	130 *I C* 15	243	1931 *A L J* 74		1931 *A L J* 117	356	12 *L R A Cr* 75
197	129 *I C* 550		52 *All* 1014		32 *Cr L J* 367		1931 *A L J* 515
198	12 *LRA Rev* 35		132 *I C* 813		1931 *Cr C* 449		1931 *Cr C* 612
	129 *I C* 553	244	1931 *A L J* 187		53 *All* 416		15 *A I Cr R* 526
	15 *R D* 162	**FB**	132 *I C* 24	306	131 *I C* 598		32 *Cr L J* 1271
200	130 *I C* 4		53 *All* 535		1931 *A L J* 263		134 *I C* 842
	12 *LRA Rev* 28	251	1931 *A L J* 150		53 *All* 529	362	12 *L R A Cr* 50
	15 *R D* 160		131 *I C* 39	307	1931 *A L J* 170		15 *A I CrR* 379
201	124 *I C* 731	252	130 *I C* 6		130 *I C* 201		131 *I C* 594
	1931 *A L J* 51	253	1931 *A L J* 219		53 *All* 428		1931 *Cr C* 618
	52 *All* 831		131 *I C* 872	313	1931 *A L J* 332		32 *Cr L J* 780
203	1931 *A L J* 29	257	1930 *A L J* 1335		131 *I C* 255		53 *All* 598
	133 *I C* 311		12 *LRA Cr* 13		53 *All* 603	364	1931 *A L J* 405
205	129 *I C* 559		15 *A I Cr R* 101	315	130 *I C* 629		15 *A I CrR* 463
	12 *LRA Rev* 47		130 *I C* 627	317	1931 *A L J* 269		12 *L R A Cr* 59
	15 *R D* 185		1931 *Cr C* 417		132 *I C* 193		132 *I C* 327
	53 *All* 414		32 *Cr L J* 565		53 *All* 524		1931 *Cr C* 620
207	129 *I C* 717	258	1930 *A L J* 1451	318	129 *I C* 732		32 *Cr L J* 864
	1931 *A L J* 267		130 *I C* 492	320 (1)	133 *I C* 606		53 *All* 724
208	124 *I C* 558		32 *Cr L J* 559		1931 *A L J* 904	366	1931 *A L J* 526
209	129 *I C* 558		1931 *Cr C* 418	320 (2)	1931 *A L J* 166		132 *I C* 332
	1931 *A L J* 98		12 *L R A Cr* 85		133 *I C* 609		1931 *Cr C* 622
	1931 *Cr C* 224		16 *A I Cr R* 19	323	130 *I C* 296		16 *A I Cr R* 122
	12 *LRA Cr* 48	262	1931 *A L J* 157	325	131 *I C* 593		12 *L R ACr* 111
	32 *Cr L J* 376		130 *I C* 625		1931 *A L J* 223		32 *Cr L J* 866
	12 *L R A Cr* 69		1931 *Cr C* 422	326	1931 *A L J* 319		53 *All* 690
	15 *AICr R* 377		32 *Cr L J* 562		131 *I C* 559	367	130 *I C* 640
	15 *A I Cr R* 473		53 *All* 458	327	1931 *A L J* 81		32 *Cr L J* 567
	53 *All* 411	263	130 *I C* 193		130 *I C* 704		1931 *Cr C* 623
210	130 *I C* 289		12 *L R A Cr* 44		53 *All* 479	368	129 *I C* 374
211 (1)	122 *I C* 597		15 *A I CrR* 283	329	131 *I C* 518	369	1931 *A L J* 235
	15 *R D* 336		1931 *Cr C* 423	331	1931 *A L J* 175		131 *I C* 604
211 (2)	1931 *A L J* 54		32 *Cr L J* 465		131 *I C* 35		53 *All* 552
	130 *I C* 448		12 *LRA Cr* 71		53 *All* 476	372	1931 *A L J* 225
212	1931 *A L J* 36		15 *AICr R* 522	332	130 *I C* 299		132 *I C* 43
	130 *I C* 498		53 *All* 407	333 (1)	...	375	131 *I C* 867
	53 *All* 422	265	1931 *A L J* 201	333 (2)	1931 *A L J* 181	377	1931 *A L J* 228
215	1931 *A L J* 79		130 *I C* 693		131 *I C* 548		132 *I C* 417
	130 *I C* 707		1931 *Cr C* 425		53 *All* 466		53 *All* 496
	15 *R D* 338		32 *Cr L J* 576	337	1931 *A L J* 335	378	15 *R D* 557
216	1931 *A L J* 204		53 *All* 437		131 *I C* 683		12 *LRARev* 288
	131 *I C* 681	267	1930 *A L J* 1130		53 *All* 595		135 *I C* 116
218	1931 *A L J* 103		128 *I C* 595	338	130 *I C* 299	380	1931 *A L J* 324
	130 *I C* 839		32 *Cr L J* 155	340	1931 *A L J* 58		131 *I C* 520
219	132 *I C* 426		52 *All* 941		130 *I C* 487		53 *All* 580
221	1931 *A L J* 94		1931 *Cr C* 427	341	131 *I C* 40		
	130 *I C* 7	269	1931 *A L J* 177		1931 *A L J* 354		

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FB	53 *All*	283
389	1931 *A L J*	503
FB	133 *I C*	904
	53 *All*	786
392	1931 *A L J*	608
FB	133 *I C*	157
394	1931 *A L J*	660
	133 *I C*	611
	53 *All*	658
398	133 *I C*	155
401	1931 *A L J*	414
	132 *I C*	429
	53 *All*	679
403	1931 *A L J*	197
	131 *I C*	115
405 (1)	131 *I C*	137
	15 *R D*	621
405 (2)	1931 *A L J*	339
	131 *I C*	251
406	15 *R D*	623
	134 *I C*	253
407	133 *I C*	792
411	1931 *A L J*	342
	131 *I C*	557
413	1931 *A L J*	321
	15 *R D*	370
	131 *I C*	869
	15 *R D*	641
415 (1)	131 *I C*	33
	15 *R D*	625
	53 *All*	515
	1931 *A L J*	901
415 (2)	...	
417	1931 *A L J*	345
	132 *I C*	329
	53 *All*	451
419	131 *I C*	686
	1931 *A L J*	985
420	1931 *A L J*	647
	53 *All*	712
421	1931 *A L J*	336
	131 *I C*	875
	53 *All*	445
423	133 *I C*	414
425	1931 *A L J*	301
	131 *I C*	878
427	132 *I C*	562
428	1931 *A L J*	397
	132 *I C*	419
	53 *All*	609
429	1931 *A L J*	673
SB	133 *I C*	298
433	1931 *Cr C*	705
	12 *L R A Cr*	108
	16 *A I Cr R*	96
	1931 *A L J*	912
	53 *All*	706
434	132 *I C*	47
	1931 *A L J*	587
	1931 *Cr C*	706
	32 *Cr L J*	849
	53 *All*	692
435	1931 *A L J*	591
	1931 *Cr C*	707
	16 *A I Cr R*	123
	12 *L R A Cr*	113
	135 *I C*	252
	33 *Cr L J*	158
437	16 *A I Cr R*	26
437	12 *L R A Cr*	92
	1931 *Cr C*	709
	133 *I C*	535
	32 *Cr L J*	1070
439	1931 *Cr C*	711
443	1931 *A L J*	697
SB	1931 *Cr C*	715
	32 *Cr L J*	1105
	134 *I C*	225
	53 *All*	804
447	1931 *A L J*	428
	133 *I C*	477
449 (1)	1931 *A L J*	528
	133 *I C*	624
449 (2)	1931 *A L J*	404
	132 *I C*	808
450	133 *I C*	790
452	132 *I C*	431
	12 *LRARev*	142
	1931 *A L J*	962
	15 *R D*	101
453	1931 *A L J*	442
	133 *I C*	31
	53 *All*	669
454	1931 *A L J*	240
	131 *I C*	248
	53 *All*	560
458 (1)	131 *I C*	546
458 (2)	1931 *A L J*	436
	133 *I C*	316
461	132 *I C*	422
462	1931 *A L J*	307
	15 *R D*	322
	133 *I C*	468
	53 *All*	568
466	1931 *A L J*	729
FB	134 *I C*	1
489	1931 *A L J*	711
FB	53 *All*	687
490	1931 *A L J*	715
FB	134 *I C*	236
499	1931 *A L J*	757
SB	134 *I C*	21
504	1931 *A L J*	773
	1931 *Cr C*	892
	33 *Cr L J*	94
	135 *I C*	113
507	1931 *A L J*	777
SB	134 *I C*	26
512	1931 *A L J*	917
FB	135 *I C*	139
	53 *All*	868
533	131 *I C*	871
	53 *All*	516
	1931 *A L J*	964
534	1931 *A L J*	432
	15 *R D*	451
	133 *I C*	532
537	131 *I C*	547
538	1931 *A L J*	413
539	130 *I C*	482
541	1931 *A L J*	400
	132 *I C*	568
546	131 *I C*	545
547	1931 *A L J*	411
	15 *R D*	439
	12 *LRARev*	221
	132 *I C*	804
548	131 *I C*	594
	53 *All*	607
548	1931 *A L J*	1060
549 (1)	1931 *A L J*	398
	132 *I C*	803
	53 *All*	631
549 (2)	1931 *A L J*	533
	133 *I C*	615
	53 *All*	702
551	132 *I C*	201
552	1931 *A L J*	429
	15 *R D*	447
	12 *LRA Rev*	226
	133 *I C*	543
	53 *All*	742
553	1931 *A L J*	408
	15 *R D*	435
	12 *LRARev*	209
	132 *I C*	805
	53 *All*	636
555	12 *L R A Cr*	91
	1931 *A L J*	644
	16 *A I Cr R*	25
	1931 *Cr C*	897
	53 *All*	797
556	131 *I C*	603
557	1931 *A L J*	393
	133 *I C*	29
	53 *All*	673
560	1931 *A L J*	522
	134 *I C*	251
562**FB**	1931 *A L J*	977
567	1931 *A L J*	865
FB	134 *I C*	836
574**FB**	1931 *A L J*	953
580**SB**	1931 *A L J*	678
582	12 *LRARev*	207
	15 *R D*	535
	134 *I C*	252
583	1931 *A L J*	390
	136 *I C*	158
585	1931 *A L J*	421
	135 *I C*	248
587	1931 *A L J*	424
	15 *R D*	441
	12 *LRARev*	231
	53 *All*	764
	135 *I C*	545
589 (1)	132 *I C*	200
	53 *All*	528
589 (2)	1931 *A L J*	295
	132 *I C*	321
594	1931 *A L J*	622
595	132 *I C*	564
596	1931 *A L J*	417
	132 *I C*	573
	53 *All*	633
597**FB**	1931 *A L J*	875
600	131 *I C*	513
605	1931 *A L J*	595
	15 *R D*	547
	133 *I C*	466
	12 *LRARev*	283
608	1931 *A L J*	856
	133 *I C*	318
609	12 *L R A Cr*	117
	16 *A I CrR*	158
	133 *I C*	593
	32 *Cr L J*	1052
	1931 *A L J*	1000
	1931 *Cr C*	961
617	1931 *A L J*	617
617	133 *I C*	617
	32 *Cr L J*	1045
	16 *A I CrR*	244
	12 *L R A Cr*	137
	1931 *Cr C*	969
	53 *All*	729
621	1931 *Cr C*	973
	1932 *A L J*	5
625	1931 *A L J*	349
629	133 *I C*	405
	32 *Cr L J*	1014
	1931 *Cr C*	926
	1932 *A L J*	32
630 (1)	1931 *A L J*	366
	12 *L R A Cr*	58
	15 *A I Cr R*	462
	132 *I C*	419
	53 *All*	594
	1931 *Cr C*	926
630 (2)	131 *I C*	687
631	1931 *A L J*	559
	132 *I C*	561
	53 *All*	695
632**FB**	1931 *A L J*	974
635	1931 *A L J*	1018
FB	15 *R D*	815
	136 *I C*	145
649	1931 *A L J*	666
651	133 *I C*	415
652	1931 *A L J*	651
	134 *I C*	452
653	1931 *A L J*	440
655	1931 *A L J*	668
	133 *I C*	622
656	1931 *A L J*	1152
	13 *LRARev*	3
657	132 *I C*	807
	1931 *A L J*	1007
659	1931 *A L J*	727
	133 *I C*	465
660	131 *I C*	679
662	1931 *A L J*	645
	53 *All*	776
663	132 *I C*	801
	53 *All*	532
664	133 *I C*	411
665	1931 *A L J*	611
	53 *All*	771
667	133 *I C*	404
	1931 *A L J*	995
668	1931 *A L J*	589
	133 *I C*	476
	15 *R D*	554
	12 *LRARev*	280
	53 *All*	794
670	133 *I C*	26
673	1931 *A L J*	593
	133 *I C*	621
	53 *All*	684
674	53 *All*	836
	1931 *A L J*	624
689	1931 *A L J*	653
	53 *All*	747
695 (1)	133 *I C*	427
695 (2)	1931 *A L J*	314
	133 *I C*	785
700	1931 *A L J*	1064
	133 *I C*	423
701	133 *I C*	424

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703 (1)	133 *I C* 417	710	1931 *Cr C* 1046	736	52 *All* 1005	752 (2)	1931 *A L J* 949
703 (2)	1931 *A L J* 646	711	1931 *Cr C* 1047		133 *I C* 204	754	1931 *A L J* 687
	133 *I C* 622	712	12 *L R A Cr* 98	739	1930 *A L J* 1558		133 *I C* 604
704	133 *I C* 432		16 *A I Cr R* 81		130 *I C* 637	756	133 *I C* 407
	1931 *A L J* 945		133 *I C* 795		53 *All* 137		1932 *A L J* 13
705	12 *L R A Cr* 95		32 *Cr L J* 1073	740	1931 *A L J* 847	758	1931 *A L J* 692
	1931 *A L J* 690		1931 *A L J* 1002	741	1930 *A L J* 1564		15 *R D* 564
	16 *A I Cr R* 53		1931 *Cr C* 1048		131 *I C* 242		133 *I C* 539
	133 *I C* 418	717	1931 *A L J* 765		53 *All* 100		12 *LRARev* 331
	32 *Cr L J* 1031		133 *I C* 419	743 (1)	1931 *A L J* 887	759	133 *I C* 159
	1931 *Cr C* 1041	721	133 *I C* 416		15 *R D* 688	760	12 *LRARev* 240
706	1931 *A L J* 829	722	131 *I C* 33	743 (2)	1931 *A L J* 1066		15 *R D* 626
	1931 *Cr C* 1042	723	1931 *A L J* 670		133 *I C* 412		133 *I C* 603
	53 *All* 799		133 *I C* 607	745	133 *I C* 403	761	53 *All* 778
708	1931 *A L J* 770	725	133 *I C* 410		1931 *A L J* 825		1931 *A L J* 682
	133 *I C* 601		1931 *A L J* 863	746	133 *I C* 303	765	1931 *A L J* 1071
	32 *Cr L J* 1061	727	1931 *A L J* 1049	748	1931 *A L J* 882		133 *I C* 401
	16 *A I Cr R* 241	735	1931 *A L J* 852	751	133 *I C* 531	766 (1)	1931 *A L J* 536
	12 *L R A Cr* 124		133 *I C* 911	752 (1)	1931 *A L J* 694	766 (2)	1931 *A L J* 271
	1931 *Cr C* 1044		15 *R D* 678		15 *R D* 563		132 *I C* 205
710	133 *I C* 800		12 *LRARev* 347		12 *LRARev* 276	767	132 *I C* 566
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ALLAHABAD HIGH COURT

✱ ✱ A. I. R. 1931 Allahabad 1
Full Bench

MEARS, C. J., SULAIMAN, BOYS, YOUNG AND KISCH, JJ.

Balmakund—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 116 of 1930, Decided on 22nd May 1930, from decision of Sessions Judge, Shahjahanpur, D/- 20th January 1930.

✱ ✱ Evidence Act, S. 24—Confession—Acceptance in part—Confession must be taken as a whole.

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible: 38 *I.C.* 740, *Appr.*; *Rex* v. *Sarah Jones and Mary Jones*, (1827) 2 *Carrington* and *Payne* 629, *Ref.* [P 2 C 1, 2]

C. Ross Alston and *P. L. Banerji*, *Saila Nath Mukerji* and *Kanhaiya Lal*—for Appellant.

U. S. Bajpai—for the Crown.

Opinion

Mears, C. J.—The question referred to this Bench is stated as follows by the Division Bench before whom the appeal came for hearing:

> "The appellant in this case made a confession. As regards the fact of the murder, we have no doubt that he killed his wife, but in a confession he alleges certain reasons which, if true, would have an important bearing upon the nature of our decision. The matters alleged by him in justification appear to us so unworthy of belief that no Court could act upon them.
>
> We are however told that the case of *Jagdeo* v. *Emperor* (1) compels us to accept the confession as a whole, and that we are not able to choose that part of the confession which appeals to our reason and reject that which strikes us untrue and absurd.
>
> This is a matter of considerable importance, and it is desirable to have this question settled by a Full Bench."

The present Full Bench was accordingly appointed to decide the question "whether the authority quoted above was correctly decided." It is important to note first that in this case there was no evidence bearing on the guilt of the accused other than the confession.

The confession may be described as comprising two elements: (a) an account of how the accused killed the woman; and (b) an account of his reasons for doing so; the former element being inculpatory and the latter exculpatory; and the question we have to answer may be stated as follows:

> "Can the Court, if it is of opinion that the inculpatory part commands belief and the exculpatory part is inherently incredible, act upon the former and refuse to act upon the latter?"

In the present case, if the answer is in the affirmative, the accused would properly be convicted of murder. If the answer is in the negative, the conviction would have to be for culpable homicide only.

It will be seen that if the Court is bound to accept the confession as a whole and cannot reject a part of it as inherently incredible, the result would be that the offence of the accused would be minimized, although the Court believed that the extenuating circumstances did not exist.

We have had a large number of authorities quoted to us and an examination of them shows that they actually establish no more than this, that (a) where there is other evidence, a portion of the confession may, in the light of that evidence, be rejected while acting upon the remainder with the other evidence; (b) where there is no other evidence and the exculpatory element is not inherently incredible, the Court cannot accept the inculpatory element and reject the exculpatory element.

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(1) [1917] 18 Cr.L.J. 356=38 I.C. 740.

The latter rule may have been justified in some cases on the ground that the prosecution putting before the Court for its consideration the confession of an accused person cannot, in the absence of evidence showing that any portion of it is false, ask the Court to believe that portion of the confession which establishes the guilt of the accused, and to reject that portion of the confession which establishes his innocence or reduces the gravity of the offence; or it may have been justified in other cases on the principle that a confession is analogous to a plea of guilty and must be accepted as a whole. But, be the particular reason what it may, this rule of practice has been established and acted on for the last 100 years, beginning with the case of *Rex* v. *Sarah Jones and Mary Jones* (2). While in all the cases which we have examined the exculpatory part of the confession has in fact in no single case been inherently incredible, the possibility of any distinction based upon whether the exculpatory element in the confession was or was not in itself inherently incredible does not seem to have been present to the mind of the Court. We have to decide now whether effect should be given to such a distinction.

In view of the fact that the two rules above stated have been applied during the last 100 years without, so far as the reports show, any attempt to engraft on those two rules the exception in question, and in view of the extreme caution with which a confession must be weighed in every case and particularly in a case where there is no other evidence to bring home guilt to the accused, we do not think that it would be expedient now to introduce that exception.

Our answer, then, to the reference is that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. With this answer let the reference be returned.

K.N./R.K. *Reference answered.*

A. I. R. 1931 Allahabad 2

KENDALL, J.

Sankatha Misir—Applicant.

v.

Bishwanath and *others*—Opposite Parties.

Criminal Ref. No. 173 of 1930, Decided on 21st May 1930, made by Sess. Judge, Benares, on 22nd February 1930.

Criminal P. C., Ss. 356 and 537—Error, not going to root of trial, does not vitiate proceedings and can be cured by S. 537.

An error in procedure, which neither goes to the root of the trial nor prejudices the parties, does not vitiate the trial and is curable under S. 537.

Where in an enquiry under S. 145, the Magistrate failed to comply with the provisions of S. 356, in recording evidence:

Held : that his error in procedure, which neither went to the root of the trial nor prejudiced the parties, did not vitiate the enquiry: 25 *Mad.* 61, *Dist.*; *A.I.R.* 1923 *All.* 81 and *A.I.R.* 1925 *Rang.* 258, *Appr.* [P 3 C 2]

Ambika Prasad—for Opposite Parties.

Order.—This is a reference from the Sessions Judge of Benares recommending that the order passed by the Magistrate in some proceedings under S. 145, Criminal P. C. be set aside and that a fresh inquiry be ordered by some other Magistrate. The Magistrate had followed the earlier provisions of S. 145, Criminal P. C., and had declared one of the disputing parties to be in possession of the land but the Sessions Judge held that as the Magistrate had only "kept a memorandum of the evidence recorded by him in English" he had acted in a manner contrary to the provisions contained in S. 356, Criminal P. C., so that there was no legal evidence on which a finding could be based.

The reference has been opposed by Mr. Ambika Prasad, who has argued that the Magistrate, in only recording a memorandum of the evidence, was not guilty of anything more than an error or irregularity which could be cured by S. 537, Criminal P. C.

Under S. 145, sub-Cl. (4), Criminal P. C. (it is not suggested that earlier provisions have not been complied with):

> "The Magistrate shall then . . . . peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evi-

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(2) [1827] 2 Carrington and Payne 629.

dence, take such further evidence (if any) as he thinks necessary, and, if possible, decide. . . . . . ."

There was evidence before the Magistrate: under S. 3, sub-Cl. (1), Evidence Act. "Evidence" means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry. There was also documentary evidence, because we know that an order of the revenue Court was before the Magistrate in which an objection on behalf of one of the parties in a demarcation proceedings was dismissed on 29th April 1929.

The oral evidence however according to the Sessions Judge was not "legal evidence" because it was not recorded in the manner provided by S. 356, Criminal P. C.; it is admitted that the evidence was not recorded according to S. 356, but it is argued that a distinction must be drawn between the mode of trial and the procedure, and that the provisions of S. 356 only refer to the procedure at the trial, namely, the mode of taking and recording evidence. The mode of trial is set forth in S. 145, and if that section be read alone there is no fault to be found with the procedure of the Magistrate, because he did receive the evidence produced by the parties and he did consider it, and it is only his mode of recording it that was wrong.

In the case of *Subramania Ayyar* v. *Emperor* (1) their Lordships of the Privy Council have remarked:

> "Their Lordships are unable to regard the disobedience to an express provision of law as to the mode of trial as a mere irregularity. . . . . It would be an extraordinary extension of such a branch administering the criminal law (i. e. remedying irregularities) to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, that this contravention of the Code comes within the description of error, omission or irregularity."

In the case before their Lordships the appellant had been charged with 41 different offences, and as this was "disobedience to an express provision of law to a mode of trial" it could therefore not be regarded as a mere irregularity. This case is clearly distinguishable from the present one, in which the mode of trial is prescribed by S. 145, Criminal P. C., against which there has been no offence.

In the case of *Bhechu Chaube* v. *Emperor* (2) a single Judge of this Court of great experience in criminal matters held that when a Magistrate had acted contrary to the provisions of S. 342, Criminal P. C., the trial was not vitiated, because the error of the Magistrate had not in any way prejudiced the person convicted, and he goes on:

> "The tests to be applied in considering whether a particular infringement of the provisions of the Criminal Procedure Code is one which does or does not come within the purview of S. 537 appears to me to be this: Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature, the proceedings are vitiated in their very inception and S. 537 has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceedings."

After this he goes on to discuss whether the applicants were prejudiced by the error, and finds that they were not. A somewhat similar line of argument was taken in the case of *Nga Hla U* v. *Emperor*(3). If these principles be accepted as I think they must be, it appears to me that in the case before me now there was an error in procedure which neither went to the root of the trial nor prejudiced the parties. The evidence before the Magistrate was exactly the same as that which he would have had before him if he had followed the correct procedure, and recorded the statements of the witnesses in the manner laid down in S. 356. I think therefore that it is not necessary and would in fact be wrong, to set aside the Magistrate's order and direct another inquiry. The reference is therefore rejected and the record may be returned.

K.N./R.K. *Reference rejected.*

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(1) [1902] 25 Mad. 61=28 I. A. 257=8 Sar. 160 (P.C.).

(2) A. I. R. 1923 All. 81=71 I. C. 115=24 Cr. L. J. 67=45 All. 124.

(3) A. I. R. 1925 Rang. 258=89 I. C. 312=26 Cr. L. J. 1336=3 Rang. 139.

A. I. R. 1931 Allahabad 3

KING, J.

Kallu—Applicant.

v.

Bashiruddin—Opposite Party.

Criminal Ref. No. 314 of 1930, Decided on 25th July 1930, made by Sess. Judge, Benares, on 3rd April 1930.

(a) Criminal P.C., S. 356(1)—Mere breaking of imperative statutory rule is not enough to vitiate trial—Criminal P. C., S. 537.

The mere fact that an imperative statutory rule of procedure has been broken is not en-

enough to vitiate the trial or proceeding. The Court should consider the gravity of the irregularity or omission and whether it might have worked actual injustice to the accused.

Where in a trial under S. 145, Criminal P. C. the Magistrate recorded the evidence in English and the evidence of the witnesses was not recorded in the veracular either by the Magistrate or by any other person in his presence and hearing and the Sessions Judge made a reference to the High Court on the ground that the whole proceeding was vitiated on account of the contravention of the provisions of S. 356, Criminal P. C.

Held: that a breach of an imperative rule of procedure, which does not go to the root of the trial and does not prejudice the accused or occasion a failure of justice, does not vitiate the whole trial and that that defect is curable by S. 537, Criminal P. C.: *A. I. R.* 1927 *P. C.* 44; *A. I. R.* 1931 *All.* 2, *Rel. on*; (1890) *A. W. N.* 164; (1891) *A. W. N.* 145, *Dist.*; 54 *I. C.* 172, *Doubted*; 42 *Cal.* 381; 43 *I.C.* 827; 25 *Mad* 61; *A. I. R.* 1923 *All.* 81 and *A. I. R.* 1928 *All.* 292, *Ref.* [P 6 C 2]

(b) Criminal P. C., S. 148 (3)—Costs.

Value of the property cannot by itself be taken as a fair test of the costs which should be awarded in a case, which has continued for an unusually long time without any fault of the parties. [P 6 C 2]

Mushtaq Ahmad—for Applicant.

Saila Nath Mukerji —for Opposite Party.

M. Waliullah—for the Crown.

Order.—This is a reference by the learned Sessions Judge of Benares recommending that an order passed by a Special Magistrate of the First Class under S. 145, Criminal P. C., be set aside, or in the alternative that the order be modified as to costs.

It appears that one Bashiruddin started proceedings under S. 145, Criminal P. C., against the opposite party, who are now the applicants before me, alleging that a certain chabutra belonged to him and that the accused were interfering with his possession and were likely to commit a breach of the peace. The Magistrate found that the chabutra was in Bashiruddin's possession and passed orders restraining the opposite party from interfering with Bashiruddin's possession and ordered them severally and jointly to pay to Bashiruddin a sum of Rs. 428-6-0 as costs under S. 148 (3). It appears that the Magistrate recorded the evidence of the witnesses in English and that the evidence of the witnesses was not recorded in the vernacular either by the Magistrate himself or by any other person in his presence. This procedure being in contravention of the provisions of S. 356, Criminal P. C., constituted an illegality or irregularity, in the opinion of the learned Sessions Judge, such as to vitiate the whole proceedings.

As proceedings under S. 145 of the Code are inquiries under Ch. 12 of the Code it is clear that under S. 356 (1) the evidence of each witness should have been taken down in writing in the vernacular by the Magistrate himself, or in his presence and hearing and under his personal direction and superintendence, and should have been signed by him. This procedure was not followed. The learned Sessions Judge states that the Magistrate kept only an English memorandum of the evidence. I think the Magistrate's record amounts to more than a memorandum. He did in fact record the evidence of the witnesses at length and in great detail and I think his record amounts to more than a memorandum but it is certainly in English and there is no vernacular record, so it must be conceded that the provisions of S. 356 have not been complied with.

The question then arises whether this error or irregularity or illegality is sufficient to vitiate the whole proceedings. It is argued by the learned advocate for the applicants that the provisions of S. 356 (1) are imperative and that a breach of these provisions amounts to an illegality and not a mere irregularity such as might be curable under S. 537. He has cited certain authorities which more or less support his contention. In the case of *Matai* v. *Anant Ram* (1) a single Judge of this Court set aside an order passed by a Magistrate on account of various irregularities. One of the irregularities specified was that the Magistrate had failed to comply with the provisions of S. 356 since he had recorded the evidence of witnesses in English only and had not kept any vernacular record. It must be noted, however, that this was by no means the only irregularity. It appears to me that the Judge laid great stress upon the non-compliance with the provisions of S. 202. He did not hold that the failure to observe the provisions of S. 356 was of itself and apart from all other considerations sufficient to vitiate the order. This decision therefore does not clearly support the applicant's contention.

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(1) [1890] A. W. N. 164.

In the case of *Empress* v. *Barmajit* (2) a conviction was set aside on account of several irregularities. Here again one of the irregularities was that the Judge did not make his memorandum of the evidence at the time when the evidence was actually given and this constituted a breach of the provisions of S. 356. But some of the other irregularities that occurred in the trial of the case were of a graver nature. The learned Sessions Judge in recording the opinion of the assessors had shown that the assessors found the accused guilty although it appears, as a matter of fact, that the assessors found the accused not guilty. Hence, although the conviction was set aside and a retrial ordered, it was certainly not merely or even mainly upon the ground that the provisions of S. 356 regarding the mode of recording evidence had not been complied with. The case of *Udit Narain* v. *Emperor* (3) does indeed support the applicant's contention. In that case a single Judge of this Court held that as the evidence of witnesses had been recorded in English only and not in the vernacular this amounted to an irregularity which vitiated the trial. With due respect to the learned Judge, however, I do not think this ruling is very satisfactory. The question whether the irregularity was or was not curable under S. 537 was not even discussed.

In the case of *Janki Prasad* v. *Emperor* (4) a single Judge of the Patna High Court held that where in a trial the Magistrate had recorded the evidence in the Urdu character only, which was not the language of the Court in that province, he had been guilty of an illegality which vitiated the trial, and further that even if it were held to be only an irregularity then it was not such an irregularity as would be curable under S. 537. Reliance is also placed upon a ruling of a Bench of the Calcutta High Court in the case of *Sadananda Mandal* v. *Krishna Mandal* (5). This was a case under S. 145, Criminal P. C., and is therefore directly applicable to this case. In that case the Magistrate made a memorandum of the evidence in English, but the depositions were not taken down in the vernacular. It was held that the provisions of S. 356 (1) were imperative and that non-compliance with those provisions cannot be condoned. It is perhaps possible to distinguish that case on the ground that in the case before me the evidence was recorded in full and amounts to more than a mere memorandum of the substance of the evidence; but the reasoning of this case does no doubt support the applicant's contention.

For the opposite party reference is made to a very recent decision of a learned Judge of this Court in the case of *Sankatha Misir* v. *Bishwanath* (6). The facts of that case are almost precisely on all fours with the case before me. In proceedings under S. 145 the Magistrate had only recorded the evidence of the witnesses in English and their depositions had not been recorded in the vernacular as required by S. 356. The learned Judge distinguished the ruling of the Privy Council in the case of *Subramania Ayyar* v. *Emperor* (7) in which their Lordships remarked that they were unable to regard the disobedience of an express provision of law as to the mode of trial as a mere irregularity. I agree that that ruling can be distinguished, and it has been distinguished by their Lordships of the Privy Council themselves in a more recent case, *Abdul Rahman* v. v. *Emperor* (8) to which I shall presently refer again. In the case of *Subrahmania Ayyar*, a man was tried on charges of extortion in respect of 41 criminal acts extending over a period of two years, in contravention of a provision of the Code providing that a man can only be tried at one trial for three offences which have been committed within a period of 12 months. The procedure adopted in that case was one which the Code positively prohibited and, it was possible that it might have worked actual injustice to the accused. There was thus a grave illegality, or irregularity, in the mode of trial. It was an irregularity which went to the root of the trial. Finding that the case of *Subrahmania Ayyar* was distinguishable, the learned Judge relied upon the case of *Bechu Chaube* v.

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(2) [1891] A. W. N. 145.

(3) [1919] 21 Cr. L. J. 28=54 I. C. 172.

(4) [1918] 19 Cr. L. J. 235=43 I. C. 827.

(5) [1915] 42 Cal. 381 = 16 Cr. L. J. 192 = 27 I. C. 672.

(6) A. I. R. 1931 All. 2.

(7) [1902] 25 Mad. 61 = 28 I. A. 257 = 8 Sar. 160 (P. C.).

(8) A. I. R. 1927 P. C. 44=100 I. C. 227=54 I. A. 96=28 Cr. L. J. 259=5 Rang. 53 (P. C.).

Emperor (9), and held that as the applicants in revision had not been in any way prejudiced, and as there was no error in procedure which went to the root of the trial, the Magistrate's order should be upheld.

I agree with the learned Judge that the case of *Subrahmania Ayyar* is distinguishable and that a breach of an imperative rule of procedure does not necessarily vitiate the whole proceeding.

A similar view was taken by a Bench of this Court in the case of *Emperor* v. *Jhabbar Mal* (10). In that case the trial Court had omitted to question the accused generally on the case after the witnesses for the prosecution had been examined. The Court did question the accused after the prosecution witnesses had been examined in chief, but did not question him again after the witnesses had been cross-examined and re-examined. The learned Judges held that this was a breach of the provisions of S. 342 (1) of the Code, but nevertheless it was curable under S. 537.

I rely strongly upon the decision of their Lordships of the Privy Council in *Abdul Rahman* v. *Emperor* (8). In that case it was held by their Lordships that the provisions of S. 360, which require that the deposition of each witness is to be read over to him, had not been complied with. They then proceeded to discuss whether non-compliance in this respect should vitiate the trial. They distinguished the case of *Subrahmania Ayyar* and disapproved of two decisions of the Calcutta High Court in which it had been held that non-compliance with the provisions of S. 360 vitiated the trial. Their Lordships summed up their views as follows:

> " To sum up: in the view which their Lordships take of the several sections of the Criminal Procedure Code the bare fact of such an omission or irregularity, as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction which in their Lordships' view may be supported by the curative provisions of Ss. 535 and 537."

In the face of this pronouncement it is no longer open to the Courts in India to hold that the mere fact that an imperative statutory rule of procedure has been broken is enough to vitiate the trial or proceeding. It is clear that the Courts should consider the gravity of the irregularity or omission and whether it might have worked actual injustice to the accused. If non-compliance with an imperative provision in S. 360 is curable under S. 537, as held by their Lordships, it is clear that it is open to this Court to consider whether a breach of a statutory provision under S. 356 is not similarly curable. In my opinion the irregularity complained of may be considered a mere technical irregularity. The evidence of the witnesses was recorded in full and there is no suggestion that the record does not contain a full and accurate account of the depositions. The fact that the applicants were not prejudiced, and that the irregularity cannot possibly be held to have occasioned a failure of justice, is apparent inter alia from the fact that when the applicants applied in revision to the Sessions Judge they set forth five grounds alleging certain illegalities or irregularities but it never occurred to them to set forth a ground complaining of the irregularity of failing to record the depositions in the vernacular. The point was raised by the learned Sessions Judge himself. He was no doubt perfectly entitled to raise that point although it had not been raised by the applicants themselves, but it is quite obvious that the applicants did not consider themselves in any way prejudiced by the procedure adopted by the trial Court and that no failure of justice was occasioned thereby.

I hold therefore that I should not be warranted in setting aside the order under S. 145 on the ground of non-compliance with the provisions of S. 356, as the irregularity did not go to the root of the trial and did not prejudice the applicants or occasion a failure of justice.

Another point remains, namely, the amount of costs which the applicants have been ordered to pay to the successful opposite party. The property in dispute is said to be not more than Rs. 300 or Rs. 400 in value. I do not think that the value of the property can by itself be taken as a fair test of the costs which should be awarded in a case of this sort but it does seem to me that the trial Court has allowed costs on too liberal a scale. It is very unfortunate that the case lasted so long. There were no less than 26 hearings and it took about 11 months to decide. It appears however that neither party can be held to blame for the prolongation of proceedings. The complainant employed two mukhtars daily paying them Rs. 8 each per day. In my opinion the complainant should have contented himself in a case of this sort with engaging one mukhtar and I think the trial Court was too liberal in ordering the opposite party to pay for two mukhtars daily. The complainant is entitled to Rs. 12-6-0 court-fees and to the services of one mukhtar daily at Rs. 8. This amounts to Rs. 12-6-0 plus Rs. 208 or a total of Rs. 220-6-0 instead of Rs. 428-6-0 which was allowed by the trial Court.

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(9) A. I. R. 1923 All. 81=71 I. C. 115=24 Cr. L. J. 67=45 All. 124.

(10) A. I. R. 1928 All. 222.

It has been further argued that Fida Husain and Kallu, son of Bafati, twoof the applicants, took very small interest in the proceedings and engaged no counsel and therefore they should not be made liable for costs, as the third applicant Kallu son of Zahur was the principal contestant. I do not think that the first-named applicants can escape liability for costs as the complainant was compelled to take action against them also and they denied the allegations of Bashiruddin and were at least interested in the result. I therefore maintain the order passed by the trial Court regarding possession but modify the order regarding costs only to this extent that I substitute the sum of Rs. 220-6-0 instead of Rs. 428-6-0.

K.N./R.K. *Order modified.*

A. I. R. 1931 Allahabad 7

KING, J.

Ambika Prasad—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 490 of 1930, Decided on 2nd August 1930, made by Sess-Judge, Banda, on 14th July 1930.

Criminal P. C. (1898), S. 254—Magistrate not bound to frame charge unless it is warrant case — Omission to frame charge is however no ground for setting aside a conviction— Trial should be recommenced if accused is prejudiced after framing of charge —Criminal P. C. (1898), S. 535 (2).

A Magistrate is not bound to frame a charge unless he is of opinion that the accused has committed an offence punishable with death, transportation or imprisonment for a term exceeding six months. An omission to frame a charge is no ground for setting aside the conviction. If the omission appears to have caused a failure of justice, an order under S. 535 (2) should be made to frame a charge and that the trial be recommenced from the point immediately after the framing of the charge. [P 7 C 2]

Judgment. — Ambika Prasad was accused of offences under Ss. 186 and 353, I. P. C. for obstruction and assaulting a "kurkamin" in the discharge of his duty. The trial was begun as that of a warrant case but after the two principal witnesses the amin and the decree-holder had been examined and cross-examined and the examination of the accused had been recorded, the Magistrate found that the evidence did not support a conviction under S. 353 and therefore framed no charge but ordered that the case should proceed (as a summons case) in respect of the offence under S. 186 only. The defence was an alibi which the Magistrate had good grounds for disbelieving. He found an offence under S. 186 clearly established by the evidence of three eyewitnesses and convicted the accused.

The Sessions Judge of Banda recommends that the conviction be set aside because the Magistrate should have framed a charge under S. 186 and should thus have given the accused an opportunity of cross-examining the amin for the second time. He relies on a ruling of a single Judge of this Court in *Ganga Saran* v. *Emperor* (1) which supports his view. With due respect to the learned Judge I do not agree that the Court was bound to frame a charge. S. 254, Criminal P. C., requires a Magistrate to frame a charge only when he

> "is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter."

i. e., an offence punishable with death, transportation or imprisonment for a term exceeding six months. As the Magistrate was of opinion that no such offence had been established I hold that he was not bound to frame a charge. In any case the omission to frame a charge is no ground for setting aside the conviction. Even if the omission appears to have occasioned a failure of justice the utmost that I could do under S. 535 (2) would be to order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge. This would give the accused an opportunity of a second cross-examination of the amin and if I thought there was the least likelihood of the result of the trial being thereby affected I might do so. Or I might give the accused an opportunity of further cross-examination without ordering that a charge be framed. But the accused has already cross-examined the amin without eliciting anything tending to shake his credit. Moreover the guilt of the accused is established by the evidence of two other eyewitnesses who have been believed. No useful purpose will be served by permitting further cross-examination of the amin. The prosecution case is too clear and the defence is too incredible. There has been no failure of justice.

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(1) A. I. R. 1921 All. 282=59 I. C. 850=22 Cr. L. J. 146.

I reject the reference. Let the records be returned.

B.V./R.K. *Reference disallowed.*

A. I. R. 1931 Allahabad 8

BENNET, J.

Babu Ram and *another*—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 577 of 1930, Decided on 30th August 1930, made by Sess. Judge, Kumaun, on 24th June 1930.

Penal Code (1860), S. 159—Attack by one and defence by another person is affray, essence being terror to public.

Where one person attacks and the other defends, it is legally correct to say that the two persons are fighting and the case comes under the definition of affray. The gist of the offence consists in the terror it causes the public. [P 9 C 1, 2]

Order.—This is a reference by the learned Sessions Judge of Kumaun asking this Court to set aside the convictions of Babu Ram and Bhim Singh under S. 160, I. P. C., and the sentences of fines of Rs. 75 and Rs. 25 respectively. The sole ground for the recommendation is expressed as follows:

> "But I am doubtful whether on the facts stated the conviction under S. 160, I. P. C., is justified. The offence of "affray" is committed when two or more persons, by fighting in a public place, disturb the public peace. There must not only be a disturbance of the public peace; there must also be a fight, and the fight must be between two or more persons. By this I understand that there must be at least one person fighting on each side. In the present case Kali Das was acquitted of an offence under S. 160, I. P. C., on the ground that "he took no part in the affray." He did no fighting at all. He was merely dragged out of his shop and beaten. If this was the case we are left with Babu Ram and Bhim Singh, both on the same side. In the circumstances can there be said to have been a fight at all? If Kali Das did not fight, it is difficult to see how Babu Ram and Bhim Singh can have done so, for as I understand the meaning of the word there cannot be a fight without at least one combatant on each side."

There are several fallacies in the reasoning of the Sessions Judge and his recommendation that these fines should be remitted. The accused were prosecuted by the police under S. 160, I. P. C., and if the reasoning of the Sessions Judge was correct, and no cognizable offence was committed, by the beating of Kali Das in Pauri Bazaar Street, the result would follow that the constable who intervened would have no right to do so under S. 149, Criminal P. C., but he could only have acted in the right of private defence of the body of Kali Das under S. 97, I. P. C. The Sessions Judge states that traffic was temporarily suspended. But his view is that a constable would have no power to interfere with persons who were suspending traffic in this manner, as there is in his opinion no cognizable offence. If therefore Kali Das did not make a complaint under S. 323, I.P.C., for the wrong done to him privately, the accused Babu Ram and Bhim Singh could not, in the opinion of the Sessions Judge, be in any way punished. If the Penal Code failed to provide for the punishment of persons who obstructed traffic in a public street in this manner, the Code would surely be defective. But Chap. 14, I. P. C., does provide for offences against the public convenience, and S. 283, I. P. C., provides for the punishment of

> "whoever by doing any act, causes danger, obstruction, or injury to any person in any public way"

by fine which may extend to two hundred rupees. In the present case there is a clear finding that the accused Babu Ram and Bhim Singh caused obstruction to traffic in the public way, and they also caused injury to Kali Das in the public way. They could therefore have been charged under S. 283, I. P. C., or if not charged under that section they could have been convicted under it in accordance with the provisions of S. 237, Criminal P. C., and that conviction under S. 160, I. P. C. could be altered on revision to a conviction under S. 283, I. P. C. S. 283, I. P. C., is cognizable and triable summarily. The only difference would be that the sentences of one week's rigorous imprisonment in lieu of payment of fine would be altered to one week's simple imprisonment, as S. 67, I. P. C. provides that where the offence is punishable with fine only, the imprisonment in default of payment of fine shall be simple.

The next question is whether on the facts found by the Magistrate the offence of S. 160, I. P. C., was proved against Babu Ram and Bhim Singh. The Sessions Judge has not quoted the findings correctly, and he is wrong in stating that the Magistrate found as regards Kali Das that

> "he did no fighting at all. He was merely dragged out of his shop and beaten."

What the Magistrate found was:

> "Kali Das took no part in the affray. He was beaten by the accused, Babu Ram and Bhim Singh. Whatever he did, he did in his self-defence. It has been proved from the statements of prosecution witnesses that he was overpowered by the accused Babu Ram and Bhim Singh. He is therefore not guilty under S. 160, I, P. C."

This finding shows that Kali Das did defend himself. This was in accordance with the prosecution evidence. Prem Singh, constable, says as regards the three accused, of whom Kali Das was one:

> "The accused were quarelling in the Pauri Bazaar and beating each other . . . . Kali Das was beating one of the accused when I reached the spot. Bhim Singh was beating Kali Das with his hand and so was accused Babu Ram . . . . I do not know who was the aggressor."

The evidence of the other prosecution witnesses showed that Babu Ram and Bhim Singh were the aggressors and so the Magistrate found that Kali Das was acting in his right of self-defence. But where one person attacks and the other defends it is legally correct to say that the two persons are fighting and the case comes under the definition of affray in S. 159, I. P. C., "when two or more persons by fighting in a public place, disturb the public peace, they are said to commit an affray."

Gour, Penal Law of India, 1925 edition, para. 1426 quotes 1 Hawk., P. C. C., 63, S. 22, as stating that

> "an affray may receive an aggravation from the persons against whom it is committed, as where the officers of justice are violently disturbed in the due execution of their office, by the rescue of a person legally arrested, or by the bare attempt to make such a rescue."

The officers of justice would not be guilty of any offence in defending themselves against such an attack, yet the attackers are held to be guilty of committing an affray.

"Affrays," says Blackstone,

> "are the fighting of two or more persons in some public place, to the terror of His Majesty's subjects; for, if the fighting be in private, it is no affray, but an assault (4 Black. 145)."

The gist of the offence consists in the terror it causes the public. The fact that Babu Ram and Babu Singh were the aggressors and were able to overpower Kali Das is a fact which would cause the people in the bazaar more terror, not less terror. Affray is derived from the French *affraiers*, to terrify. I refuse the references and direct that the record be returned.

B.V./R.K. *Reference refused.*

A. I. R. 1931 Allahabad 9

BENNET, J.

Brij Nandan and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 261 of 1930, Decided on 1st August 1930, from judgment of Addl. Sess. Judge, Pilibhit, D/- 11th March 1930.

Evidence Act (1872), Ss. 24, 25 and 26—Making of counterfeit coin is not statement and hence evidence regarding it is not barred.

A confession is an admission by an accused person in a criminal case. The making of a counterfeit coin is not a statement and hence evidence relating to making of the counterfeit coins by the accused cannot be barred under Ss. 24, 25 and 26 of the Act. [P 10 C 1]

Saila Nath Mukerji—for Appellants.

Sarkar Saran—for the Crown.

Judgment.—This is an appeal through counsel on behalf of Brij Nandan and from jail on behalf of Ram Prasad each of whom has been sentenced to seven years' rigorous imprisonment under S. 232 and S.235, I.P.C., and to five years' concurrent rigorous imprisonment under S. 243, I. P. C. These offences relate to false coining. The evidence for the prosecution consists of the statements of the Circle Inspector and Sub-Inspector and other police officers of Pilibhit city to the effect that they received information that false coining was taking place at the house of the accused Ram Prasad in Pilibhit city. A party of the police, with four search witnesses from the locality, Phulchand, Khubchand, Shambhunath and Chidda, went to the house of Ram Parsad and found Ram Prasad in the shop on the ground floor, and in that shop there was a furnace, a light and a fan attached to the wall and five counterfeit rupees and some genuine coins and instruments of counterfeiting consisting of six iron frames, two presses, screws, crucibles, lead, etc. The accused Brij Nandan was found in a room upstairs in which there were 41 counterfeit Rupees, 7 counterfeit four-anna pieces, 61 counterfeit one-anna pieces, a brass scale, a phial and a packet of cleaning powder. The witnesses state that the accused Brij Nandan was brought downstairs, and that at the direction of the police the accused Brij Nandan made with the materials a counterfeit rupee Ex. 35, assisted by the accused Ram Prasad who worked the fan. A list was made of the articles found in the house.

The defence is an allegation that these articles were planted in the house, and the witnesses to the search have been cross-examined to show that there had been some litigation remotely connecting them with the accused. As regards the making of the counterfeit rupee objection was taken by the learned counsel for the appellant that this was not admissible in evidence. There are only three sections of the Evidence Act barring testimony connected with an accused person. These sections are Ss. 24, 25 and 26. They all bar confessions made in certain circumstances. Now a confession is an admission by an accused person in a criminal case. S. 17, Evidence Act, defines an admission as a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact. The making of a counterfeit coin is not a statement.

Accordingly the evidence given by the witnesses, that the two accused made this counterfeit coin in their presence is not barred by Ss. 24, 25 or 26, Evidence Act. No other section is shown which could bar such evidence. The accused Ram Prasad owns a house in which the coins and implements were found. The accused Brij Nandan explained his presence on the occasion by saying that he was a witness in a case in the Small Cause Court in which Ram Prasad was a party, and that he had been called on that date for a consultation. But he could not have been engaged in the consultation at the time, because he was alone in the upper room, and he was not with Ram Prasad or anyone else. I consider that there is nothing in this allegation for the defence. The convictions of both the accused are correct. The sentences are not severe, as the large number of coins found indicates that the fraud has been systematically carried out. Accordingly I dismiss these appeals. The accused Brij Nandan who is on bail will surrender to his bail.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 10

BENNET, J.

Sirpat Rai and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 324 of 1930, Decided on 11th August 1930, from order of Sess. Judge, Gorakhpur, D/- 16th April 1930.

(a) Criminal P. C. (1898), S. 530—Trial for charges named in complaint.

A Magistrate was entitled to try the accused under the sections named in the complaint and he tried him accordingly.

Held: that it cannot be said that, because another section could also be charged in the complaint, therefore the trial under the sections charged in the complaint is void: 12 *Mad.* 54 and 24 *Mad.* 675, *Dist.* [P 11 C 2]

(b) Criminal P. C. (1898), S. 201—Magistrate entitled to take cognizance of some of charges in complaint but not of charges not in complaint but which could be made out therefrom—Section does not apply.

Section 201 does not cover the case of a Magistrate who is entitled to take cognizance of some of the charges named in the complaint but who is not entitled to take cognizance of a charge not named in the complaint, but which could possibly be made out from the allegations in the complaint. [P 11 C 2]

K. O. Carleton—for Applicants.

Waliullah—for the Crown.

L. M. Roy—for Opposite Party.

Order.—This is an application in revision by six persons against their convictions under S. 323, I.P.C., and 379, I.P.C., and the abetment of S. 379, I.P.C., and fines of Rs. 25 each imposed by the Magistrate which were reduced to fines of Rs. 10 each by the 1st Class Magistrate who heard the appeal. The name of another person, Sarabjit, appears as an applicant for revision, but this has been entered by a mistake, as Sarabjit was not one of the persons on trial before the Tahsildar or convicted by him. The facts as found are that Anrudh Rai, the complainant, alleged that on the evening of 7th October 1929 he found the three accused "Ahirs," Ram Dhayan, Bhirgunath and Ramjanam stealthily cutting his crop, and he caught Ram Dhayan Ahir, and there was a struggle and the other three "Bhuinhar" accused came up and told the complainant to release Ram Dhayan and the complainant refused and all the accused then beat the complainant and kicked him and rescued Ram Dhayan. The argument in revision is that because the complainant had caught hold of one of the three Ahirs therefore he had legally arrested this Ahir and the action of the other Ahirs and Bhuinhars in assaulting the complainant and releasing this Ahir amounted to an offence under S. 225, I.P.C., a section which is not triable by a Third Class Magistrate. Therefore it is argued that the trial by the Tahsildar was illegal.

In support of this argument reference is made to two rulings of the Madras High Court, one being *In re Madurai* (1), and the other *King-Emperor* v. *Ayyan* (2). The first ruling was the case of a man who had torn up a promissory note and he was convicted by a Magistrate under S. 426, I.P.C., for mischief. It was held that the offence of tearing up a promissory note being one which falls under S. 477, I.P.C., a case cognizable only by the Court of Session cannot be legally tried by a Magistrate by the mere device of making a charge under S. 426, I.P.C. Similarly, in *King-Emperor* v. *Ayyan* (2), certain persons were charged with giving false evidence in an inquiry before a Magistrate on a charge of murder. They were prosecuted under S. 193, I.P.C., in the Court of a Magistrate of the Second Class but the offence of giving false evidence on a charge of murder falls under S. 194, I.P.C., and is exclusively triable by the Court of Session. Therefore it was held that under S. 530 (P), Criminal P. C., the proceedings of the Magistrate in trying the accused were void.

Now it is to be noted that in both these cases there was a particular offence charged which fell under a particular section of which the trying Magistrate was not entitled to take cognizance. In the present case however the complaint dealt with offences under Ss. 323, 426 and 379, I.P.C. All of these were offences of which the Tahsildar, a Third Class Magistrate, was entitled to take cognizance. It is true that the offence of S. 225, I.P.C., might have been also charged in the complaint, but it would have been a separate and distinct offence from the offence of theft and abetment of theft with which the six accused were charged and also a distinct offence from the offence under S. 426, I.P.C. The offence of S. 323, voluntarily causing simple hurt, is no doubt indirectly connected with the offence of S. 225, I.P.C. The section in question is S. 530, Criminal P. C. This section lays down that if any Magistrate not being empowered by law tries an accused, his proceedings are void. Now the Tahsildar was entitled to try the accused under the sections named in the complaint. No ruling has been shown to me in which it has been laid down that because another section could also be charged in the complaint therefore the trial of the sections charged in the complaint is void. The case therefore differs from the two rulings in the Madras High Court. Further, if we refer to S. 201, Criminal P. C., we find it laid down that if a complaint has been made in writing to a Magistrate, who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court. This section does not cover the case of a Magistrate who is entitled to take cognizance of some of the charges named in the complaint, but he is not entitled to take cognizance of a charge not named in the complaint, but which could possibly be made out from the allegations in the complaint.

Further, it appears to me that a charge of S. 225, I.P.C., in the present case would be highly technical and would not naturally arise on the complaint. It was only one of the three Ahirs who were stealing the crop who was caught by the complainant and the complainant was still struggling with that accused when the other accused interfered and rescued him. In these circumstances I do not consider that anything illegal is shown to have occurred which vitiated the trial. Accordingly I refuse this application in revision.

B.V./R.K. *Revision disallowed.*

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(1) [1889] 12 Mad. 54=2 Weir. 22.
(2) [1904] 24 Mad. 675=2 Weir. 699.

A. I. R. 1931 Allahabad 12

MEARS, C. J. AND SEN, J.

Moti Lal Nehru and *another*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 449 of 1930, Decided on 18th July 1930, from order of Dist. Magistrate, Allahabad.

(a) Evidence Act (1872), S. 78—Newspaper extract is not admissible.

An extract from a newspaper about a Government notification is inadmissible in evidence. A copy of the Government Gazette should be produced. [P 12 C 2]

(b) Criminal P. C. (1898), S. 439 — Evidence by prosecution witnesses as to handwriting not challenged in trial Court—It cannot be challenged in revision.

The evidence of the prosecution witnesses as to the handwriting of a person was not challenged in the trial Court, nor were the witnesses cross-examined by the defence, though they had an opportunity to do so.

Held: that the prosecution having given sufficient proof to comply with the provisions of law that matter cannot be challenged in revision. [P 12 C 2]

G. Agarwala and *K. N. Agarwala*—for Applicants.

U. S. Bajpai—for the Crown.

Mears, C. J. — On 1st July 1930, Pandit Moti Lal Nehru and Dr. Syed Mahmud were charged before Mr. Bomford, District Magistrate of Allahabad, with having committed offences under S. 17 (1), Criminal Law Amendment Act, and S. 117, I. P. C. Both were convicted on both charges, and each sentenced to six months' simple imprisonment, such sentences to run concurrently. On 3rd July 1930 an application was made to this Court asking that the record might be called for in the exercise of its power of superintendence and revision. The record was called for by an order of this Court and a Bench was appointed. At the request of the Government Advocate the hearing which had been fixed by Kendall, J., for the 14th, was postponed till to-day.

The grounds of application are not clearly drafted, and there is no indication as to which of them apply to S. 17 (1) or to S. 117. A reference to the record however shows that Nos. 2, 3, 4, 5, 6, 10 and 11 relate to S. 17, whilst Nos. 7 and 8 apply to S. 117.

The learned Government Advocate has informed the Court that he has been instructed by the Local Government to concede that the conviction under S. 17 (1), Criminal Law Amendment Act, cannot stand. We think that was, in the circumstances, the proper course to take. Everybody, of course, understands how the mistake arose. Everybody in the Court of the Magistrate, on the morning of 1st July knew as a matter of certainty, that the Criminal Law Amendment Act had been extended to the whole of the United Provinces as from 4 o'clock on the preceding morning. The actual text of the notification was contained in a newspaper of standing. Nobody doubted its authenticity. S. 78, Evidence Act, however indicates with precision how official documents of this nature are to be proved and an extract from a newspaper is inadmissible as proof. The failure to produce a copy of the Gazette Extraordinary left a broken link in the chain of evidence.

The statement of Mr. Williamson, that he had had a telephone conversation with the Chief Secretary as to the extension of the Act, should not have been accepted by Mr. Bomford or brought upon the record. It was inadmissible in evidence. As the Local Government realize, the conviction under S. 17 (1) cannot be supported. We need not discuss other points which challenged the validity of the convictions.

The setting aside of these convictions however is not a result which will have any practical benefit, unless a successful attack can be made upon the convictions under S. 117, I. P. C. The two specific grounds of attack contained in the application, relate to the proof of the handwriting of Pandit Moti Lal Nehru and Dr. Syed Mahmud. The point that is taken is that neither Mr. Measures nor Mr. Manohar Singh gave a sufficient degree of proof of the handwriting of the two gentlemen concerned. The actual words of grounds Nos. 7 and 8 are that the statements "fall short of proving" that the witnesses were acquainted with the handwritings. Now, when that evidence was given, it was not challenged. Nobody cross-examined Mr. Measures or Inspector Manohar Singh; and they having given, according to the evidence which lies before us, sufficient proof to comply with the provisions of the law, that matter cannot be challenged in revision.

The Government Advocate however has pointed out that we should not confine ourselves to the grounds of revision, but must satisfy ourselves with the legality and propriety of the conviction ; and for that purpose he has read to us a document, which is on our record and which is known as Ex. 12, and an extract from Ex. 2, in which the committee of which Pandit Moti Lal Nehru and Dr. Syed Mahmud were members called upon the country publicly to disobey the three Ordinances. He has also read to us the language of S. 117, I. P. C. and has urged that there is no flaw and no gap in the evidence and that that conviction is unassailable. We are of that opinion.

The position therefore is that the conviction under S. 17 (1), Criminal Law Amendment Act, is set aside, and with it is set aside the sentence passed both upon Pandit Moti Lal Nehru and Dr. Syed Mahmud. The conviction under S. 117, I. P. C., stands, and the sentences stand.

B.V./R.K. *Order accordingly.*

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* A. I. R. 1931 Allahabad 13

KING AND BENNET, JJ.

Man Singh—Applicant.

v.

Reoti—Opposite Party.

Criminal Revn. No. 345 of 1930, Decided on 27th August 1930, from an order of Sess.-Judge, Muttra, D/- 2nd April 1930.

***Criminal P. C. (1898), S. 439—Application for enhancement of sentence can be made by private complainant.**

Where the complainant wishes to apply for enhancement of sentence passed on the accused by the Sessions Judge, it is not intended by the Criminal Procedure Code, that the only remedy of a complainant should be to apply to a District Magistrate to move the Local Government to apply for an enhancement, because the Local Government will only apply for an enhancement if the enhancement is required in the public interest. The High Court does not regard the question of enhancement only from the point of view of public interest but from the circumstances of the particular case before it. A private complainant can therefore apply in revision to the High Court for enhancement of a sentence : *A. I. R.* 1924 *Bom.* 320, *Dist.* [P 14 C 1]

A. P. Dube and *S. C. Das*—for Applicant.

M. Waliullah—for the Crown.

Nehal Chand Shastri — for Opposite Party.

Order.—These are three applications for enahancement of sentence filed on behalf of a complainant, Man Singh. The various accused persons, Reoti, Bharat Singh and Roshan Singh, have been convicted under S. 193, I. P. C., of giving false evidence against Man Singh on a charge of S. 224 I. P. C. which was brought by Reoti against Man Singh and Reoti has also been convicted under S. 211, I. P. C. The convictions were in the Court of a Magistrate on the the complaint of a Sessions Judge and they were upheld in appeal by the Sessions Judge. The sentences of 6 months' rigorous imprisonment on Reoti and 4 months' rigorous imprisonment each on Bharat Singh and Rosham Singh were reduced by the Sessions Court to the period of imprisonment already undergone, which was 23 days. There was a trial of Man Singh and his son under S. 324, I. P. C. for causing the death of a woman, Mt. Rajo, and Man Singh was acquitted by the Sessions Court and Debi was acquitted by the High Court on appeal.

It is common ground that on 19th January 1929 the kurkamin of Sadabad went to attach property belonging to Reoti and to his brother under a warrant of attachment issued in execution of a decree by Nek Ram. Nek Ram and Debi are sons of Man Singh. The kurkamin states that Man Singh who is an old man of 70, was not present on that occasion, and evidence has been given that Man Singh was collecting rents on that date at a village at a considerable distance. The kurkamin states that Reoti and his brother came out with chopper and showed signs of violence and the kurkamin then left. After that some collision took place between Debi on one side and Reoti and his brother on the other, and in this collision the woman took part and the fatal injury was caused to Mt. Rajo. Reoti made a complaint in which he stated that Man Singh was present with a spade and struck the woman. The question is : was this complaint by Reoti against Man Singh true or false ? The allegations of Reoti were supported by his evidence and the evidence of Bharat Singh and Roshan Singh, who claimed to have witnessed the occurrence which Reoti alleged took place. On the other hand, we have the evidence of the kurkamin and several witnesses on behalf of Man Singh to the effect that he was not present on this occasion. Both lower Courts have believed that evidence and we see no reason to differ. We, therefore, find that the convictions of Reoti, Bharat Singh and Roshan Singh were correct. Some further argument was addressed to us that a private individual such as Man Singh cannot move this Court in revision, and reference was made to *Nagji Dula, In re* (1). In that ruling a Bench of the Bombay High Court held that a private complainant should not apply in revision for enhancement of a sentence passed by a Magistrate but that he should apply to the District Magistrate, or the Sessions Judge, or Government. Now in the present case the order against which complaint is made is the order of the Sessions Judge and, therefore, it would not have been possible under the Criminal Procedure Code to apply either to the Sessions Judge, or to the District Magistrate. It is not, we consider, intended by the Code that in these circumstances the only remedy of a complainant should be to apply to a District Magistrate to move the Government to apply for an enhancement, because the Local Government will only apply for an enhancement if the enhancement is required in the public interest. This Court does not regard the question of enhancement only from the point of view of the public interest, but from the circumstances of the particular case before it.

In the present case we consider that the sentence should be largely enhanced, and that of the Sessions and Subordinate Judge of Muttra, are utterly inadequate. We trust that this Sessions Judge will in future give more care to the question of sentences in cases which come before him. In the present case there was a complaint made by Reoti which is shown to have been false, and on that complaint proceedings were instituted in the Sessions Court for an offence punishable with transportation for life. The offence of Reoti therefore came under the second part of S. 211, I. P. C. Taking all the facts into consideration we enhance the the sentence of Reoti to 1½ years' rigorous imprisonment under S. 211, I. P. C. and to 1½ years' rigorous improsonment under S. 193, I. P. C. Those sentences will be consecutive and not concurrent. We sentence Bharat Singh and Roshan Singh under S. 193, I. P. C. to two years rigorous imprisonment each in enhancement of the sentence already undergone. Warrants will issue for the arrest of these accused.

R.M./R.K. *Sentences enhanced.*

A. I. R. 1931 Allahabad 14

BENNET, J.

Todar Mal and *another*—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 433 of 1930, Decided on 11th August 1930, made by Sess. Judge, Benares, on 26th June 1930.

(a) Criminal P. C. (1898), S. 147 (1)—Police report to be used merely for purposes of S. 147 (1)—Police officer need not be called to depose to correctness.

Provided the only use that the Magistrate has made of the police report is the use contemplated by S. 147 (1), it is not necessary for him to call on the police officer to give evidence in regard to the correctness of his report. [P 15 C 1]

(b) Criminal P. C. (1898), S. 539—Absence of memorandum.

The absence of a memorandum of a local inspection does not render a trial or inquiry illegal: *A. I. R.* 1927 *All.* 350 and *A. I. R.* 1924 *Cal.* 1035, *Dist.*; *A. I. R.* 1925 *Cal.* 1246; *A. I. R.* 1925 *Cal.* 353; *A. I. R.* 1926 *Bom.* 534 and 1926 *Rang.* 193 (1), *Ref.* [P 15 C 2]

(c) Criminal P. C. (1898), Ss. 145 and 148—Provisions of Chap. 12 are intended to provide speedy remedy in cases of dispute with which that chapter deals.

There is nothing in Chap. 12 or in S. 146 which states that in order that action under Chap. 12 may be justified the danger of a breach of the peace should be imminent and that the opposite party should have no sufficient time to go to the proper Court. In fact no case could ever be made legal under that chapter if it was necessary that it should be impossible to have sufficient time to go to the proper Court, because obviously it is always as easy to file a plaint in a civil Court as to file a complaint in a criminal Court. The provisions of Chap. 12 are intended to provide a speedy remedy in cases of disputes with which that chapter deals in order that the matter may be settled temporarily while more lengthy civil proceedings take place. [P 15 C 2]

Kumuda Prasad and *Mansur Alam*—for Applicant.

Panna Lal and *Haripal Vaishni*—for the Crown.

Judgment.—This is a reference by the learned Sessions Judge of Benares recommending that the order passed under S. 147, Criminal P. C. by a Magistrate should be set aside. The learned Sessions Judge gives three grounds under which he considers the order was invalid. The first ground was that no service of a copy of the preliminary order was made on the applicants in revision. The Magistrate in his explanation points out that a copy of the preliminary order was served on the two applicants in revision and it is admitted by the learned counsel for the applicants that this is correct. The second ground is that the Magistrate relied on a police report without having that report proved by the police officer who made it. The learned Sessions Judge is apparently unaware of the procedure under S. 147, Criminal P. C. S. 147 (1) lays down that whenever a Magistrate is satisfied from a police report or from information that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water etc., he makes an order in writing and requires the parties to put in written statements and thereafter he holds an inquiry. The only use that the Magistrate has made of the police report is the use contemplated by this section and accordingly it was not necessary for him to call on the police officer to give evidence in record to the correctness of his report.

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(1) A. I. R. 1924 Bom. 320=81 I. C. 614=25 Cr. L. J. 966=48 Bom. 358.

The third ground on which the learned Sessions Judge relies is that although the Magistrate made a local inspection he did not make a memorandum of that local inspection as required by S. 539 (b), Criminal P. C. This the Magistrate admits but he points out that all that he saw on his local inspection was that there was a pond on a certain number and that matter is hardly a matter requiring a memorandum. The order of the Magistrate extends to eight pages and there are only seven lines in which he referred to what he saw on his local inspection. Accordingly it is clear that the order of the Magistrate was based on evidence in the case and not on what he saw on his local inspection. The learned Sessions Judge refers to a ruling in *Hirday Govind* v. *Emperor* (1) in which it was held that a memorandum of a local inspection was mandatory but it has been held in .the later ruling of the Calcutta High Court *Forbes* v. *Md. Ali Haidar* (2) and also in *A. I. R.* 1929 *Cal.* 353 and in *Khushal Jeram* v. *Emperor* (3) and in *A. I. R.* 1926 *Rang.* 193. p. 193 that non-compliance with the direction in S. 539 (b), Criminal P. C., to make a memorandum of an inspection does not vitiate the trial. In the ruling of this High Court mentioned by the learned Sessions Judge *Tirkha* v. *Nanak* (4), it was merely held that the section required a memorandum to be made but it was not held that the mere absence of a memorandum would vitiate the trial or inquiry. Accordingly I consider that the absence of a memorandum of a local inspection did not render a trial or inquiry illegal. Two other points were urged by the learned Sessions Judge for the applicant in revision. Firstly, that unless it is shown that the breach of the peace is imminent and that the opposite party has not sufficient time to go to the proper Court, action under Chap. 12, Criminal P. C., is not justified. There is nothing in Chap. 12 or in S. 146 which states that the danger of a breach of the peace should be imminent. In fact no case could ever be made legal under that chapter if it was necessary that it should be impossible to have sufficient time to go to the proper Court because obviously it is always as easy to file a plaint in a civil Court as to file a complaint in a criminal Court. The provisions of Chap. 12 are intended to provide a speedy remedy in cases of disputes with which that chapter deals in order that the matter may be settled temporarily while more lengthy civil proceedings take place. The remaining ground urged by the learned counsel was that there was no finding of the Magistrate under S. 146, proviso (2). Irrigation from this tank is a matter which is exercisable at particular seasons and therefore the section requires that an order should not be passed unless the right has been exercised on the last season preceding the date of institution. I find that the first witness for the applicant to the Magistrate states that from all time irrigation has gone on from this tank and other witnesses give similar evidence. The Magistrate on this evidence in his order states:

"that water accumulates in this tank No. 410 and this water is used for irrigating a number of fields in the village."

This shows that the case before the Magistrate was that the tank was used in previous seasons by the applicants and that those applicants in the present season were prevented from making a similar use of the tank for irrigation by the opposite party. I consider that there is nothing in any of these grounds for reference or revision. Accordingly I refuse the reference and uphold the order of the Magistrate.

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(1) A. I. R. 1924 Cal. 1035=82 I. C. 767=52 Cal. 148.

(2) A. I. R. 1925 Cal. 1246=90 I. C. 308=53 Cal. 46.

(3) A. I. R. 1926 Bom. 534=97 I. C. 671=27 Cr. L. J. 1151=50 Bom. 680.

(4) A. I. R. 1927 All. 350=100 I. C. 371=28 Cr. L. J. 291=49 All. 475.

V.B./R.K. *Reference rejected.*

A. I. R. 1931 Allahabad 16

MUKERJI AND BENNET, JJ.

Ram Prasad and *others*—Defendants—Appellants.

v.

Mithan Lal and *others*— Plaintiff — Defendants—Respondents.

Second Appeal No. 262 of 1928, Decided on 4th July 1930, from decision of Dist. Judge, Aligarh, D/- 13th January 1928.

U. P. Land Revenue Act, S. 111--Partition proceedings—Objections—Not allowing evidence on merits of objections is inequitable.

All the cosharers concerned should be properly represented before the questions raised in the objections can be determined by the revenue officer. It is highly inequitable to prevent the objectors from producing evidence on the merits of their objections. [P 16 C 2]

Panna Lal and *Joti Sarup Gupta*—for Appellants.

S. N. Gupta—for Respondents.

Bennet, J.— These are two second appeals of certain objectors in a partition suit before the revenue Court. The suit was for partition of khewats Nos. 1 and 2, Mahal Hoti Lal, Mauza Band Abdulhaipur. The objections both took the form that about 50 years ago a private partition of khewat No. 1 was made between the applicants for partition, the ancestors of the different objectors and other persons, and that from that date these sets of persons had been in separate possession and occupation of their respective shares, paying land revenue separately and had separate proprietary and adverse possession of the land of their shares. We may note that khewat No. 2 is merely a small area of presumed muafi land which goes with khewat No. 1.

The objections taken were fundamental and if allowed would have rendered it necessary to dismiss the application for partition under S. 109, Land Revenue Act. As the objections related to questions of proprietary title, they also came under S. 111. The course adopted by the Assistant Collector was that laid down in S. 111 (1) (c) to inquire into the merits of the objections himself. That being so under S. 112 an appeal lay from his decree to the civil Court. The actual order passed by the Assistant Collector on 12th March 1924 was that the objections were frivolous on the face of it and they were rejected. That order shows that he had not appreciated the nature of the objection. On that date, on 12th March, no evidence was produced by the applicants, but they had summoned their witnesses on a previous date, 19th February 1924, and there was no clear direction on the order sheet that evidence should be produced on 12th March. Moreover, there were certain minor cosharers who had not been properly represented by guardians on 12th March. It was obviously necessary that all the cosharers concerned should be properly represented before the questions raised in the objections could be determined by the Assistant Collector.

An appeal was taken by the objectors to the District Judge, and after various references to this Court, he was directed to dispose of that appeal on the merits. In his order of 13th January 1928, which is before us now in appeal, the learned District Judge considered that he should not allow any evidence to be produced by the objectors. The only question before us in these two appeals is whether that was a correct order or not of the learned District Judge. Having given our consideration to all the facts of the case, we consider that it would be highly inequitable to prevent the objectors from producing evidence on the merits of their objections.

Accordingly we allow these appeals, and we remand the case to the Assistant Collector through the District Judge in order that the parties may have an opportunity to produce their evidence on these objections and for the Assistant Collector to decide these objections on the merits. Any party who is dissatisfied with the decision of the Assistant Collector may of course appeal to the District Judge. The costs so far incurred will be costs in the cause.

B.V./R.K. *Appeal allowed.*

* A. I. R. 1931 Allahabad 17

KING, J.

Kifayatullah Khan—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 565 of 1930, Decided on 30th August 1930, made by Sess.Judge, Shahjahanpur, D/- 10th July 1930.

*** (a) Arms Act (1878), Ss. 19 (f) and 4—Patakhas are not "ammunition".**

The general words "other explosive of fulminating materials" in S. 4 must according to the well recognized rule of "ejusdem generis" be interpreted in the light of the foregoing examples of explosives. According to this, the definition of "ammunition" in S. 4 includes only such explosive or fulminating material as could be used for any military purpose or in particular for fire arms or torpedos or war-rockets or for mining or blasting. As patakhas are quite useless for such purposes, they are not "ammunition" within the meaning of the Act : 5 *Mad.* 159 and 8 *Mad.* 202, *Ref.* [P 17 C 2]

***(b) Criminal P.C. (1898), S. 439—It is not fair in revision to alter conviction under one Act to one under another Act.**

It is not fair in revision to alter a conviction under one Act to one under another Act, unless a conviction under the latter Act were obviously correct and unless it were certain that the accused had not been prejudiced by being charged under the former Act. [P 18 C 1]

Order.—One Kifayatullah Khan was convicted under S. 19 (f), Arms Act of 1878, for being in possession of 340 patakhas without a licence. The learned Sessions Judge recommends that the conviction be quashed.

The patakhas are " 1½ to 2" in diameter. They contain a very small quantity of chlorate of potassium mixed with sulphide of arsenic, together with small pieces of kankar, wrapped, and rolled in several layers of paper so as to form a small ball. When thrown on the ground they explode with a report. These patakhas or crackers are customarily used by children at the time of shabarat just as crackers of a rather different kind are generally associated with Christmas festivities. Hitherto no licence has been required even for their sale, much less for their possession, probably because they are regarded as mere playthings. They are said to be sold at the rate of 8 for one pice.

It seems prima facie astonishing that such insignificant crackers could be regarded as " ammunition" within the meaning of the Arms Act. "Ammunition" is defined in S. 4 of the Act as including

"all articles specially designed for torpedo service and submarine mining, rockets, gun-cotton, dynamite, litho fracteur and other explosive or fulminating material."

The Magistrate argues that patakhas are "explosives", as they do explode on percussion, and therefore they must be "ammunition". I do not agree to this view. The general words " other explosive or fulminating material" must, according to the well recognized rule of ejusdem generis or 'noscitur a socils', be interpreted in the light of the foregoing examples of explosives. According to this rule of interpretation I hold that the definition includes only such explosive or fulminating material as could be used for any military purpose or in particular for fire-arms or torpedos or war-rockets, or for mining or blasting. As patakhas are quite useless for such purposes I hold that they are not "ammunition" within the meaning of the Act.

It is worth noting that it has been held by a Bench of the Madras High Court so long ago as 1882 in *Queen* v. *Suppi* (1) that the manufacture or possession of fireworks without a license is not prohibited by S. 5, Arms Act. The " rockets" referred to in the definition mean war-rockets. This latter point is supported by the Arms Rules of 1924. Wherever rockets are referred to they are expressly called "war-rockets" e. g., Rr. 5, 23 and 30. This ruling still holds good so far as I am aware. It was distinguished in *Queen-Empress* v. *Khasim Sahib* (2), but not dissented from. Licenses for the manufacture, possession or sale of fire-works are granted under the Explosives Act of 1884 and not under the Arms Act. I am clearly of opinion that the conviction under S. 19 (f), Arms Act, cannot be sustained.

The Magistrate suggests that if the conviction under S. 19 (f), Arms Act, be set aside, the accused might be convicted under R. 138 (6), Explosives Rules, of 1914. It is however at least open to doubt whether the accused is guilty even of any offence under the Explosives Act or the rules made thereunder. It was held by a Bench of the Punjab Chief Court in *Emperor* v. *Bansidhar* (3) that no license for the sale of patakhas is required under the Explosives Act, as patakhas are not fire-works. I do not wish to express any opinion on this point as it clearly would not be fair in revision to alter a conviction under the Arms Act to one under the Explosives Act, unless a conviction under the latter Act were obviously correct and unless it were certain that the accused had not been prejudiced by being charged under the Arms Act.

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(1) [1882] 5 Mad. 159=1 Weir 655.

(2) [1885] 8 Mad. 202=1 Weir 664.

(3) [1910] 8 P. R. 1910 Cr.=11 Cr. L. J. 287=5 I. C. 911.

I accept the reference, set aside the conviction and sentence, and order that the fine if paid be refunded.

B.V./R.K. *Conviction quashed.*

A. I. R. 1931 Allahabad 18

MUKERJI AND BENNET, JJ.

Prahlad Singh and *another*—Plaintiffs—Appellants.

v.

Barumal—Defendant—Respondent.

Letters Patent Appeal No. 86 of 1927, Decided on 15th May 1930.

Adverse Possession—Actual physical possession should be considered in case of adverse possession—For right under adverse possession claim must be continuous during whole period.

For the purpose of adverse possession regard should be had to the actual physical possession of the person making the claim, provided that that claim has been put forward during the whole period to be entitled to the right which is claimed by adverse possession. Therefore a person claiming adverse possession can add the period of his possession as usufructuary mortgagee to the period of his possession as a vendee from his usufructuary mortgagor: 19 *I. C.* 367 and 3 *All.* 24 (*F.B.*), *Dist.* [P 18 C 2]

Panna Lal—for Appellants.

N. C. Vaish—for Respondent.

Bennet, J.—This is a Letters Patent appeal by the plaintiffs against a judgment of a learned single Judge of this Court dismissing the suit of the plaintiffs with costs. The two lower Courts had decreed the suit of the plaintiffs. The plaint sets forth that Parbhu Dayal, the adopted son of Khushi Ram, was a zamindar and also the owner and in possession of a shop in a village and that under a sale deed of 23rd January 1911, Parbhu Dayal sold the shop together with its site to the plaintiffs and that Mt. Manohari lived in the shop as a ryot at the will of Parbhu Dayal and that she had as a ryot no right of transfer of any sort in the shop; and further that Mt. Manohari executed a sale deed on 16th April 1912, registered on 19th April 1912, by which she sold this shop to the defendant. Accordingly the plaintiffs ask for possession of the shop. In the written statement the defendant set up the case that he had been in possession of the shop under a usufructuary mortgage deed of 23rd March 1908, and that he was in possession of the shop when Mt. Manohari executed a sale deed of her equity of redemption to him on 16th April 1912. Accordingly the defence claimed that the suit was time barred because of 12 years' adverse possession. This was the sole question on which the learned single Judge of this Court dismissed the suit of the plaintiffs.

The suit was brought on 16th April 1924, that is, within 12 years from the sale deed but more than 12 years from the deed of usufructuary mortgage.

The question before us is a very simple one of law: Is it permissible for a person claiming adverse possession to add the period of his possession as usufructuary mortgagee to the period of his possession as a vendee from his usufructuary mortgagor? For the appellants it was argued that it is not permissible, because the nature of his title during his period as usufructuary mortgagee is different from the nature of his title as vendee. Reference was made by the learned counsel for the appellants to *Lahuri Bibee* v. *Bejoy Chand Mahatap* (1). But in that case it was merely held that a defendant who is claiming adverse possession as lessee could not add to his period as lessee the period which he alleged was adverse possession against his lessor, because there was no authority for that proposition. Reference was also made to the case of *Umrunnissa* v. *Muhammad Yar Khan* (2) but in that case it was merely held that you cannot treat the receipt of malikana allowance from a mortgagee as equivalent to the possession for the purposes of adverse possession of the recipient. Neither of these cases has any bearing at all on the proposition before us.

We consider that for the purposes of adverse possession we should regard the actual physical possession of the person making the claim, provided that that claim has been put forward during the whole period, to be entitled to the right which is claimed by adverse possession. In the present case the usufructuary mortgage was a mortgage of the whole proprietary rights subject of course to the right of redemption of the mortgagor. The period of possession as mortgagee and as vendee by the defendant was continuous, and during the whole of that period the defendant was in possession claiming the full rights of an owner in this shop. We may also regard the matter from a different angle of vision and say that Mt. Manohari and her mortgagee together from 1908 were setting up an adverse title against the plaintiffs' vendor, because in the plaint it is alleged that Mt. Manohari had no right of transfer at all (para. 3); whereas in 1908 she made a usufructuary mortgage purporting to transfer the rights of an owner in this house. The plaint on the other hand alleged in para. 2 that Mt. Manohari lived in this shop merely as a ryot at the will of Parbhu Dayal, the vendor of the plaintiffs, i. e., that she was a licensee. When Mt. Manohari sold the house to the mortgagee she enabled the latter to tack to his possession claiming as full owner after the sale, his vendor's adverse possession as the owner. Thus the statutory period of 12 years under a claim of full ownership was completed. Considering therefore the nature of the claim set up in the plaint and the nature of the title asserted by Mt. Manohari and by the defendant, we hold that for more than 12 years the defendant has been making a claim to adverse possession and that therefore this present suit of the appellants is barred by limitation.

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(1) [1913] 19 I. C. 367.

(2) [1881] 3 All. 24 (F.B.).

Accordingly we dismiss this Letters Patent appeal with costs.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 19

BOYS, J.

Bansi Dhar—Defendant—Applicant.

v.

Mt. Bitola and *others*—Defendants—Opposite Parties.

Civil Revn. No. 83 of 1930, Decided on 4th June 1930, from order of Addl. Sub-Judge, Etawah, D/- 31st January 1930.

(a) Civil P. C., (1908), O. 23, R. 1—Orders under O.23, R. 1, are not to be lightly passed and when passed are not to be lightly set aside.

Orders under O. 23, R. 1, are not to be lightly passed and when passed are not to be lightly set aside. But the latter proposition presupposes that there is ground for believing that the Judge has applied a judicial discretion to the point before him for decision. *A. I. R.* 1929 *All.* 683, *Foll.* [P 19 C 2 & P 20 C 1]

(b) Civil P. C., O. 23, R. 1—Order of lower Court under O. 23, R. 1, should state grounds for allowing the suit to be withdrawn with leave to file fresh suit.

The order of the lower Court allowing the suit to be withdrawn with leave to file a fresh suit should be in such terms as to make it possible for the High Court to be satisfied that there was prima facie, at any rate, proper ground for the Court's order. [P 19 C 2]

H. C. Vaish—for Applicant.

Judgment.—The application asks for the revision of an order of the Additional Subordinate Judge of Etawah, dated 31st January 1930, allowing the suit to be withdrawn with leave to file a fresh suit. Now before such an order can be passed under O. 23, R. 1, the Court must be satisfied in terms of sub-R. (2) that the suit must fail by reason of some formal defect, or that there are sufficient grounds for allowing the plaintiffs to institute a fresh suit for the subject-matter of the suit or part of the claim. I have had the facts, as I believe, fully stated before me by Dr. Vaish. I have not had the advantage of hearing anybody on behalf of the opposite party or parties. The order of the lower appellate Court under O. 23, R. 1 (2), should have been in such terms as to make it possible for this Court to be satisfied that there was, prima facie at any rate, proper ground for the Court's order. The judgment before me in revision says:

> "I have considered the application. The arguments in appeal were heard some time back. The defect appears to be a formidable one. No harm will come to any party if a status quo is restored and the appellant compensated by costs. The application is allowed. The plaintiff is allowed to file a fresh suit on the same cause of action."

There is nothing whatever in this order to enable this Court to feel in the least satisfied that the learned Judge had present to his mind the provisions of O. 23, R. 1. The statement that "the arguments in appeal were heard some time back" seems irrelevant to the order that the learned Judge was passing. The statement that "no harm will come to any party if the status quo is restored" while it may be relevant for consideration, is by no means a primary reason for passing an order such as the present. There is no indication whatever as to how the result of the defects named might be to unjustly cause the plaintiff to fail. At the same time, as I have not had the advantage of hearing anybody on the other side, it is not desirable when cancelling this order to put it out of the learned Judge's power to pass a fresh order to the same effect properly framed.

Orders under O. 23, R. 1, are not to be lightly passed, and when passed are not to be lightly set aside. But the latter proposition presupposes that there is ground for believing that the learned Judge has applied a judicial discretion to the point before him for decision: see *Jagmohan* v. *Ram Khilawan* (1). I set aside the order of the lower appellate Court and direct it to restore the appeal to its original number and to take it up from the stage at which it had arrived when Mt. Bitola, the plaintiff and respondent 1, in the appeal, filed her second application of 31st January 1930. He will hear again any counsel who desire to be heard on that application, and if he then finds himself in a position, as he may find himself, to write an order showing himself to be satisfied as to the points set out in O. 23, R. 1 (2), he will pass such an order. If he on the other hand arrives at the decision that the application must be rejected, he will then after giving the parties an opportunity of re-arguing the appeal, proceed to decide the appeal. The direction in favour of allowing the parties to re-argue the appeal is necessary in view of the fact that so much time has passed since the arguments were heard.

Allowing the application in revision I set aside the order of the lower appellate Court dated 1st January 1930, allowing the suit to be withdrawn, and direct the learned Judge to take up the appeal again in accordance with the above observations. The costs of this application will abide the result.

P.N./R.K. *Revision allowed.*

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(1) A. I. R. 1929 All. 683=119 I. C. 859.

A. I. R. 1931 Allahabad 20

NIAMATULLAH, J.

Dharam Singh and *another* —Judgment-debtors—Applicants.

v.

Shah Mal Singh and *another*—Decree-holders—Opposite Parties.

Execution Second Appeal No. 722 of 1929, Decided on 2nd July 1930, from decision of Sub-Judge, Muzaffarnagar, D/- 4th February 1929.

(a) Civil P. C. (1908), S. 60 (c)—Agriculturist is one whose main source of income is agriculture—No hard and fast rule can be laid down as to whether person cultivating his own land is agriculturist or not.

An agriculturist for the purposes of S. 60 is one whose main source of livelihood is agriculture.

No hard and fast rule can be laid down for cases where a person cultivates his own land and the aggregate income derived from his labour and ownership of land is spent on the maintenance of himself and his family. Each case must depend upon its own circumstances. The fact that he cultivates his own land and thereby maintains himself and his family will not necessarily make him any the less an agriculturist. On the other hand, if land, which he cultivates, if let to tenants, may be considered to be sufficient for his maintenance, he will not be considered an agriculturist only because he cultivates the whole of what he owns : 33 *I. C.* 727, *Rel. on.* [P 20 C 2 ; P 21 C 1]

(b) Civil P. C , S. 60 (c)—Burden of proof.

Although in considering whether the means of livelihood of a zamindar is agricultural or zamindari, the question of burden of proof cannot be ignored, still an effort should be made to arrive at a definite finding on the evidence. [P 21 C 1]

Krishna Murari Lal—for Applicants.

K. C. Mital—for Opposite Parties.

Judgment.—This is an appeal by two judgment-debtors, Dharam Singh and Munshi, who are brothers, from an order of the learned Subordinate Judge, Muzaffarnagar. confirming that of a Munsif of that district who disallowed an objection preferred by them, to the attachment of their residential house in execution of a simple money decree obtained against them by the respondents decree-holders, on the ground that they (the judgment-debtors) are agriculturists whose residential house is exempt under S. 60, Civil P. C., from attachment and sale in execution of decree. The lower appellate Court has mentioned, with reference to certain evidence, that the appellants are proprietors of 27 bighas pakka land, which they themselves cultivate. It observes that

> "the burden of proof was on the judgment-debtors to prove that their main source of income is agriculture. All zamindars, however small zamindari may be, cannot be said to be agriculturists simply because they cultivate land. S. 60, proviso (c), is meant to protect the house of agriculturists, whose main source of income is agriculture. The judgment-debtors appellants failed to prove the extent of their income from the zamindari and from agriculture, in order to make out that their main source of income is zamindari, to be entitled to the protection of S. 60, Cl. (c)."

I agree with the view taken by the appellate Court as to who should be considered an agriculturist within the meaning of S. 60, Cl. (c). It has been held by this Court in numerous cases that an agriculturist for the purposes of that section is one whose main source of livelihood is agriculture: see for instance *Shafian* v. *Hamidullah Khan* (1). I am not however prepared to accept the view expressed somewhat widely by the lower appellate Court, viz., that zamindars, however small their zemindari may be, cannot be considered to be agriculturists under any circumstances. It may be that an enterprising zamindar, who carries on a prosperous farm, on a large scale, leaving no lands which could be let to tenants and be a source of additional income to him, cannot be considered to be an agriculturist for the obvious reason that, though agriculture may be a source of income to him, it is not his source of livelihood. If he discontinues cultivation his income derived from the land let to tenants will be a sufficient source of livelihood for him. On the other hand, a petty proprietor of a few bighas cannot manage to make the two ends meet unless he supplements his slender means by taking to agriculture and cultivating his own land, and possibly other land let to him. The main source of his income in such a case is not what can be reasonably attributed to his ownership of land, but what he produces through his personal exertion. No hard and fast rule can, in my opinion, be laid down for cases where a person cultivates his own land and the aggregate income derived from his labour and ownership of land is spent on the maintenance of himself and his family. Each case must depend upon its own circumstances. The fact that he culivates his own land and thereby maintains himself and his family will not necessarily make him any the less an agriculturist. On the other hand, if land which he cultivates, if let to tenants may be considered to be sufficient for his maintenance, he will not be considered to be an agriculturist only because he cultivates the whole of what he owns.

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(1) [1916] 33 I. C. 727.

The learned Subordinate Judge has laid stress on the question of onus and held that the appellants failed to establish that their means of livelihood is cultivation and not zamindari. While the question of burden of proof cannot be ignored, an attempt should be made in a case like this to arrive at a definite finding on the evidence. The fact, that the appellants own 27 pakka bighas of land, is, in my opinion, an indication of the extent to which they are maintained by sources other than agriculture pure and simple. This amount of land, if let to tenants will fetch sufficient though somewhat reduced income for the maintenance of the appellants. On the whole I think that they cannot be considered to be agriculturists within the meaning of S. 60, Cl. (c).

I must notice that Courts below have fallen in a curious inconsistency. The learned Munsif exempted one of the enclosures attached by the decree-holders on the ground that it had been

> "proved to have been used for keeping cattle and implements of husbandry and for agricultural purposes."

As regards the rest of the house, he held that the appellants not being agriculturists, the house is not exempt from attachment. The appellants are either agriculturists or they are not. If they are, the entire house and other buildings belonging to and occupied by them are exempt. If they are not, no part of their house or any other building owned by them, though occupied by them and used for agricultural purposes, can be exempted from attachment. The exemption of part of the premises belonging to the appellants was not objected to by the decree-holders before the lower appellate Court and is not objected to before me. I need, therefore, take no further notice of that question. The result is that this appeal is dismissed with costs. Having regard to the nature of the question involved in this appeal, I grant permission to the appellants for a Letters Patent appeal which has been verbally asked for by the learned advocate for the appellants.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 21

MUKERJI AND BENNET, JJ.

Hazari Singh—Plaintiff—Appellant.

v.

Jhunna Singh and *others*—Defendants—Respondents.

Letters Patent Appeal No. 59 of 1929, Decided on 28th March 1930, against judgment of Ashworth, J., D/- 7th November 1928.

(a) Civil P. C., S. 11—Previous suit dismissed as person through whom plaintiff claimed title was held not to be in title and title held in another person—Plaintiff bringing another suit claiming through that another person—Suit is not barred.

Where rights claimed in both suits are the same, if the plaintiff claims title through one person and Court finds that title in the other and thereby dismisses the claim, the subsequent suit by the same plaintiff claiming through the other person in whom Court found title is not arred as res judicata. [P 22 C 2]

(b) **Estoppel—Plaintiff undervaluing previous suit—He is not estopped in matter of jurisdiction in second suit—Jurisdiction.**

In the matter of jurisdiction there cannot be any estoppel simply because a plaintiff undervalued his previous suit. [P 22 C 2]

B. Malik and *Mansur Alam*—for Appellant.

M. L. Agarwala and *Mukhtar Ahmad*—for Respondents.

Mukerji, J.—This is an appeal against a judgment of a learned single Judge of this Court, who gave effect to the plea of res judicata in second appeal and dismissed the plaintiff's suit.

It appears that the plaintiff claimed a share in a certain property. He instituted two suits. In the first suit he stated that the property belonged to one Kauleshar, that on his death the widow Mt. Kali Kunwar was in possession as a Hindu widow, and that on her death as a reversioner to the estate of Kauleshar he was entitled to the property. The suit was filed in the Court of the Munsif of Azamgarh and was dismissed on the sole ground that the property did not belong to Kauleshar, but had belonged to Kali Kunwar who was the absolute owner of the property.

Thereupon the plaintiff instituted the suit out of which the present appeal has arisen on the allegation that he was one of the heirs of Kali Kunwar and he was entitled to a share in the property. The present suit was filed in the Court of the Subordinate Judge of Azamgarh.

The lower appellate Court has found that the valuation of the present suit was a correct one, that the former suit had really been under-valued and should not have been filed in the Court of the Munsif of Azamgarh. On this ground he held that the former suit did not operate as res judicata and decreed the plaintiff's claim partially.

On second appeal the learned single Judge of this Court applied the case of *Tamizunnissa Bibi* v. *Mohammad Hussain* (1), and held that the former judgment did operate as res judicata although the present suit was properly valued and it was not within the cognizance of the Munsif. In Letters Patent appeal two points have been raised. The first point is that in the second suit the plaintiff was not litigating under the same title and secondly that the former judgment was delivered by a Court which was not competent to take cognizance of the second suit. In our opinion, both the points have force and the appeal must be decreed.

The former suit, as already stated, was based on the ground that the property belonged to Kauleshar. It was found that it did not belong to Kauleshar but to somebody else. The plaintiff then says that he is also an heir to that somebody else, namely Mt. Kali Kunwar, and he brings his suit. In the second suit, therefore, the plaintiff is not litigating under the same title. His suit would, therefore, be maintainable, and the former judgment would not operate as res judicata. The learned counsel for the appellant has relied on the case of *Kanhaiya Lal* v. *Ashraf Khan* (2). That judgment supports the appellant's contention. On the second point also we think the appellant ought to succeed. It is true that in the former suit the valuation was put on the property by the plaintiff himself. But in the matter of jurisdiction there cannot be any estoppel simply because the plaintiff under-valued his suit. There was the defendant to point out that the suit had been under-valued. It is the finding of fact in the present litigation that the value of the second suit exceeded Rs. 1,000 and therefore, it could not be taken cognizance of by the Munsif. In the case relied on by the learned single Judge the converse proposition was held to be correct. It was held that by exaggerating the value of the second suit a party could not get rid of the application of the rule of res judicata. That is perfectly a sound judgment, if we can say so with respect. In that case it appears that the value put on the property was something more than the value of the former suit. The former suit was within the cognizance of the Munsif and the Munsif had jurisdiction up to Rs. 1,000. In the second suit the valuation put was Rs. 1,350 and the learned Judges found that the later valuation was arbitrary. That being their opinion, the learned Judges rightly held that by giving an arbitrary value to the second suit the operation of the judgment of the first suit could not be got rid of.

On both points the appeal succeeds. We allow the appeal, set aside the judgment of this Court and restore the decree of the lower appellate Court. The appellant will have his costs at both hearings in this Court.

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(1) A.I.R. 1928 All. 127.

(2) A.I.R. 1924 All. 355=46 All. 230.

V.B./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 23

MUKERJI AND BENNET, JJ.

In re Radhey Lal, Balmakund and *others* —Appellants.

Misc. Case No. 37 of 1930, Decided on 16th May 1930.

(a) Income-tax Act (11 of 1922), Ss. 22 and 23(3) — Notice issued to assessees indicating that they were to be assessed separately —Income-tax Officer examining them for finding out if they were members of joint Hindu family and concluding that they were such members taxing them accordingly— They were never called on to show cause why they should not be so taxed— Procedure adopted is against provisions of Ss. 22 and 23(3).

The assessees were never told that they were going to be assessed as members of a joint Hindu family. The notices that were issued to them indicated that they were going to be assessed separately. The Income-tax Officer however at some stage or other having come to know that they were members of the same joint Hindu family examined them at different stages with a view to find out whether they were such members, He came to the conclusion that they were such members and taxed them jointly without ever telling the assessees that he was going to tax them as such members and calling on them to show cause why they should not be so taxed.

Held: that there was a material irregularity and disregard of the procedure as laid down in Ss. 22 and 23. [P 24 C 2]

(b) Income-tax Act (11 of 1922), S. 66— Scope.

The High Court will consider only such points of law as were already before the officers of the Income-tax Department: *A. I. R.* 1930 *Mad.* 449 (*F. B.*). *Foll.* [P 23 C 2]

(c) Income-tax Act (11 of 1922), Ss. 13 and 23 (3)—Account books not furnishing any method of computation— Income-tax Officer must employ some method— He cannot act arbitrarily.

Section 13 does not authorize the Income-tax Officer to act arbitrarily and without any evidence. If the account books do not furnish any method of computation of the profits, he has to employ such methods and such basis as appeal to him to be best, but he has to employ some "basis" or method as he thinks fit. [P 25 C 1]

(d) Interpretation of Statutes — Fiscal enactments must be construed in favour of the subject—Income-tax Act (11 of 1922),S. 66(2).

Fiscal enactments must be construed in favour of the subject. If an assessee has not been properly taxed and if he succeeds on a reference in the High Court, a sum of money deposited by him for reference under S. 66 (2), Income-tax Act, can be regarded only as a part of the costs of reference. [P 25 C 1]

G. N. Kunzru—for Applicants.

U. S. Bajpai—for the Crown.

Mukerji, J.— This matter has arisen out of an application made to this Court by three assessees asking this Court to call upon the Commissioner of Income-tax, United Provinces, to state a case, he having refused to state one when applied to for the purpose by the applicants. The Commissioner of Income-tax has now stated a case and we have to see what are the questions of law that arise for determination by this Court.

The learned Government Advocate has placed before us an unreported judgment of a Full Bench of the Madras High Court delivered on 20th January 1930 * as an authority for the proposition that the High Court would not consider any point of law that was not raised either before the appellate officer or the Commissioner himself by the assessees. We have no reason to differ from what was laid down in that case and we think it but right that only such points of law should be considered by the High Court as were already before the officers of the Income-tax Department.

To find out what are the real points of law that arise in this case the following facts have to be stated: One Bankey Lal had several sons. We are concerned with only two, namely, Radhey Lal and Balmukand. Radhey Lal's son is Shyam Lal. There were three persons who were assessed with income-tax in the year previous to the year in question: (1) Bal mukand, (2) Radhey Lal Shyam Lal and (3) Balmukand Sarraf. They were assessed separately to income-tax. In the year in question, that is to say, in the year 1928-29 three separate notices were issued on 1st April 1928, to the three persons aforesaid. under S. 22 (2), Income-tax Act, calling on them to make a return of their respective incomes. They submitted returns and they also produced their account books as desired by the taxing officer. The taxing officer thereupon proceeded to assess them with income-tax. He however at some stage or other made up his mind to find out whether the three proposed assessees should or should not be assessed jointly as members of a joint Hindu family. He accordingly at different dates examined

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* Since reported in *S. A. Subbiah Iyer* v. *Commr. of Income-tax, A. I. R.* 1930 *Mad.* 449 (*F. B.*) Ed.

Radhey Lal and Balmukand. From statements made before him the income-tax officer came to the conclusion that the three proposed assessees were really members of the same joint Hindu family. He taxed them jointly with a certain amount of tax. The first point that is urged before us is that this procedure was wrong inasmuch as the assessees were never given an opportunity to contest and disprove the allegation that they were members of a joint Hindu family and were liable to be taxed jointly.

In actually assessing three persons mentioned above the Income-tax Officer examined the account books produced before him. He proceeded, according to his own assessment order, under S. 23 (3) Income-tax Act. That section lays down that where a return has been made and the Income-tax Officer has reason to believe that the return is incomplete or incorrect he shall call upon the assessee to produce evidence and after hearing all the evidence that may be liable to be examined, the officer will make an assessment. It is to be noted that the Income-tax Officer was not professing to proceed under S. 23, sub-S. (4), which allows, in certain cases of default by the assessee, the Income-tax Officer to make an assessment "to the best of his judgment."

The Income-tax Officer having found that some of the books of the assessees were not clear as regards the income derived by the owners thereof from dealing in precious metals, assessed the income at Rs. 45,000. He did not state what was the basis of his computation. The assessees raised the point, viz., that the Income-tax Officer was not justified under the law in making what was virtually an assessment to the best of his judgment. The assessees raised two other points. One is about a sum of Rs. 772, a sum said to have been the amount of a loss and another sum of Rs. 1,000, the estimated income from interest payable to Balmukand. As regards the amount of Rs. 772, we do not consider it at all, because in the appeal that was filed against the assessment made by the Income-tax Officer, no complaint was made as to the exclusion of this sum from the account.

As regards the sum of Rs. 1.000, we also exclude it from our consideration, because on the admitted facts there was no account book produced by Balmukand and the previous year's income on the head was Rs. 1,000. Thus there was certainly a basis on which the Income-tax Officer could estimate the income for the year in question.

We now proceed to consider the points of law that have been stated above. It is not denied that the assessees were never told that they were going to be assessed as members of a joint Hindu family. The notices that were issued to them indicated that they were going to be assessed separately. The notices never stated that they should be assessed jointly and therefore no 'issue,' in the ordinary sense of the word, ever arose between the Income-tax Officer on the one hand and the assessees on the other as to the jointness or separation of the family. If it be true, as has been stated, that the Income-tax Officer came to know that the assessees were really members of a joint Hindu family, it was his duty, in the name of fair play, to tell the assessees that he proposed to assess them jointly as members of a joint Hindu family and to call on them to show cause why he should not proceed accordingly. As already stated, the procedure that he had adopted was to assess the assessees separately. The mere fact that the statements of Radhey Lal and Balmukand taken at different dates indicated that they were members of a joint Hindu family along with Radhey Lal's son Shyam Lal, did not justify the Income-tax Officer in the procedure that he adopted. From the fact that the assessees were not called upon to adduce any evidence in support of their case of separation they were unable to produce any evidence. When the matter went up in appeal before the Assistant Commissioner, the assessees wanted to produce a copy of a registered will alleged to have been executed by Bankey Lal, the father of Radhey Lal and Balmukand. But that officer refused to accept it on the ground that it had not been tendered before the Income-tax Officer. The assessees however never had any chance to produce the document before the Income-tax Officer. We are of opinion that there was a material irregularity and disregard of the procedure as laid down in Ss. 22 and 23, Income-tax Act, in assessing the applicants without giving them any information of the proposal to do so and without permitting them to adduce evidence in support of their contention. This is our answer to the first question.

As regards the second question, viz., whether the Income-tax Officer was justified in fixing the income of the assessees at the sum of Rs. 45,000, we are of opinion that what the Income-tax Officer virtually did was to act under sub-S. (4), S. 23, Income-tax Act. If it was true, as we assume that it was true, that the assessees' account books did not furnish any proper clue of the actual income, it was open to the Income-tax Officer to accept such evidence as he might get for the purpose of finding out the true income. He does not in his order state any basis at which he arrived at the figure of Rs. 45,000. S. 13, Income-tax Act, did not authorize him to act arbitrarily and without any evidence. If the account books did not furnish any method of computation of the profits, he had to employ such methods, and such basis as appealed to him as the best, but he had to employ some "basis" or method as he thought fit. But he did not employ any method at all. We are therefore not in a position to say that he acted legally in the matter. Our answer therefore to this question is that the assessment was illegal having regard to the provisions of S. 23, sub-S. (3) of the Act.

Let a copy of this judgment under the seal of the Court be sent to the Commissioner of Income-tax. As the assessees have substantially succeeded, they will have their costs of this reference. The learned Government Advocate is entitled to a day's fee which is Rs. 250. He will certify payment to him within the prescribed period.

Mr. Kunzru has argued that the costs of the reference which have been awarded to the applicants should also include the sum of Rs. 100 deposited by his clients for a reference under sub-S. (2), S. 66, Income-tax Act. We have heard the learned counsel for the Government on the point. We can regard the amount of Rs. 100 deposited by the assessees only as a part of the costs of the reference. All fiscal enactments must be construed in favour of the subject and it cannot be said that if an assessee has not been properly taxed and if he succeeds on a reference in the High Court, yet whether he succeeds or loses, he must lose a sum of Rs. 100, simply because an Income-tax Officer has chosen to make an assessment. We think therefore that the sum of Rs. 100 is a part of the costs of the reference, and we therefore direct that it will be taxed as such.

P.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 25

MUKERJI AND BENNET, J.

(*Maharaja*) *Deo Das* and *others*—Plaintiffs—Appellants.

v.

Mahesh Ram Gond and *others*—Defendants—Respondents.

Letters Patent Appeal No. 166 of 1929, Decided on 11th April 1930, against judgment of Dalal, J., D/- 6th March 1929.

Limitation Act, Art. 120—Suit for recovery of zarichaharan dues from decree-holder, auction-purchaser, and judgment-debtor by owner of site—Limitation runs from date of confirmation of sale.

In the case of a custom by which in a public sale the decree-holder, judgment-debtor and purchaser of immovable property are jointly and severally liable for the payment of zarichaharan dues to the owner of the site, right to sue for such dues accrues on the confirmation of the sale and not on the date of auction sale: 14 *A. L. J.* 382, *Dist.* [P 25 C 2 ; P 26 C 2]

Gadadhar Prasad—for Appellants.

K. C. Mital—for Respondents.

Bennet, J.—This is a Letters Patent Appeal by the plaintiffs whose suit was decreed by both the lower Courts, but the judgment of the learned single Judge of this Court is against the plaintiffs. The plaintiffs are certain idols who own the site of house No. 51/8 in Benares and the tenants of this house were the predecessors of defendants 2 to 5. On 16th July 1920 defendant 1 who had a decree against defendants 2 to 5 had this house auctioned by a sale of Court and purchased it himself for the sum of Rs. 1,050. This sale was confirmed on 18th August 1920. The present suit was brought on 17th August 1926 that is within six years from the date of confirmation, but more than six years from the date of auction sale. The suit is for one-fourth of the purchase price, that is Rs. 262-8-0 and interest, on the ground of a custom by which in the case of a public sale the decree-holder, the judgment-debtor and the purchaser are jointly and severally liable for the payment of this "zarichaharum" to the owner of the site. Various grounds of defence were taken, but the only question which concerns this Court is the question of whether the suit was brought within the period of limitation allowed by Art. 120. That period of six years dates from the time when the right to sue accrues. The plaintiffs alleged that the right to sue accrued on the date of confirmation of the sale, and the defendants allege that the right to sue accrued from the date of the auction sale. The learned single Judge of this Court has followed the ruling reported in *Bindeshri* v. *Somnath* (1) in which it was held that the period of limitation in a similar claim of haq chaharum should run from the date of execution of a sale deed and not from the date of registration of that sale deed. But we consider that the parallel is inaccurate. In the case of a sale deed the deed is complete on the date of execution, and registration is effected subsequently as a formality by the legislature in the special case of deeds of sale, etc., relating to immovable property. In the case of an auction sale the sale is a sale by a Court, and the orders of the Court confirming the sale are a vital and necessary part of the transaction. The actual auction sale is merely carried out by a ministerial officer as a matter of convenience, and it is not until the sale is confirmed that orders are passed by the Court in the matter. It is true that S. 65, Civil P. C., lays down as follows :

> " Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. "

The fact that a special provision of the Civil Procedure Code was necessary indicates that without such a provision the result would not have been attained. Therefore as regards the immovable property passed at the sale it is only because of this provision that the property vests from the date of the auction sale. There is no such provision in the Civil Procedure Code or in the orders under it in regard to the purchase price. Now the provisions in regard to purchase price are contained in O. 21, and R. 84 states that on every sale of immovable property the person declared to be the purchaser shall pay immediately a deposit of 25 per cent. R. 85 directs that the purchaser should pay the full amount of the purchase money into Court within 15 days. The owners of the site, that is the plaintiffs in this case, could not have obtained their haq chaharum at the date of the auction-sale for two reasons. For one thing it was not then known whether the sale to defendant 1 would or would not be confirmed. For another reason defendant 1 was under the obligation, unless he was excused by the execution Court, of paying one-fourth of the purchase money down at the time of the auction sale, and the remaining three-fourths into Court within 15 days. It would not have been possible for an auction-purchaser to retain 25 per cent of the purchase price and pay it to the plaintiffs instead of making the payment of the full amount into Court. The plaintiffs only got the right to obtain their 25 per cent after the full amount of the purchase money had been paid into Court, and they would have obtained that money by an application to the Court on which the Court would have ordered withdrawal of the amount by the plaintiffs. For these reasons we consider that it cannot be said that the right of the plaintiffs to sue accrued on the date of the auction sale. They did not have the right to obtain the money on that date. Some argument was made as to whether the payment of the 25 per cent should be in addition to the deposit by the auction-purchaser of the amount of Rs. 1,050 in Court. If however the amount was in addition to that amount, the custom would not be of one-fourth but of one-fifth. We consider therefore that the right to sue accrued to the plaintiffs on the confirmation of the sale and therefore the present suit is within time. Accordingly we allow this Letters Patent Appeal and we restore the decree of the lower appellate Court with costs at both hearings in this Court.

V.B./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 26

BOYS AND PULLAN, JJ.

Tahir Husain and *others*—Applicants.

v.

Ikram Khan—Opposite Party.

Civil Misc. Ref. No. 266 of 1929, Decided on 21st March 1929, made by Commissioner, Benares.

(a) Practice—Reference.

It is not the practice of the Allahabad High Court or any other Court to give a decree or pass an order or express an opinion on a reference when such decree, order or opinion must of necessity be infructuous. [P 27 C 1]

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(1) [1916] 14 A. L. J. 382=35 I. C. 347.

(b) U. P. Municipalities Act, S. 19 (2) (a)—Election of member cannot be questioned on the ground that he was not a qualified voter.

In view of the provisions contained in S. 19 (2) (a), U. P. Municipalities Act, it is manifest that the election of a member of Municipal Board cannot now be questioned on the ground that he was not qualified to be a voter; or, in other words, that his name had wrongly found place on the list of electors passed by the revising authority and finally accepted by the District Magistrate. [P 27 C 1.2]

Kamalakanta Verma and *S. Majid Ali*—for Applicants.

Iqbal Ahmad and *A. M. Khwaja*—for Opposite Party.

Boys, J.—This is a reference made by the Commissioner of Benares under the Municipalities Act asking us for a decision as to whether Muhammad Ekram, who has been returned as a member of the Benares Municipal Board election, was qualified as voter. It is not the practice of this or any other Court to give a decree or pass an order or express an opinion on a reference when such decree, order or opinion must of necessity be infructuous. It is possible that there are other facts or considerations which have not been drawn to our attention which were present to the mind of the Commissioner and which led him to make this reference, but, as we are at present advised, we are unable to appreciate how any expression of our opinion on the question that has been referred would be otherwise than infructuous. S. 19 (2), Municipalities Act, says that

> "the election of any person as a member of Board shall not be questioned, (a) on the ground that the name of any person qualified to vote has been omitted from, or the name of any person not qualified to vote has been inserted in, the electoral roll or rolls."

There was formerly a second para. (6) to this subsection immediately following the one which we have quoted, which made a similar provision in regard to challenging the qualifications of a candidate. That para. 2 has been omitted, and para. (c) re-lettered as (b), and we have no reason to suppose that it was omitted for any other than the reason which is given to us, namely, that the qualifications of electors and of all candidates are now, at any rate for the purposes of the Benares Municipality, identical. It would, therefore, appear manifest that the election of a member of Board cannot now be questioned on the ground that he was not qualified to be a voter; or, in other words, that his name had wrongly found place on the list of electors passed by the revising authority and finally accepted by the District Magistrate. We use the word "finally" in reference to R. 13, Election Rules of 28th June 1928, which provides that the proceedings of the revising committee shall be submitted to the District Magistrate "whose orders thereon shall be final." It is agreed to by counsel on either side representing the parties before us that no question arises in this reference of the exercise within their authority of powers by the revising committee or by the District Magistrate. In the presence of S. 19 (2) (a), S. 19 (2) (b) can have no application.

In view of the provisions we have quoted it appears manifest that whether or no Muhammad Ekram was qualified or was not qualified to be placed on the roll of electors, his name being there and having been passed by the revising committee and the District Magistrate, its inclusion cannot now be challenged, and no petition can be based on any allegation that he was unqualified. As, therefore, we are not at present advised as to the facts, it would make no difference whether we return an expression of opinion to the Commissioner that Muhammad Ekram was qualified or whether we return it in an adverse sense; in either case the Commissioner would have to reject the petition in so far as it is based only on the allegation that the name of Muhammad Ekram was improperly included in the electoral roll, and on the consequential ground that he was not therefore a qualified candidate. We have expressed our views above with some caution, for we do not find any reference to this aspect of the case in the order of the Commissioner. If in view of what we have said above he still desires an answer to his question and desires to say anything to suggest that an expression of our opinion on this point could be given effect to, it will be open to him to again refer the matter to this Court. Let the return of this reply to the Commissioner be expedited.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 28 (1)

SEN AND NIAMATULLAH, JJ.

Rama Shankar and *another*—Defendants—Appellants.

v.

Janki Prasad—Plaintiff—Respondent.

Second Appeal No. 2277 of 1927, Decided on 16th May 1930, from decree of Dist. Judge, Bulandshahr, D/- 7th September 1927.

Civil P. C., S. 100—Lower appellate Court finding that no proper case was made out for exercising discretion to extend time under S. 5, Lim. Act—There is no point of law involved under S. 100—Lim. Act, S. 5.

Where a Court below upon consideration of the facts before it and the surrounding circumstances comes to the conclusion that no proper case has been made out for exercising its discretion for extending the period of limitation under S. 5, Lim. Act, and dismisses the appeal upon that ground, there does not appear to be any point of law involved in the case under S. 100, Civil P. C. [P 28 C 1]

Panna Lal—for Appellants.

G. Agarwala—for Respondent.

Sen, **J.**—The facts of the case which have given rise to this appeal are set forth in the judgment of the lower appellate Court and need not be recapitulated. A decree for profits was passed against the appellant by the revenue Court on 30th October 1926. An appeal was filed in the Court of the District Judge on 17th January 1927. Ex facie the appeal was time barred. The lower appellate Court dismissed the appeal on the ground of limitation. It is contended before us that the lower appellate Court has erred in computing the period of limitation having regard to the provisions of S. 12, sub-S. (2), Lim. Act. It is not necessary to examine this contention in detail because we are clearly of opinion that even upon computing the period of limitation most favourably to the appellant, the appeal is clearly time barred by at least three days. It was contended that the appellant was misled by the advice of some legal practitioner whose name we do not know. The Court below has evidently disbelieved this story. Where a Court below upon consideration of the facts before it and the surrounding circumstances comes to the conclusion that no proper case has been made out for exercising its discretion for extending the period of limitation under S. 5, Lim. Act and dismisses the appeal upon that ground, there does not appear to be any point of law involved in the case under S. 100, Civil P. C., for interference in second appeal. It has not been shown that the lower appellate Court either did not exercise its discretion at all, or acted arbitrarily in the exercise of its discretion. We are of opinion that this case calls for no interference and we accordingly dismiss this appeal with costs including in this Court, fees on the higher scale.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 28 (2)

MUKERJI AND BANERJI, JJ.

(Kuerani) Mt. Dan Kuer—Defendant—Applicant.

v.

Ewaz Singh — Plaintiff — Opposite Party.

Civil Revn. No. 203 of 1929, Decided on 24th June 1930, from decree of Dist. Judge, Mainpuri, D/- 18th May 1929.

(a) Agra Tenancy Act (3 of 1926), S. 271—Trial before revenue Court—Question of title raised—What Court is competent to decide the question explained.

The "competent Court" before whom an issue on question of title should go, is the Court who would take cognizance of a suit involving the title to property and of the suit, in which that question of title may be fairly and ultimately decided. [P 29 C 1]

(b) Civil P. C., S. 24—Transfer of revenue case in Sub-Judge's Court to another Court is competent.

When once a revenue case is transferred to a Munsif's Court and the Munsif is fully seised of the case, it is open to the High Court or the District Judge under S. 24, Civil P. C., to transfer the proceedings to any other Court of competent jurisdiction. [P 29 C 2]

N. P. Asthana and *Baijnath Sahai*—for Applicant.

S. N. Seth—for Opposite Party.

Mukerji, **J.**—This application in revision arises under the following circumstances: The respondent Thakur Ewaz Singh brought a suit for recovery of profits against the applicant Kuerani Mt. Dan Kuer for recovery of Rs. 700 odd as profits, being the profits of a half-share in a mortgaged property. The respondent's case was that he and the defendant had taken a mortgage in equal shares from certain persons and the respondent had not been given his share of the profits, by the Kuerani Mt. Dan Kuer, who was in possession.

In her defence the defendant raised the plea that she was the owner of the entire mortgage and that the plaintiff was not at all interested in the mortgage. The question of proprietary title to the property involved in the suit for profits having thus been raised, the learned

Assistant Collector framed an issue and sent it through the District Judge to the Court of the Munsif at Shikohabad for trial. An application was made by the Kuerani Mt. Dan Kuer to the District Judge for transfer of the proceedings, from the Court of the Munsif to the Court of the Subordinate Judge, on the ground that the value of the property involved was more than Rs. 10,000 and the value of the mortgage itself was over Rs. 9,000. It appears that the Munsif at Shikohabad is invested with pecuniary jurisdiction up to Rs. 4,000 only.

The application was opposed before the learned District Judge by Thakur Ewaz Singh and the learned Judge was of opinion that the valuation of the issue to be tried must be the value of the suit for profits, namely Rs. 700 odd. In that view, the learned Judge dismissed the application. The defendant Kuerani, Mt. Dan Kuer, has come before us and it is urged that the question of proprietary title of large property has to be tried and it ought to be tried by the Subordinate Judge.

We are of opinion that the "competent Court" before whom an issue like this should go is the Court who would take cognizance of a suit involving the title to the property and of the suit on which that question of title may be fairly and ultimately decided. We are fortified in this opinion by the language of S. 271, Agra Tenancy Act, being Act 3 of 1926. The relevant portion runs as follows:

> ". . . . The revenue Court shall frame an issue on the question of proprietary right and submit the record to a competent civil Court for decision of that issue only."

The words "competent civil Court" have been intentionally used, so that the issue may be tried by a Court which would be competent to decide the question of proprietary title to the property in question. We are further fortified in this view by the provision made in the same section, namely an appeal would lie from the decision of the Assistant Collector to a Court which would be competent to hear an appeal from the Court which shall decide the question of proprietary title. This would mean that if the proprietary title relates to a property of the value of say Rs. 20,000 the Subordinate Judge should hear the issue and the appeal from the revenue Court should come directly to the High Court. This state of the law has great advantage, because the question of proprietary title, we take it, will be finally decided between the parties and no further chance of litigation will be left to them.

We would point out that in the rules that were framed by the High Court for the guidance of the subordinate Courts, the Court directed the District Judge to send the case to a "proper subordinate civil Court for disposal." The idea clearly was that the Judge would be in a better position to see which Court would have jurisdiction to hear the question of proprietary title raised by the issue.

It was urged by the learned counsel for the respondent that the Assistant Collector having said that the issue should go before the Munsif we should virtually be setting aside an order of the revenue Court if we said that the case should go before the Subordinate Judge. We do not think this argument is sound. When once the Munsif is fully seised of the case it is open to the High Court or the District Judge, under S. 24, Civil P. C., to transfer the proceedings to any other Court of competent jurisdiction.

In the result, we allow the application and direct the proceedings pending before the learned Munsif at Shikohabad be transferred to the Court of the Subordinate Judge of Mainpuri. Having regard to the fact that the question is a new one and much could be said on either side, we direct that the parties pay their own costs in the Court below and in this Court.

B.V./R.K. *Application allowed.*

A. I. R. 1931 Allahabad 29

MUKERJI AND BENNET, JJ.

Sada Sheo and *others* — Plaintiffs — Appellants.

v.

Mt. Ram Peary and *others*—Defendants—Respondents

Letters Patent Appeal No. 185 of 1929, Decided on 15th May 1930, from judgment of King, J., D/- 26th June 1929.

(a) U. P. Land Revenue Act (3 of 1901), S. 233(k)—Certain property put in separate patti of particular person—Objection not raised by cosharer though party to partition suit—Civil suit for possession by him of that patti claiming that he is entitled to it is barred—Civil P. C., S. 11, Expl. 4.

If any cosharer, who is a party to the partition case, has any objection to the entry in the khewat of the name of the cosharer or of the amount of the share recorded for a cosharer, it is open to that party to make an objection before the partition Court. If such a cosharer does not raise the objection before the partition Court and subsequently brings a suit in the civil Court for possession of the property formed as separate patti of a particular person in the partition suit, claiming that he is entitled to the whole of that property, such suit is barred by S. 233 (k), U. P. Land Revenue Act, and by S. 11, Civil P. C.: 39 *All.* 469 (*F. B.*) and 23 *All.* 291 (*F. B.*), *Rel. on.* 38 *All.* 243 and 38 *All.* 302, *not Foll* [P 31 C 1, 2]

(b) U. P. Land Revenue Act (3 of 1901), S. 111—Entry of widow in partition patti must be considered to be entry that she should have estate of Hindu widow in that patti.

The entry of a widow in the partition patti cannot be considered to be an entry which is merely for her consolation. It must be taken that such an entry is an entry that she should have the estate of a Hindu widow in that patti. [P 31 C 2]

Ambika Prasad and *Sehat Bahadur Lal*—for Appellants.

S. Majid Ali and *Sri Narain Sahai*—for Respondents.

Bennet. J.—This is a Letters Patent appeal by the plaintiffs against the judgment of a learned single Judge of this Court dismissing the suit of the plaintiffs on the ground that that suit is barred by the provisions of S. 233, (k), Land Revenue Act. The facts are that the plaintiffs sued for possession of seven-eighths of certain zamindari property in the possession of Mt. Gurdei, defendant 2 claiming that plaintiffs and defendant 3, Ram Naik, are entitled to the whole of this property. The property in suit belonged to one Harnath, who was of the family of the plaintiffs, and it has been found as a fact by the lower appellate Court that on the death of Harnath his son Maharaj Kishor was a leper to such an extent that he was disqualified from inheriting the property of his father. Maharaj Kishor nevertheless was entered for the property after the death of his father and died very shortly afterwards, and left a widow, Mt. Ram Peary, defendant 1. The death of Harnath took place within six or seven years of the suit, and therefore there is no question of adverse possession. The suit has been brought on account of a deed of gift executed by Mt. Ram Peary in favour of her daughter Mt. Gurdei of the property in question.

The allegation that the suit was barred by S. 233 (k) does not find a place in the written statement or in the grounds of appeal by the defendants to the lower appellate Court, but the lower appellate Court mentions that the point was raised in argument. The point was taken in the grounds of second appeal. When the matter came before the learned single Judge of this Court, the facts which would give rise to this plea were not contested, and in fact it is shown to us that in the statement of the plaintiff it is admitted that the plaintiffs were parties as cosharers to a partition in which partition a separate patti was formed for Mt. Ram Peary of the property in question. Argument was advanced in the Letters Patent appeal to the effect that the materials before the learned single Judge of this Court were not sufficient to establish the facts under which a bar under S. 233 (k), Land Revenue Act could be established; but there is no allegation in the grounds of appeal of this Letters Patent appeal to that effect, nor was there any argument on that point taken before the learned single Judge. Accordingly we consider that this point cannot be raised now and that the sole point which is open to argument in this Letters Patent appeal is purely a point of law whether the suit is barred by the provisions of S. 233 (k), Land Revenue Act.

Now various rulings of this Court have been referred to the learned single Judge and in argument. The first of these rulings is a Full Bench ruling reported in *Mohammad Saddiq* v. *Lauti Ram* (1). In that ruling a Bench of five Judges held that where a question of title could have been raised in a partition proceeding in the revenue Court, and was not raised, then S. 241 (f), N. W. P. Revenue Act of 1873, bars a suit raising the question later in the civil Court.

In *Kalka Prasad* v. *Manmohan Lal* (2) and *Shambhu Singh* v. *Daljit Singh* (3). In both these rulings it was held that there was no bar under S. 233 (k) to a suit in the civil Court in somewhat similar circumstances. Later there was another Full Bench decision in *Bijai Misri* v. *Kali Parsad Misr* (4) in which reference is made to both these Full Bench decisions reported in *Shambhu Singh* v. *Daljit Singh* (3), and *Kalka Prasad* v. *Manmohan Lal* (2). In the latest Full Bench ruling of *Bijai Misri* v. *Kali Prasad Misr* (4) it is laid down that S. 233 (k) does bar a civil suit in which persons who had been parties to the partition suit sued in the civil Court to recover possession of shares other than had been entered in the partition application. We consider that this Full Bench ruling of *Bijai Misri* v. *Kali Prasad Misr* (4) is a ruling which should guide us in the present case. We consider that the principles which should guide a Court in cases similar to the present are derived partly from res judicata under S. 11, Civil P. C., and partly from S. 233 (k), Land Revenue Act. We consider that these are not too isolated principles but that the effect of these two rules of law is to lay down one and the same principle. Under S. 107, Land Revenue Act, an application for partition is accompanied by a certified copy of the khewat showing the shares recorded for the cosharers in the mahal. If any cosharer, who is a party to the partition case, has any objection to the entry in the khewat of the name of a cosharer or of the amount of the share recorded for a cosharer, it is open to that party to make an objection before the partition Court. Such an objection is made under S. 111, Land Revenue Act, and on such an objection being made the revenue Court may either decide the question of proprietary title itself or refer a party to the civil Court or decline to grant the application until the question has been determined by a competent Court. If the revenue Court decides the question of title itself, S. 112 provides for an appeal to the civil Court.

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(1) [1901] 23 All. 291=(1901) A. W. N. 86 (F. B.).

(2) [1916] 38 All. 302=33 I. C. 86 (F. B.).

(3) [1916] 38 All. 243=33 I. C. 19 (F. B.).

(4) [1917] 39 All. 469=41 I. C. 912 (F. B.).

It is clear therefore that at this stage in a partition proceeding it is the intention of the legislature that the parties to that partition proceeding should have an opportunity to raise any question of title to a share or to the amount of a share in the khewat in question. Now under S. 11, Civil P. C., where it is open to the parties to a suit to raise such a question and they neglected to raise that question, they are then debarred by Expln. 4 from raising the question in a subsequent suit. The parties therefore must take advantage of the opportunity which is afforded to them of having questions of title decided in the partition suit.

The learned counsel for the appellant urged upon us that the particular patti for which the name of Mt. Ram Piary was entered was merely a case of entry of Mt. Ram Peary for her consolation. Now the only case recognized by the law of entries for consolation is in mutation cases in a khewat where a widow is occasionally entered for her consolation and not with the intention that she should hold the property for which she is entered as a Hindu widow's estate. But in a mutation case the revenue officer making the entry does so in an administrative capacity and he is not entitled to decide a question of title. In a partition proceeding the revenue Court is entitled either to decide a question of title or to refer the parties for decision of that question to the civil Court. The two cases therefore differ very greatly, and we do not consider that there is any validity in the plea put forward that the entry of Mt. Ram Peary in the partition patti was an entry which was merely for her consolation. We consider that it must be taken that such an entry was an entry that she should have the estate of a Hindu widow in that patti. We consider that the decision of the learned single Judge of this Court was correct and that S. 233 (k), Land Revenue Act and S. 11, Civil P. C., do bar the present suit by the plaintiffs. Accordingly we dismiss this Letters Patent appeal with costs.

P.N./R.K. *Appeal dismissed.*

✻ A. I. R. 1931 Allahabad 31

DALAL, J.

Gobardhan Das — Judgment-debtor — Appellant.

v.

Dau Dayal—Decree-holder — Respondent.

Execution Second Appeal No. 1975 of 1928, Decided on 20th December 1929, from decree of Dist. Judge, Bareilly, D/- 17th November 1928.

✻ Civil P. C. (1908), S. 48—Decree passed on 10th February 1915—On 21st March 1923 decree-holder unsuccessfully applying for arrest of judgment-debtor—Judgment-debtor promising by agreement to pay by instalments by 15th January 1928 but not paying—Decree-holder applying for execution on 16th January 1928—His application is not in continuation of previous one—There was no "subsequent order" — But decree-holder's application held within time for judgment-debtor's action amounted to fraud—Limitation Act (1908), Art. 175.

A decree was passed on 10th February 1915. Decree-holder applied for execution on 21st March 1923 for the arrest of the judgment-debtor but there was no arrest. On 29th August 1923, the parties applied to the execution Court to register an agreement between them that the judgment-debtor would pay the decretal amount by instalments up to 15th January 1928. The judgment-debtor however failed to pay by that date. The decree-holder again applied for execution on 16th January 1928, i.e. beyond 12 years from the decree.

Held: that the application of 16th January 1928 was not in continuation of the application of 21st March 1923: 18 *All.* 9, *Foll.*; 32 *I.C.* 1005, *Cons.*: [P 32 C 1]

Held further: that there was no subsequent order of the Court; for a subsequent order for payment by instalments can be passed by the Court which gave the decree within six months of the decree under Art. 175 and not after: 40 *All.* 198 and 48 *Mad.* 846, *Foll.*; *A.I.R.* 1925 *Bom.* 503, *not Appr.* [P 32 C 2]

Held also; that the action of the judgment-debtor amounted to fraud and hence the application was not barred.

Any action of the judgment-debtor which puts off the decree-holder from executing his decree at once should be taken as fraud if the result thereof is to bar the execution of the decree under the 12 years' rule: *A.I.R.* 1922 *All.* 145, *Ref.* [P 33 C 1]

G. S. Pathak—for Appellant.
S. B. Johari—for Respondent.

Judgment.—A revenue Court decree was passed on 10th February 1915. The decree-holder applied for execution admittedly within time by reason of his previous application of 21st March 1923 for the arrest of the judgment-debtor in execution of the decree. There was no arrest. On 29th August 1923, the parties applied to the execution Court to register an agreement between them that the judgment-debtor would pay the decretal amount by certain instalments payable on certain dates. For the purposes of the present case the only date worth noting is that of 15th January 1928 when the judgment-debtor agreed to pay the balance. The balance not having been paid on that date the decree-holder applied on 16th January 1928 for recovery of the balance by attachment of property. On that date the application was beyond 12 years from the date of the decree and came within the bar of S. 48, Civil P. C., from the date of the decree sought to be executed unless that bar was escaped by the date of a subsequent order of the Court or by reason of any fraud of the judgment-debtor. The learned Judge of the lower appellate Court held that the application of 16th January 1928 was one in continuation of the application of 21st March 1923 and that therefore the bar under S. 48 did not arise. This view is in conflict with a definite ruling of this Court reported in *Har Sarup* v. *Balgobind* (1).

It is a single Judge decision. There is however no ruling of this Court to the contrary, nor is any ruling in conflict of any other Court produced. The learned counsel for the respondent quoted *Sant Lal* v. *Sri Newas* (2). The general principles were laid down there that the question whether an application for execution of a decree is a new application or a revival or continuation of an old one is a simple question of fact and it is also a question of substance and not of form. Though a question of fact, when the decision of the lower Court is in conflict with the decision of this Court such a decision of fact cannot be accepted. As to the matter of substance, the difference is not only in form but also in substance because what the decree-holder desired in 1923 was arrest, while at present he desires the execution by attachment. Secondly, in the previous application, reference was made to the original decree of 1915, while in the present application reliance is placed on a subsequent agreement between the parties of 29th August 1923.

Coming now to the provisions of S. 48, Civil P. C., the bar is not saved by the provisions of Cl. (1) (b) because there was no subsequent order of the Court. A subsequent order can be passed only within six months of the passing of the decree under Art. 175, Lim. Act. It seems to me that the words "subsequent order" refer to the particular order permitted to be passed for instalment under O. 20, R. 11 (2). A Bench of two Judges have held accordingly in the case of *Jurawan* v. *Mahabir* (3). This ruling has been specifically dissented from by the Bombay High Court in the case of *Apte* v. *Tirmal* (4). With all respect the Bench of that Court appears to have overlooked the provisions of the Lim. Act, Art. 175. A subsequent order for payment by instalments can be passed by the Court which gave the decree within six month and not after. If the legislature had desired that the Court may be permitted to pass a subsequent order in modification of its decree at any time whatever to make the money decreed payable by instalments, no such limitation as is provided in Art. 175 would have been laid down. The view of this Court appears to have been accepted by the Madras High Court in *Shuja-ul-Mulk Bahadur* v. *Umir-ul-Umra Bahadur* (5).

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(1) [1895] 18 All. 9=(1895) A.W.N. 123.
(2) [1916] 32 I.C. 1005.
(3) [1918] 40 All. 198=44 I.C. 24.
(4) A.I.R. 1925 Bom. 503=88 I.C. 949=49 Bom. 695.

In my opinion however this consideration does not exhaust the matter in issue. The learned Judge of the lower appellate Court has rightly referred to the ruling of this Court in *Lalta Prasad* v. *Suraj Kumar* (6). The circumstances of the present case are such that, in my opinion, the decree-holder is entitled to a concession of the period of limitation on the ground of fraud. As pointed out by Walsh, J., in the ruling just quoted the word "fraud" in S. 48, Cl. 2 (a), should not be interpreted in a narrow sense. Any action of the judgment-debtor which puts off the decree-holder from executing his decree at once should be taken as fraud if the result thereof is to bar the execution of the decree under the 12 year's rule. In the present case the judgment-debtor made a certain promise in August 1923 which led the decree-holder to hold his hand and not to execute his decree until after 15th January 1928. By making such an agreement he derived an advantage and when he is not prepared to fulfil the agreement his conduct amounted to fraud. For this reason I hold that the application for execution dated 16th January 1928 was within limitation. It may be noted that the decree-holder has taken prompt steps and come to Court the very day after the failure of the judgment-debtor's promise. For this reason I dismiss this appeal but make no order as to costs.

P.N./R.K. *Appeal dismissed.*

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(5) A.I.R. 1926 Mad. 20=91 I.C. 597=48 Mad. 846.

(6) A.I.R. 1922 All. 145=65 I.C. 877=44 All. 319.

A. I. R. 1931 Allahabad 33

MUKERJI AND BOYS, JJ.

Babu Ram—Plaintiff—Appellant.

v.

Ram Narain and *others* — Defendants —Respondents.

Second Appeal No. 771 of 1928, Decided on 9th May 1930.

(a) Jurisdiction—Civil and Revenue Courts.

Where the Court is of opinion that the suit is not congnizable by the civil Court, the proper order to make is to return the plaint to the plaintiff for presentation to the proper Court and not to dismiss his suit. [P 33 C 2, P 34 C 1]

(b) Agra Tenancy Act (1901), S. 95—Landlord asserting that tenancy came to end on death of tenant and lapsed to him as there was no successor — He cannot ask for declaration under S. 95.

It is necessary for the application of S. 95 that the tenancy should be in continuance. Where therefore the landlord asserts that the tenancy has come to an end on the death of the tenant and there being no successor, it lapsed to him, it is not open to him to ask for a declaration under S. 95 : *A.I.R.* 1922 *All.* 372, *Dist.* [P 34 C 1]

(c) Agra Tenancy Act (1926), S. 273 — Applicability.

After the Act of 1926 came into force, S. 273 should be applied and not S. 202 of the old Act as it is a rule of procedure alone. [P 34 C 2]

N. P. Asthana—for Appellant.

R. C. Ghatak and *A. M. Gupta* — for Respondents.

Mukerji, J. — This appeal raises the vexed question of jurisdiction, viz., whether the civil Court or the revenue Court should take cognizance of this case. The plaintiff, who is the zamindar of the entire village, brought the suit out of which this appeal has arisen in the Court of the Munsif of Etawah on the allegations that one Ram Din Brahman was the occupancy tenant of certain lands specified in the plaint, that he died without any issue and without having made any adoption, that defendants 2 and 3 set up defendant 1, son of defendant 2, falsely as the adopted son of Ram Din with the idea that the occupancy holding should go to those defendants and that as a matter of fact there was no such adoption. The plaintiff accordingly asked for a declaration that Ram Din died without having made an adoption and that the alleged adoption was a mere fiction.

The defence was several and among these, one was that the suit was not cognizable by the civil Court, as defendant 1 was a tenant of the plaintiff. The first Court dismissed the suit on the merits holding however that the suit was cognizable by the civil Court. The plaintiff went in appeal, but the respondents contended in the appellate Court that the Munsif was wrong in taking cognizance of the suit. This argument found favour with the learned appellate Judge, and he by his decree dismissed the suit holding that it was not cognizable by the civil Court. We might point out here that if the learned Subordinate Judge was of opinion that the suit was not cognizable by the civil Court, the proper order to make was to return the plaint to the plaintiff for presentation to the proper Court and not to dismiss his suit.

The plaintiff has come in second appeal and his contention is that the learned Judge of the lower appellate Court was wrong in holding that the suit was not cognizable by the civil Court. The learned Subordinate Judge has cited the case of *Jagannath* v. *Balwant Singh* (1) and S. 122, Act 3 of 1926, as authorities for his opinion. When the suit was filed Act 3 of 1926 had not yet been placed on the statute book and it cannot therefore be said that the plaintiff was bound to follow the procedure laid down in S. 122 of that Act. Whether the suit was cognizable by the civil Court or not must be judged by the provisions of the N. W. P. Tenancy Act of 1901.

As regards the case quoted, it has no application whatsoever. In that case the plaintiff admitted that the defendant was his tenant, but all that he disputed was the class of tenancy. His contention was that the defendant was only a non-occupancy tenant and not an occupancy tenant as the defendant claimed to be. That case therefore does not govern the present case.

Coming to the provisions of the Act of 1901 we find that there is only one section which deals with a declaration as to the nature of tenancy and it is S. 95. It begins by saying, "At any time during the continuance of a tenancy," and goes on to provide that under those circumstances a landholder or a tenant may sue for obtaining certain declarations. The first thing that is required for the application of the section is that the tenancy should be in continuance. In this case the landholder asserts that the tenancy has come to an end on the death of Ram Din, and there being no successor, it has lapsed to him, the sole zamindar. In the circumstances it was not open to the landholder to go to the revenue Court and to ask for a declaration under S. 95 of the Act. There being no other provision, under which the plaintiff could go to the revenue Court, he was obliged to come to the civil Court, the only other Court available. We hold therefore that the plaint was cognizable by the civil Court.

There is one point and it is this. The defendant pleaded that he was a tenant of the plaintiff. The sole question that was raised by the suit whether the defendant by virtue of his alleged adoption became or not a tenant of the plaintiff in place of Ram Din. S. 202, Tenancy Act of 1901 and S. 273 of the Act of 1926 provide the procedure as to such cases. They both lay down that where a suit is instituted in a civil Court in respect of agricultural holding and that the defendant pleads that he is a tenant of the plaintiff, the prescribed rules are to be followed. Under S. 202 the procedure is that the civil Court would direct the defendant to institute in the revenue Court a suit within three months of the order to obtain a declaration as to his (defendant's) status as a tenant. S. 273 of the Act of 1926 directs that the Court shall frame an issue on the question of tenancy and shall remit that issue to the revenue Court for determination. The learned Munsif had the case before him before the Act of 1926 came into operation and should have followed the provisions of S. 202 when he came to frame issues. Now that we have to direct him to follow the proper procedure, and we have to follow the provisions of S. 273 of the Act of 1926, because it is a rule of procedure alone. It has been held in this Court on numerous occasions that after the Act of 1926 came into force, S. 273 should be applied and not S. 202 of the old Act.

Following this procedure therefore we set aside the decree of the Court below and also the decree of the Court of first instance and remand the suit to the Court of the Munsif. We direct him to follow the procedure laid down in S. 273 of Act 3 of 1926, to frame an issue as to the tenancy of the defendant and to send it to the revenue Court for determination. In subsequent proceedings he will follow the rule laid down in the same section. Costs here and hitherto will abide the result.

S.N./R.K. *Suit remanded.*

A. I. R. 1931 Allahabad 34

BENNET, J.

Tahal Saithwar—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 273 of 1930, Decided on 1st July 1930, from order of Second Addl. Sess. Judge, Gorakhpur, D/- 12th April 1930.

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(1) A. I. R. 1922 All. 372 = 68 I. C. 247 = 44 All. 692.

Criminal P. C., S. 162, Proviso 1—Cross-examination of witness is not necessary for granting copy of his statement recorded under S. 161.

There is nothing in the proviso to indicate that there should be any cross-examination previous to granting the copy. There is no justification for imposing on the defence the condition that before a copy of the statement of a witness recorded under S. 161 is applied for, the cross-examination of that witness by the defence must lay the foundation for the suggestion that the evidence given by the witness in Court is contradicted by his statement made to the police. It would be manifestly impossible for a defence counsel to establish some kind of contradiction in regard to a statement of the nature of which he is not aware, and to impose such a condition would be to hinder him in performing a duty to his client for which provision has been made in S. 162. [P 35 C 2]

Kumuda Prasad—for Applicant.

M. Waliullah—for the Crown.

Judgment.—This is an application on behalf of Tahal Saithwar in criminal revision dealing with a point of procedure. Tahal is being tried under Ss. 148 and 325, I. P. C., in the Court of a Magistrate of Gorakhpur District. After the witnesses for the prosecution had been examined and before cross-examination began, the counsel for the defence made an application under S. 162, Criminal P. C., for copies of the statements of those prosecution witnesses recorded under S. 161, Criminal P. C., by the investigating police officer. The Magistrate and the Additional Sessions Judge have both held that the accused is not entitled to receive these copies, because they consider that that right would only arise in case the defence is able to show by cross-examination that there is some suggestion of contradiction by the witness of what he stated in the police inquiry. I find that this idea is supported by *Madari Sikdar* v. *Emperor* (1) (at p. 311 *of* 54 *Cal.*) where it is stated :

> " But the cross-examination must lay the foundation for the suggestion that the evidence given by the witness in Court is contradicted by his statement recorded under S. 161, Criminal P. C., and it is only then that the accused is entitled to ask the Judge to refer to the writing and grant him copies. S. 162 does not impose the duty upon the Judge of granting copies of the statement recorded under S. 161, before the cross-examination has been opened.''

I cannot find anything in S. 162, Criminal P. C., to support this view, and the first proviso which deals with the subject appears to me to be clearly contrary to the view laid down by the Calcutta High Court. This proviso states that the request should be made at the stage when the witness for the prosecution has been called. I understand this to mean before the cross-examination of this witness. The purpose for which the statement shall be used is further laid down in the proviso with the condition that the statement must be duly proved. But there is nothing in this portion of the proviso to indicate that there should be any cross-examination previous to granting the copy. Further I am unable to understand what kind of procedure is suggested by the ruling of the Calcutta High Court. It would, in my opinion, be manifestly impossible for a defence counsel to establish some kind of contradiction in regard to a statement of the nature of which he was not aware. I consider that to impose a condition such as is suggested by the Calcutta High Court on a defence counsel would be to hinder him in performing a duty to his client for which provision has been made in S. 162, Criminal P. C. Accordingly I allow this application in revision and I direct that the Magistrate should furnish copies of the statements of witnesses called for the prosecution to the defence unless he finds any parts of those statements which should be excluded under proviso 2, S. 162, in which case he may exclude that part. When these copies have been furnished then the stay order will come to an end and the trial will proceed.

K.N./R.K. *Order accordingly.*

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(1) A. I. R. 1927 Cal. 514 =102 I. C. 520 =28 Cr. L. J. 582=54 Cal. 307.

** A. I. R. 1931 Allahabad 35
Full Bench

MEARS, C. J., BOYS AND YOUNG, JJ.

Ram Kinkar Rai and *another*—Plaintiffs—Appellants.

v.

Tufani Ahir and *others*—Defendants—Respondents.

Second Appeal No. 1157 of 1928, connected with S. A. No. 1158 of 1928, Decided on 27th June 1930, from decision of Sub-Judge, Ghazipur, D/- 29th May 1928.

**** Practice— New plea — Appeal — Civil P. C., O. 41, R. 2.**

A point not taken in the Court below, whether the omission was by the appellant in that Court or whether the respondent failed to support his decree by taking the point, will not be permitted to be raised, except possibly : (a) where the point may be described as involving a question of public policy, e. g., involving jurisdiction, or involving the principle of res judicata, or where the decision of the point would prevent future litigation. In the above instances the point will be allowed to be argued only if it can be decided upon the materials before the Court and does not involve the taking of further evidence, of the sending of the case, or any issue, back to the lower Court, or a decision of a question of fact; (b) where the plaint discloses no cause of action or the written statement no ground of defence, it is not a ground for permitting a new point to be argued, merely that it was omitted by oversight in the Court below, or that the materials are all on the record and that the answer to the point is plain: *(Case law considered)*.

New points, when they lie outside the area of the special classes mentioned above, cannot be permitted to be raised for the first time in second appeal: *A. I. R.* 1917 *P. C.* 23, *Ref.* [P 38 C 1, 2]

M. L. Agarwala—for Appellants.

S. C. Goyel and *S.B.L. Gaur*—for Respondents.

Opinion.—This is a Full Bench appointed to consider the question whether, to use the language of Young, J.:

> "a point of law which has never been taken in either the trial Court or the lower appellate Court can be raised in second appeal."

The plaintiffs sued eight defendants in ejectment and for damages. The defence of the first group of defendants was that they were tenants, holding by virtue of an agreement with defendant 3, a widow by name Mt. Batasi, her husband being by name Baldeo. The second group of defendants were cosharers, who did not join in the action. In the year 1926 the defendants had been actually ejected from the land in dispute but they subsequently regained possession; and the principal point that was discussed before the Munsif and the lower appellate Court was, whether the defendants were trespassers, a matter which involved the right of Mt. Batasi to grant a lease to defendant 1. The Munsif on the issue of jointness or separation held that Baldeo the husband of Mt. Batasi, died as a member of the joint Hindu family, and therefore decreed the suit. On appeal Mr. Krishna Das held that Baldeo was separate from the plaintiffs. He therefore dismissed the suit holding that Mt. Batasi had power to grant the lease. Counsel for the plaintiff omitted to raise in their pleadings the legal position which later in this Court they sought to raise, viz., that even if Baldeo was separate from the plaintiffs Mt. Batasi could not thereby grant a lease to defendant 1, and that in the further alternative, the suit of the plaintiffs ought to have been decreed in part. Nor were these alternatives discussed in the lower appellate Court. When these points were sought to be taken before Young, J., he declined to receive them upon the ground that no appellant should be allowed to raise points not taken by him in the lower Courts. He noticed, however, that this matter frequently arose, and was of opinion that the matter should be authoritatively settled. Dr. Agarwala, who appeared on behalf of the plaintiffs, called our attention to a number of cases which can be conveniently grouped under five heads: cases in which the doctrine of res judicata has been allowed to be invoked; cases of limitation; cases in which on a study of the pleadings no cause of action has been put forward by the plaintiffs or defence shown by the written statement; jurisdiction; and points which the Courts have allowed to be taken upon the specific ground that all the material being before the Court, a decision would result in the saving of further litigation. On the question of res judicata he referred us to *Md. Ismail* v. *Chhatter Singh* (1), which is an authority for the proposition that the plea of res judicata, though not brought forward either before the Munsif or the lower appellate Court, can be brought forward for the first time in second appeal, and must be entertained by the Bench who have two courses open to them, either to decide the question on the record as it stands, or after a remand upon findings of fact. Decisions to the same effect are to be found in *Tek Narain Rai* v. *Dhondh Bahadur* (2), *Chhadami Lal* v. *Shyama Charan* (3) and *Bibi Wasilan* v. *Mir Syed Hussain* (4).

On the question of limitation we were referred to *Bechi* v. *Ahsanullah* (5), in which a Full Bench of this Court decided that a question of limitation, when it arises upon the facts before a Court, must be heard and determined whether or not it is directly raised in the pleadings or in the grounds of appeal. In *Ranga Charya* v. *Guru Reoti Raman Acharya* (6) the Court held that where the facts necessary to support a plea of limitation are either admitted or are apparent on the face of the record, the High Court will not be justified in refusing to entertain the plea even if raised for the first time in second appeal.

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(1) [1881] 4 All. 69=(1881) A.W.N. 116 (F.B.).
(2) [1898] A. W. N. 104.
(3) [1914] 22 I. C. 12.
(4) A. I. R. 1929 Pat. 173=117 I. C. 167=8 Pat. 107.
(5) [1890] 12 All. 461=(1893) A. W. N. 149 (F.B.).
(6) A. I. R. 1928 All. 689=114 I. C. 734.

The third case is that of *Mitthu Lal* v. *Deojit* (7), in which it was held that a plea of limitation can be raised at any moment prior to the decision of the appeal. On the question as to the duty of the Court when the plaint discloses no cause of action, we were referred to *Secy. of State for India in Council* v. *Sukhdeo* (8). In that case it came to the notice of the Court that the plaint in the suit disclosed no cause of action against the defendant. The Court examined the plaint, upheld that contention and thereupon decided that that plea must prevail though taken before the second appeal Bench for the first time.

To the same effect is *Sheodayal* v. *Jagernath* (9). Dr. Agarwala also referred us to the Privy Council case of *Kamlaput Moti Lal* v. *Union Sugar Mills Co.* (10). In that case it was pointed out to their Lordships of the Privy Council that a scheme, which it was essential should have been laid before the shareholders for their approval, had by omission not been so laid before them. It was "tentatively suggested" in the High Court that a decision by the shareholders should precede sanction by the Court; but the point was not pressed. When however the omission was brought to the notice of their Lordships of the Privy Council they at once gave effect to it. This is an example of a point taken which involved the jurisdiction of the High Court.

On the fifth head, viz., the desirability of allowing a fresh point to be taken which if decided will prevent further litigation we were referred by Dr. Agarwala to *Skinner* v. *Nihal Singh* (11) at p. 226; *Chhote Lal* v. *Chandrabhan* (12).

Three other cases lying outside these groups to which our attention was drawn by counsel for the plaintiffs are: *Brij Lal Singh* v. *Bhawani Singh* (13), where at p. 826, a claim was allowed to be amended which enabled the plaintiffs-appellants to redeem both mortgages and thereby to save the expenses of a fresh suit. It is to be noticed that the Court held that that was not an unreasonable application and it was not objected to by the advocate for the respondents. Dr. Agarwala concluded his argument by very properly presenting to us two cases which were contrary to the contention that he was urging: *Kanhia* v. *Mahin Lal* (14) and *Balkaran Singh* v. *Mt. Dulari Bai* (15). In the latter case the Court said:

> "We have repeatedly stated in this Court that lower appellate Courts and this Court, sitting either in Letters Patent or in second appeal ought not to entertain points which should have been alleged in the pleadings and made the subject of an issue and of argument and of decision by the trial Court and also stand in the grounds of appeal clearly and directly. The trial Judge does not have an opportunity of giving a decision upon a point such as this and it is not fair to a lower Court to upset an appeal on a ground never submitted to it."

In answer to these authorities Mr. Gour referred us to many cases of which these are the principal; they are in addition to the last two cases cited by Dr. Agarwala: *Partap* v. *Ram Sewak* (16), *Jai Ram Das* v. *Rajnarain* (17), *Sadho Kandu* v. *Mt. Jhinka Kuer*, *A. I. R.* 1929 *All.* 456; *Iqbal Haidar Khan* v. *Mt. Wasi Fatima Bibi* (18), *Subramanian Pattar* v. *Kishakkara Uthamanthil Raman*, *A. I. R.* 1922 *Mad.* 519; *Girish Chandra Choudhury* v. *Gopal Chandra Poddar*, *A. I. R.* 1925 *Cal.* 1184 and *Balkaran Singh* v. *Dulari Bai* (15).

Further, he contended that, before the points which Dr. Agarwala sought to raise in the second appeal could be decided, it would be necessary to send down issues inasmuch as the defendants' case would be that Mt. Batasi was in exclusive possession of the property which was the subject of the lease, and that that was a matter which could only be decided by evidence as to whether there was a private arrangement by which cosharers were entitled to have exclusive possession over certain particular agreed portions of property.

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(7) A. I. R. 1927 All. 589=102 I.C. 1=49 All. 809.

(8) [1899] 21 All. 341=(1899) A. W. N. 151 (F.B.).

(9) [1919] 8 A. L. J. 922.

(10) A. I. R. 1929 P. C. 256=119 I. C. 631.

(11) [1913] 35 All. 211=40 I. A. 105=19 I. C. 267 (P.C.).

(12) A. I. R. 1923 All. 176=80 I. C. 1041=45 All. 59.

(13) [1910] 32 All. 651=7 A. L. J. 821=7 I.C. 115.

(14) [1888] 10 All. 495=(1888) A. W. N. 181.

(15) A. I. R. 1927 All. 231=97 I. C. 292=49 All. 55.

(16) [1926] 96 I. C. 304.

(17) A. I. R. 1922 All. 493=70 I. C. 953=45 All. 21.

(18) A. I. R. 1923 All. 358=74 I. C. 1004=45 All. 53.

The question then for decision is, should the raising of a new point ever be permitted, and if the answer is in the affirmative, then in what circumstances? The question is really analogous to that dealt with in O. 41, R. 2, which lays down that

> " the appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; and the appellate Court in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by the leave of the Court under this rule. "

From all the very numerous cases to which we have referred, and many others, we deduce the following principles which we approve:

A point not taken in the Court below, whether the omission was by the appellant in that Court or whether the respondent failed to support his decree by taking the point, will not be permitted to be raised, except possibly:

I. Where the point may be described as involving a question of public policy e.g.,

(1) involving jurisdiction ;

(2) involving the the principle of res judicata ;

(3) where the decision of the point would prevent future litigation.

In the above instances the point will be allowed to be argued only if it can be decided upon the materials before the Court and does not involve the taking of further evidence, or the sending of the case, or any issue, back to the lower Court, or a decision of a question of fact.

II. Where the plaint discloses no cause of action, or the written statement, no ground of defence, it is not a ground for permitting a new point to be argued, **merely:**

(1) that it was omitted by oversight in the Court below ; or

(2) that the materials are all on the record and that the answer to the point is plain.

In this connexion the principles enunciated by their Lordships of the Privy Council in *Manindra Chandra Nandi* v. *Durga Parsad Singh* (19) are of interest.

> " Their Lordships said : " In the absence of any exceptional conditions, it was not open to the appellant to raise as a fresh point in appeal an issue which had not been raised before the Subordinate Judge or the High Court and might then have been raised in a convenient form and at an opportune time, and that there was no valid reason in the present case for departing from the established practice of the Privy Council. "

A reference to the authorities given above shows the uniformity with which Courts in India have in fact refused to allow new points to be raised in second appeal, when they lie outside the area of the special classes we have mentioned.

It will be noticed that we have excluded limitation from the type of cases in which the new point can, under certain conditions, be entertained. We have done this because we are of opinion that when next it is sought in this Court to put forward a plea of limitation which was not argued in the lower Court, the decision of *Bechi* v. *Ahsan Ullah* (supra) will have to be considered and contrasted with that of *Baldeo Prasad* v. *Sukhdeo Prasad* (20), decided on 27th March 1929. An authoritative decision can then be given on this point.

We therefore dismiss this appeal with costs.

K.N./R.K. *Appeal dismissed.*

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(19) A. I. R. 1917 P. C. 23=38 I. C. 929.

(20) A. I. R. 1929 All. 485=121 I. C. 452.

A. I. R. 1931 Allahabad 38

MUKERJI AND BANERJI, JJ.

Khalilur Rahman Khan—Objector—Appellant.

v.

Collector of Etah—Opposite Party.

Execution First Appeal No. 242 of 1929, Decided on 24th June 1930, from decree of Sub-Judge, Etah, D/- 22nd April 1929.

(a) Civil P. C. (5 of 1908), Sch. 3, Para 11 —Prohibition in para. 11 does not apply to decree in which sale is ordered.

It is only in the case of a money decree that the sale is prohibited by the words "a civil Court shall not issue any process against such property or part thereof in execution of a decree for payment of money " in para. 11. The prohibition does not apply to a decree in which the Court has ordered the sale of any specific property: *A. I. R.* 1921 *All.* 118, *Dist.* [P 40 C 1]

(b) Evidence Act (1 of 1872), S. 115—During continuance of lease granted by Collector in execution of decree under Sch. 3, Civil P. C., judgment-debtor mortgaging leased property—In suit on mortgage no defence raised that mortgage was prohibited—Such defence cannot be allowed to be raised in execution of decree passed in mortgage suit.

Where the Collector grants a lease of the judgment-debtor's property in execution of the decree transferred to him under Sch. 3, Civil P. C., and during the continuance of that lease the judgment-debtor mortgages the leased property, though such mortgage is prohibited by this schedule, the judgment-debtor must raise the defence that the mortgage is void in the suit on the mortgage, and if he does not do that at that stage he cannot be allowed to do so in the execution of the decree passed in the mortgage suit: *A. I. R.* 1926 *All.* 432 and *A. I. R.* 1929 *All.* 625 (*F. B.*), *Rel. on.* [P 40 C 1]

Iqbal Ahmed, *A. M. Khwaja* and *T. A. K. Sherwani*—for Appellant.

U. S. Bajpai—for Opposite Party.

Banerji, J.—This is a judgment-debtor's appeal under the following circumstances: One Abdul Jalil Khan, a zamindar of Aligarh, in the year 1909 or 1910, borrowed money from various people and several decrees for money were passed against him. The decrees were simple money decrees, and under the provisions of Sch. 3, Civil P. C., the property which was attached in execution of the decree being ancestral property, the execution proceedings were transferred to the Collector. Under the provisions of the law, the Collector on 29th August 1911, gave a lease to one Habiburrahman Khan of the properties of Abdul Jalil Khan for a period of seventeen years.

On 25th September 1914, while the property was in the possession of Habib urrahman Khan under the aforesaid lease, Abdul Jalil Khan executed a simple mortgage in favour of Rao Maharaj Singh (now represented by the Collector of Etah in charge of his estate) for a sum of Rs. 15,000. A suit for sale on foot of this mortgage was filed in the Court of the Subordinate Judge on 25th October 1920. This suit was decreed on 9th March 1921, i. e., a preliminary decree for sale was passed by the Court on that date and was made final on 29th July 1922. All the proceedings, viz., the preliminary decree and the final decree were passed ex parte after due notice having been served on Abdul Jalil Khan.

On 4th October 1923, Abdul Jalil Khan died and was succeeded by the appellant Maulvi Mohammad Khalilur Rahman Khan. On 2nd June 1925 an application for execution was filed by the decree-holder and it was sought by that application to bring the legal representatives of Abdul Jalil Khan on the record. On 14th July 1925 the pleader for the decree-holder stated that the decree-holder wanted first to bring the legal representatives of the judgement-debtor on to the record and then to proceed with the execution. Notices therefore were sent to the proposed legal representatives. The notices were returned by the serving officer as unserved, but no steps having been taken to re-serve the judgment-debtor's heirs the application was struck off. A second application was filed on 8th July 1926 and notice of this application was duly served on 10th September 1926 on the appellant, but as steps were not taken for execution of the decree the application was struck off on 16th September 1926. On 1st July 1928 the lease of 29th August 1911, in favour of Habibur Rahman Khan, came to an end. The application for execution out of which the present appeal has arisen is dated 30th August 1928, and was presented to the Court on 8th September 1928. Objections were taken by the appellant Khalilur Rahman Khan and two points were raised by him. The first point was that the decree which was under execution was void and incapable of execution and the second point was that the application for execution was barred by time having been filed more than three years from the date of the decree, the two intervening applications not being applications according to law to take steps-in-aid of execution.

The learned Subordinate Judge having overruled these objections, the judgment-debtor has presented an appeal in this Court. The objections raised in the Court below are reiterated before us. It is contended by Mr. Iqbal Ahmad appearing on behalf of the appellant that inasmuch as the mortgage of the property in question having been made at a time when the property was held under a lease granted by the Collector was not saleable, was void, and under the provisions of para. 11 Sch. 3, Civil P. C., the Court could not sell the property. Mr. Iqbal Ahmad has referred us to the case of *Katwari* v. *Sitaram Tiwari* (1), and on the analogy of that case he has submitted that he was entitled to object to the sale under the provisions of para. 11, Sch, 3, Civil P. C. We are of opinion that that case is clearly distinguishable as the wording of S. 20, Tenancy Act, prohibits any civil Court or revenue Court from selling an occupancy holding. That is not the case here. Under para. 11 it is provided that a civil Court shall not issue any process against such property or part thereof in execution of a decree for payment of money. "Such property" in this paragraph means the judment-debtor's property, over which the Collector, as in the present case, had power to deal with under the provisions of Sch. 3, Civil P. C.

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(1) A. I. R. 1921 All. 118=63 I. C. 264.

It is argued by Mr. Iqbal Ahmad that the prohibition being against any process in a decree for the payment of money must include the present decree as all that the decree directs is the sale of the property for realization of money. In our opinion it is only in the case of a money decree (i. e. not a decree in which the Court has ordered the sale of any specific property) the sale is prohibited by the words referred to above.

It is no doubt true that para. 11 prohibits the transfer of any property by way of mortgage, but in our opinion the stage at which any person entitled to plead that the mortgage was void was in the suit. The defendant Abdul Jalil Khan could have raised the defence that the mortgage in the suit was void. The defendant not having raised this plea, it is not in our opinion open to the judgment-debtor, after the passing of the decree, to raise this plea that no decree should have been passed against him. It is what the appellant now seeks to plead, but he cannot be permitted to do so. In our opinion the point is covered by authority: see the case of *Ballabha Das* v. *Murat Narain Singh* (2). (We may mention that the head note is incorrect.) The learned Government Advocate has by way of an analogy referred us to a case where a defendant could have raised the point that a mortgage which was in suit had been imperfectly registered under the Registration Act and submits that if the defendant does not choose to raise that plea he could not in execution of the decree plead that the mortgage which was the basis of the claim was a void document not having been registered according to the law and that the position of the judgment-debtor in the present case is not different.

We are therefore of opinion that there is no force in the contention of the learned advocate for the appellant. As regards the point of limitation, we are of opinion that the finding of the learned Subordinate Judge is correct. In view of the ruling of this Court in the case of the *Kayastha Co. Ltd.* v. *Sitaram* (3) the objections raised by the judgment-debtor cannot be maintained now. The result therefore is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

P.N./R.K. *Appeal dismissed.*

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(2) A. I. R. 1926 All. 432=95 I. C. 1048=48 All. 385.

(3) A. I. R. 1929 All. 625 = 118 I. C. 17 (F. B.).

**A. I. R. 1931 Allahabad 40

SEN AND NIAMATULLAH, JJ.

Narain Pershad and *others*—Plaintiffs—Appellants.

v.

Narain Singh and *others*—Defendants—Respondents.

Second Appeal No. 1736 of 1927, Decided on 5th June 1930, from decree of Dist. Judge, Farrukhabad, D/- 9th August 1927.

**** (a) Transfer of Property Act (4 of 1882), S. 74—Subrogation operates for benefit of person who being himself creditor discharges claim of another having priority over him by antecedence of liens and securities—Party only secondarily liable on obligation created by his debtor compelled to discharge it under grave necessity to save himself loss—He steps into shoes of creditor.**

Subrogation operates for the benefit of a person who being himself a creditor discharges the claim of another who has a priority over him by reason of antecedence of liens and securities. Where a party only secondarily liable on an obligation created by his debtor is compelled to discharge it under grave necessity to save himself the loss, he steps into the shoes of the creditor so that all rights and remedies which were available to the latter are available to him. There are of course certain limitations upon the rule of subrogation. For instance, there cannot be a partial subrogation by a partial discharge of a mortgage debt. Similarly it is a settled principle that the mortgagor discharging a prior debt is not entitled to be subrogated to the rights and remedies of his creditor, because in discharging a prior incumbrance created by himself, he merely performs his own obligation to his creditor. Under normal conditions, where a mortgagor employs an agent to clear a prior mortgage, the agent is not entitled to subrogation for the manifest reason that the agent cannot be clothed with a higher right than the principal. It is in each case a question of fact whether a payment has been made by a person as a mere agent of the mortgagor or on his own account for the protection of his interest in the mortgaged property. Again the right is never accorded to a volunteer.

[P 42 C 2, P 43 C 1]

N executed a simple mortgage in favour of *S* for Rs. 500 in August 1902. He on 14th January 1912 executed a simple mortgage in favour of *P* for Rs. 1,000, and left that sum with the mortgagee directing the latter to pay the amount to *S* and redeem the mortgage. On the same day he also executed a deed of usufructuary mortgage in favour of the plaintiff and others. *P* did not pay *S* and the latter sued on his mortgage including the plaintiffs as parties to the suit and got a decree. In execution of the decree, the property was auctioned and purchased for Rs. 29,000. The sale was set aside on plaintiff depositing in Court the decretal amount. A suit was brought claiming to recover from *N* the amount deposited in Court with interest, by enforcement of the mortgage lien in favour of *S*. It was found that *P* was a mere benamidar of plaintiff and consequently it was argued that the money paid to satisfy *S's* decree must be taken to be money belonging to mortgagor and that plaintiff in depositing the decretal amount must be taken to have acted as agent of *N*.

Held: that the contract to lend was not the same thing as a contract of agency and that the plaintiff mortgagee did not hold in his hands any money belonging to the mortgagor and that the money paid by the plaintiff was paid "under grave necessity" to protect his interest in the property as usufructuary mortgagee and was therefore subrogated to the right of *S*: 4 *A. L. J.* 349, *Expl.* and *Dist.*; 11 *I. C.* 649; 36 *Cal.* 193; 10 *Cal.* 1035 (*P. C*); 29 *Cal.* 154 and 39 *Cal.* 527 (*P. C.*), *Rel. on.*; 27 *All.* 400; 6 *A. L. J.* 549; 33 *All.* 101 (*F. B.*); *A. I. R.* 1923 *All.* 509 and 43 *Cal.* 69, *Ref.* [P 44 C 2, P 45 C 1]

(b) Specific Relief Act (1 of 1877), S. 21 (a)—Scope.

Where a mortgagee fails to perform his undertaking with mortgagor to discharge a debt due from the mortgagor, the remedy of the mortgagor lies in a suit for compensation against the defaulting mortgagee and not by specific performance of the contract; 12 *I. C.* 952 and 30 *All.* 252, *Rel. on.* [P 44 C 1, 2]

K. N. Katju—for Appellants.

P. L. Banerji and *Binod Bihari Lal*—for Respondents.

Sen, J.—This is an appeal from the decree of the learned District Judge of Farrukhabad affirming the decree of the Additional Subordinate Judge of the same place in a suit for enforcement of a lien. Narain Singh, defendant 1, owned a zamindari share in Mauza Mandal Shankarpur, pargana Bhojpur, in the District of Farrukabad. On 1st August 1904 he executed a simple mortgage deed in respect of the bulk of the aforesaid share in favour of one Sadho Ram for Rs. 500 at a certain rate of interest.

On 19th January 1912 he executed a simple mortgage deed in favour of one Pearey Lal for Rs. 1,000 and left the entire sum with the mortgagee with the direction that the latter should pay the amount to Sadho Ram and redeem his mortgage. On the same day, he also executed a deed of usufructuary mortgage in favour of the plaintiffs and defendants 2 to 4 for Rs. 5,000 for a period of 20 years. The property mortgaged by these two documents was the entire interest of Narain Singh in Mandal Shankarpur. Pearey Lal did not pay Sadho Ram and the latter sued for enforcement of his mortgage on 30th September 1916 and obtained a decree on 11th January 1917. Plaintiffs and defendants 2 to 4 were parties to this action. The decree was put into execution and the property was purchased at auction by Parsotam Singh, defendant 7, and three others for Rs. 2,900. The sale was set aside at the instance of the plaintiffs, who on 18th September 1920 deposited in Court Rs. 2,925-6-8 which represented the decretal amount together with the legal penalty at the rate of 5 per cent. Plaintiffs claim to recover from Narain Singh the aforesaid sum and Rs. 10,24-9-4 on account of interest by enforcement of the mortgage lien in favour of Sadho Ram. Defendants 5 and 6 have been impleaded as puisne incumbrancers of the mortgaged property.

Narain Singh alone contested the suit. He denied the usufructuary mortgage set up by the plaintiffs and pleaded that the entire consideration had not been paid to him. The main defence however was that Pearey Lal was merely a benamidar for the plaintiffs under the simple mortgage dated 19th January 1912, that the plaintiffs had agreed to discharge the mortgage debt of Sadho Ram and that, as they did not fulfil their obligation and did not pay Sadho Ram till the latter brought a suit on his mortgage, obtained a decree and got the property sold, the plaintiffs had no right to sue for the money so paid by them.

Plaintiffs had denied all knowledge of Sadho Ram's mortgage. This denial was foolish and false. Plaintiffs had also denied that Pearey Lal was their benamidar under the simple mortgage dated 19th January 1912.

The Court of first instance held that the usufructuary mortgage in favour of the plaintiff was duly executed by Narain Singh and that it was supported by consideration. A considerable portion of the judgment was devoted to the determination of the question as to whether the plaintiffs were the real mortgagees under the simple mortgage, dated 19th January 1912. The Court apparently considered this to be the crucial issue in the case and after elaborate reasoning arrived at the conclusion that the plaintiffs were the real mortgagees, Peary Lal being a mere benamidar for them. This finding was considered to be decisive as is manifest from the following extract:

> "In view of the foregoing findings on issues 6 and 7, the plaintiffs must be taken to have paid what they had taken upon themselves to pay to Sadho Ram in connexion with his (Sadho Ram's) mortgage. In this view of the matter, they cannot recover the decretal money of Sadho Ram, nor have they (plaintiffs) got a right to sue."

It is difficult to follow the reasoning of the learned Additional Subordinate Judge. The decretal amount was considerably in excess of what the plaintiffs had agreed to pay Sadho Ram. In paying the decretal amount, the plaintiff could not be "taken to have paid what they had taken upon themselves to pay to Sadho Ram." The assumption of the Subordinate Judge is against settled facts and the conclusion is amazing. Assuming that the decretal amount had been paid in fulfilment of the contract with the defendant, why were not the plaintiffs entitled to sue for this money? No reasons have been given in support of this view, nor any authorities cited. But the above conclusion having been reached, the Subordinate Judge was justified, consistently with his view, in dismissing the suit. The plaintiffs appealed. They impugned the correctness of this decision and urged that they were by the rule of subrogation clothed with all the rights of Sadho Ram. This contention was negatived by the Court below, which dismissed the appeal and affirmed the decree of the trial Court.

The appellate Court appears to have shared the opinion of the first Court that the question whether Pearey Lal was a benamidar for the plaintiff was the vital issue in the case. It held on the evidence and was justified in so doing that:

> "Pearey Lal was the benamidar not only of the plaintiffs but also of their co-mortgagees."

It next addressed itself to the question whether the plaintiffs had acquired the rights of Sadho Ram on the principle of subrogation. The answer was a clear negative. We shall deal with the reasons in support of this view.

The principle of subrogation, according to the Court below:

> "would be applicable only where a puisne mortgagee pays off a prior mortgage in addition to some payment made by him to his mortgagor. The universal rule of subrogation is subject to this exception . . . ."

The restriction imposed by the Court below upon the applicability of the rule does not appear to us to be legitimate. It is a matter of common occurrence that the mortgagee is directed by the mortgagor to redeem a prior mortgage out of funds left in his hands and when the mortgage is redeemed, he is subrogated to the position of the prior mortgagee as the result of an agreement with either the debtor or the creditor. This indeed is one of the common instances of conventional subrogation. But as was pointed out in a notable decision, subrogation:

> "is independent of any mere contractual relations between the parties to be affected by it, and is broad enough to cover every instance in which one party is required to pay a debt for which another is primarily answerable, and which in equity and conscience ought to be discharged by the latter."

There are certain well-recognized limitations upon the rule of subrogation and these limitations are founded upon reason and principle. For instance, there is the rule that there cannot be a partial subrogation by a partial discharge of a mortgage debt. To allow subrogation in such cases would lead to obviously anomalous results which need not be enlarged upon. It is therefore settled law that subrogation does not take place until the payment of the entire debt. Similarly, it is a settled principle that the mortgagor discharging a prior debt is not entitled to be subrogated to the rights and remedies of his creditor. Only such persons are entitled to the benefit of the rule who discharge a debt for which they are not primarily liable. The right is denied to the mortgagor because, in discharging a prior incumbrance created by himself, he merely performs his own obligation to his creditor: *Sat Narain* v. *Sheo Baran Singh* (1). It is also clear that under normal conditions, where the mortgagor employs an agent to clear a prior mortgage, the agent is not entitled to subrogation for the manifest reason that the agent cannot be clothed with a higher right than his principal.

It is in each case a question of fact whether a payment has been made by a person as a mere agent of the mortgagor or on his own account for the protection of his interest in the mortgaged property. Again, the right is never accorded to a volunteer. The principle underlying legal subrogation is that a person claiming it had to pay the debt under grave necessity to save himself a loss. There is authority for the view that persons are not entitled to subrogation of any rights, where such alleged rights arise from their own tortious conduct. Where a rule of equity is sought to be invoked, the person who invokes it must come into Court with clean hands.

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(1) [1911] 11 I.C. 649.

The restriction imposed and the exception grafted upon the general rule does not come within the fold of any of the cases enumerated above. We have not the slightest hesitation in laying down the rule that subrogation operates for the benefit of a person who being himself a creditor discharges the claim of another who has a priority over him by reason of of antecedence of liens and securities. The creditor here is not a stranger or a volunteer and he must be presumed to have discharged the incumbrance for safeguarding his own interest. It is a settled rule of law that where a party only secondarily liable on an obligation created by his debtor is compelled to discharge it, he steps into the shoes of the creditor, so that all the rights and remedies which were available to the latter are available to him : *Gurdeo Singh* v. *Chandrika Singh* (2).

It is next argued that the plaintiffs having undertaken to discharge the mortgage of Sadho Ram were not entitled to subrogation for the amount claimed for the following reasons :

(a) The money paid to satisfy Sadho Ram's decree must be taken to be money belonging to the mortgagor ; (b) the plaintiffs in depositing the decretal amount must be taken to have acted as agents of Narain Singh (mortgagor) ; (c) plaintiffs acted mala fide in not paying Rs. 1,000 to Sadho Ram. They were legally bound to pay the money, and the interest on Sadho Ram's mortgage mounted up as the natural result of breach of engagement and laches on the part of the plaintiffs. The lower appellate Court for its view of law relies upon a ruling of Burkitt, J., in *Baijnath* v. *Murlidhar* (3).

The facts of that case were as follows :

Ghasi Ram had mortgaged his property first to Lakshmi Chand for Rs. 500 on 27th May 1898, and next to Murlidhar on 14th September 1899, for Rs. 425. On 14th April 1900 he sold his equity of redemption to Baijnath for Rs. 1,000 and left with the vendee the two sums of Rs. 500 and Rs. 425 to be paid to Lakshmi Chand and Murlidhar respectively. Baijnath paid off Lakshmi Chand, but did not pay Murlidhar. The latter sued on his mortgage. Baijnath contended that he was entitled to priority for having paid the mortgage of Lakshmi Chand. Burkitt, J., held that Baijnath

> " never got into the position of a person to whom S. 74, T. P. Act, applies . . . He never became a mortgagee of the property . . . But he paid that only as agent of his vendor, the mortgagor, to discharge the debt due to Lakshmi Chand by his mortgagor. The money did not come out of the appellant's pocket, but it came from the mortgagor's."

This decision was upheld in Letters Patent Appeal No. 29 of 1907, decided on 4th January 1908. In reading his conclusion of law, Burkitt, J. follows an earlier decision of this Court in *re Tufail Fatima* v. *Bitola* (4), in which the prior claim was said to have been discharged by the plaintiff "as the mortgagor's agent." A similar view was taken by Griffin, J., in *Dalip Rai* v. *Binaik Rai* (5). In *Muhammad Sadiq* v. *Ghaos Mohammad* (6), which was followed in *Makhan* v. *Nathi* (7) the right to subrogation was negatived on the ground that the intention of the parties in effecting the sale was to wipe off the prior mortgages. A decision of the Calcutta High Court proceeds on much the same lines : *Harshyam Chaudhari* v. *Shyam Lal* (8) at p. 72. It may be remembered that it was obviously of the greatest advantage to the purchaser to retain the right of the prior mortgagee as a shield, if not as a weapon of attack, and in the absence of any evidence to the contrary a party should have been presumed to intend what was manifestly for his advantage.

The facts of *Baijnath's* case (3) are not parallel to the case now before us. Baijnath having purchased the property of Ghasi Ram, the purchase money belonged to his vendor. The whole of the purchase money having been left in his hands to pay both the prior mortgagees, the initial intention was the complete extinction of both the mortgages. It would have been monstrous and most inequitable to allow the purchaser to claim priority with reference to the mortgage he had paid as against the other mortgagee whom he had not paid in clear breach of his contract with his vendor. The decision was justified in view of the equities involved in the case.

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(2) [1909] 36 Cal. 193=1 I.C. 913.
(3) [1907] 4 A.L.J. 349=(1907) A.W.N. 85.
(4) [1908] 27 All. 400=2 A.L.J. 13=(1904) A.W.N. 284.
(5) [1909] 6 A.L.J. 549=2 I.C. 207.
(6) [1911] 33 All. 101=7 I.C. 200 (F.B.).
(7) A.I.R. 1923 All. 509=74 I.C. 640.
(8) [1916] 43 Cal. 69=31 I.C. 22.

We do not think that it was intended in *Baijnath's* case to lay down the broad proposition that a puisne mortgagee who had undertaken to pay off specific mortgages of prior dates was not entitled to the rights of the mortgagees, whom he paid off. If the case went to that length we respectfully differ from that view, as we are clearly of opinion that such a view is fundamentally opposed to the principle of subrogation which we have discussed at some length, and is not reconcilable with the pronouncements of the Privy Council in a number of cases, notably in *Gokul Das* v. *Puranmal* (9) and *Dinabandhu* v. *Jogmaya* (10). In the latter case, the mortgagor took a loan from a certain creditor, paid off two earlier mortgages with the money so advanced and executed a mortgage in favour of the creditor, who had advanced the money. The Privy Council held and held unhesitatingly, that the subsequent mortgagee whose money was utilized in paying off the prior mortgages was entitled to priority with reference to those mortgages. In a more recent case, *Ibrahim Husain Khan* v. *Ambika Prasad* (11), when a third mortgagee, in pursuance of an agreement with the mortgagor, paid off the first mortgage, it was held that the third mortgagee had acquired priority over the second mortgagee in respect of the first mortgage, discharged by him.

In view of the law indicated above, the plaintiffs could not be deprived of their right of subrogation in the absence of proof of circumstances in supersession of the said right. The judgment of the Court below proceeds upon a misappreciation of the tenor and legal effect of the simple mortgage dated 19th January 1912. The contract between the parties was one of loan. The mortgagees broke the contract and did not pay Rs. 1,000 to Sadho Ram as had been agreed upon. Where the mortgagees failed to perform their undertaking to discharge a debt due from the mortgagor, the remedy of the mortgagor lay in a suit for compensation against the defaulting mortgagees and not by specific performance of the agreement. Specific performance cannot be compelled, where compensation is the adequate remedy. The provision of S. 21-A, Specific Relief Act, is clear, and authorities are not wanting: vide *The South African Territories Co., Ltd.* v. *Wellington* (12); *Hukam Singh* v. *Khunni Lal* (13) and *Phul Chand* v. *Chand Mal* (14).

A contract to lend is not the same thing as a contract of agency. The mortgagees did not hold in their hands any money belonging to the mortgagor. No such money of the mortgagor was ever applied towards the discharge of the debt due to Sadho Ram. According to the finding of the Court below the plaintiffs had no intention to abide by their contract and the simple mortgage in the name of Pearey Lal was merely a clever move on the part of Narain Prasad and Ram Dayal to draw in their toils the poor debt-ridden mortgagor with a view to divesting him ultimately of his property.

The mortgagee had some excuse in not carrying out the contract, inasmuch as the money left with him was insufficient to satisfy the entire claim of Sadho Ram. Sadho Ram has not been examined in this case and the Court below rightly observes that:

> "it is impossible to speculate whether he should have accepted Rs, 1,000 if it was immediately offered to him,"

By a partial tender of Sadho Ram's debt, the plaintiffs would not have been entitled to all the rights and remedies available to Sadho Ram under his mortgage; on the other hand they would have still continued liable to Sadho Ram for his unpaid amount.

There is nothing on the record to show that the plaintiffs paid the sum of Rupees 2,925-6-8 in pursuance of the contract contained in the simple mortgage. The findings of the Court below on this point are inconsistent and illogical. There is the distinct finding that the plaintiffs were guilty of breach of contract. It is manifestly clear that the sum deposited in Court was considerably in excess of the sum agreed to be paid to Sadho Ram.

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(9) [1884] 10 Cal. 1035=11 I. A. 126=4 Sar. 543 (P.C.).

(10) [1902] 29 Cal. 154=29 I.A. 9=6 C. W. N. 209 (P.C.).

(11) [1912] 39 Cal. 527=14 I. C. 496=39 I. A. 68 (P.C.).

(12) [1898] A.C. 309=67 L.J.Q.B. 470=78 L.T. 426=46 W.R. 545=14 T.L.R. 298.

(13) [1911] 12 I. C. 952.

(14) [1908] 30 All. 252=5 A. L. J. 491=(1908) A. W. N. 105.

There was no warrant for the assumption that the payment was made in fulfilment of the contract with the mortgagor.

The plaintiffs were impleaded in Sadho Ram's suit as puisne mortgagees. The decree was passed against them and they were liable to pay the decretal amount, if the mortgagor failed to pay. They paid Rs. 2,925-6-8 not from qualms of conscience for the non-fulfilment of their obligation to the mortgagor, but they did so because they intended to protect their interest as usufructuary mortgagees. Narain Singh may possibly have a remedy against the plaintiffs for their breach of contract, but manifestly he cannot resist the present suit. The claim disclosed by the plaintiffs was one for which Narain Singh was primarily liable. The money was paid by the plaintiffs "under grave necessity" to protect their interest in the property as usufructuary mortgagees. The plaintiffs were therefore subrogated to the right of Sadho Ram. We allow the appeal, set aside the decrees of the Courts below and decree the plaintiffs' claim with costs throughout. Costs in this Court will include fees on the higher scale.

P.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 45

MUKERJI AND BENNET, JJ.

Nand Kishore and *others*—Plaintiffs—Appellants.

v.

Lallu and *another*—Defendants—Respondents.

Letters Patent Appeal No. 151 of 1928, Decided on 14th May 1930, from judgment of King, J., D/- 15th May 1928.

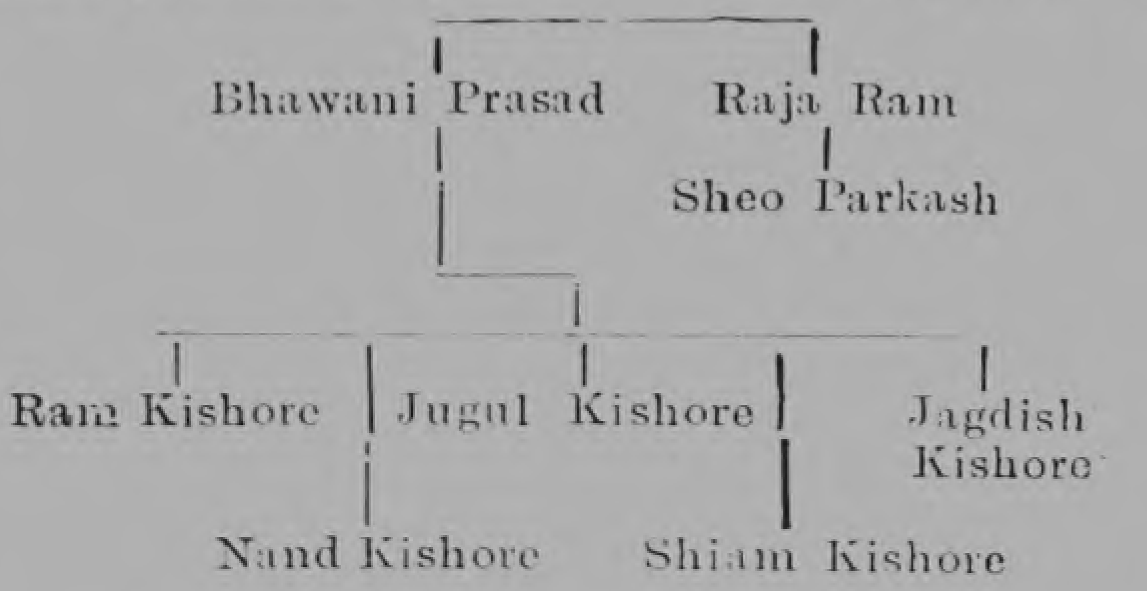
Transfer of Property Act (1882), S. 52—Lis pendens applies to partition suit.

The rule of lis pendens applies to a partition suit and negatives the effect of an auction-purchase made during the pendency of such a suit: 18 *I. C.* 492, *Foll.*; 29 *All.* 339 and 38 *Mad.* 450, *Rel. on.* [P 47 C 1]

R. K. Malaviya—for Appellants.

U. S. Bajpai and *G. S. Pathak*—for Respondents.

Bennet, J.—This is a Letters Patent appeal brought by the plaintiffs against the judgment of a learned single Judge of this Court dismissing their appeal and confirming the decrees of the two lower Courts. The family of the plaintiffs is as follows:



By a plaint filed on 16th February 1916, and registered on 18th December 1916, Raja Ram and Sheo Parkash brought a suit for partition (No. 7 of 1916) against the other members of the family. Subsequently there was a second suit for partition, No. 3 of 1918, brought by Nand Kishore which was filed on 18th December 1917. These two partition suits were tried together and a preliminary decree was passed on 6th April 1921, and a final decree on 19th September 1921. A few days after registration of the first partition suit brought by Raja Ram and Sheo Parkash, Lalta Prasad got a simple money decree against Bhawani Prasad and his son Ram Kishore on 22nd December 1916. This was in connexion with a business which was in the name of Ram Kishore alone and the name of Bhawani Prasad his father was subsequently added to the suit and a decree was given against both. On 28th August 1918, attachment was made of house No. 95 with which the present suit is concerned, and an objection was made by the present plaintiffs to the effect that the property attached was joint ancestral family property; that these suits for partition of the entire family property were pending, and that the attachment should be released, but if that prayer be not granted that this objection be postponed until determination of the two partition cases. When the objection came on for hearing, the vakil for the decree-holder stated that he only desired auction-sale of the right and share of the two judgment-debtors Ram Kishore and Bhawani Prasad. The vakil for the objectors admitted that the two judgment-debtors had a share in the attached property, but he wanted the sale postponed for two months. The objections were disallowed, and the house in dispute in its entirety was put up for sale and purchased on 2nd June 1919, by Kedarnath father of the defendants who obtained formal possession on 5th November 1919. Kedarnath had been a tenant of the house since 1905 on a monthly rent of Rs. 17 to the joint family of which the plaintiffs were then members. In the final decree in the partition suit on 19th September 1921, the whole of the house in dispute was allotted to the four plaintiffs in equal shares, one-fourth to each plaintiff, that is, it was alloted to the branch of Bhawani Prasad and his sons with the exception of Bhawani Prasad and his son Ram Kishore who were judgment-debtors in the case of Lalta Prasad. The present case has been brought by the plaintiffs for arrears of rent from 1st August 1921 to 31st August 1924. Various grounds were taken in defence in the written statements, but the present ground with which we are concerned is that, as found by both the lower Courts, the defendants were not liable for the one-third of the rent owing to the purchase at the auction-sale by the father of the defendants, Kedarnath, of the shares of Bhawani Prasad and Ram Kishore. The question which has been argued before us is, whether owing to the rule of lis pendens contained in S. 52, T. P. Act, that purchase by Kedarnath was null and void as against the rights of the plaintiffs. It is clear that the auction-sale was made while both partition suits were pending. The view taken by the two lower Courts was that S. 52, T. P. Act, would not apply, because the partition suit No. 3 of 1918 was not contentious as Bhawani Prasad and Ram Kishore did not contest it, and the rights of Bhawani Prasad and Ram Kishore to a share in the house in dispute was not in question in that suit.

In addition to the house in dispute there was also a grove and the same decree-holder Lalta Prasad attached and purchased that grove himself. In the partition that grove was allotted to the share of Sheo Parkash, the cousin of the present plaintiffs. A suit was brought in regard to that grove and came before this Court in First Appeal No. 297 of 1924 decided by a Bench of this Court on 1st December 1927. In that suit it was held that Sheo Parkash could recover the grove. The basis of the decision was that S. 52, T. P. Act, applied and the auction-purchaser therefore did not obtain rights which were valid against Sheo Parkash to whom the grove had been allotted in the partition suit which was pending at the time of the auction-purchase. The learned Judge of this Court alludes at some length to First Appeal No. 297 of 1924 and he distinguishes the second appeal in the present case on various grounds. He held that the present appeal was different and he went on to state :

> "The appellant has not even argued in second appeal that the doctrine of lis pendens is applicable."

Most of the grounds in the present second appeal dealt with the question of lis pendens and as the First Appeal No. 297 of 1924 was contested on the ground of lis pendens we are convinced that the learned Judge of this Court was under a misapprehension when he wrote that the question of lis pendens was not argued before him in second appeal. Consequently it is open to the plaintiffs to argue lis pendens before this Court in the Letters Patent appeal.

As regards the broad question as to whether S. 52, T. P. Act, applies to a partition suit, there is a ruling of this Court in *Tara Chand* v. *Bachnun Singh* (1) which states that an assignment of a mortgage debt during a partition suit by a party comes under S 52, T. P. Act. We agree with the principle of that ruling that partition cases come within the meaning of contentious suits under S. 52, T. P. Act. Some argument has been made on the meaning of the word "contentious," and the learned advocate for the respondent has endeavoured to support the finding of the lower appellate Court that the present suit was not contentious, because Bhawani Prasad and Ram Kishore did not contest it. In the Privy Council case in *Faiyaz Husain Khan* v. *Parag Narain* (2), it was laid down at p. 345 that where a suit is contentious in its origin and nature, it is not necessary that summons should have been served to make it contentious. Further it was held in *P. Kathir* v. *C. Maremadissa* (3) that a contentious suit in S. 52, T. P. Act, means every suit other than a friendly suit. It was further argued by the learned counsel for the respondent that in a partition suit a right to immovable property is not directly and specifically in question, because apparently it is admitted by the parties that the joint family possessed the property in question. But we consider that the question in the partition suit is how that immovable property should be divided and those rights apportioned. Consequently we consider that a partition suit does come under S. 52, T. P. Act. Accordingly, differing from the learned single Judge of this Court, we hold that the plaintiffs in the present suit are entitled to claim that the rule of lis pendens would apply to a partition suit and would negative the effect of an auction-purchase made during the pendency of a partition suit.

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(1) [1913] 18 I. C. 492.

(2) [1907] 29 All. 389=34 I. A. 102=4 A.L.J. 344 (P. C.).

(3) [1915] 38 Mad. 450=2) I. C. 976.

One further question of fact remains for decision. In the written statement there were various pleas of fraud raised in paras. 19, 21 and 22, and although the trial Court did not directly frame an issue on the subject of fraud, the trial Court considered those pleadings under issue 1:

> "Are the plaintiffs the owners of the whole house in dispute ?"

The trial Court came to this finding:

> "The plaintiffs, thereafter, seem to have taken to another course to defraud the creditor, the course being the non-allotment of the house actually sold to the share of the judgment-debtors on partition."

Ground 3 of appeal to the District Judge stated that no evidence was produced to prove any fraud or collusion, and the lower Court was not at all justified in importing allegations of fraud in its judgment quite beyond the pleadings of the parties. The lower appellate Court mentioned that six grounds had been taken in appeal and that the Court need not take them one by one as they seem to overlap one another. In the end the lower appellate Court dismissed the appeal of the plaintiffs on different grounds and did not come to any finding on the question of fraud. As we have differed from the lower appellate Court on the ground on which it set aside the decree of the trial Court, it is necessary for us to remand an issue to the lower appellate Court on the question of fraud. It is also necessary to remand an issue in regard to the amount of the shares of Bhawani Prasad and Ram Kishore, because although it was found by both the lower Courts that the shares amounted to one-third of the house in question and before the lower appellate Court it was stated that that point was not contested, still it has been contested in this Court that those two shares together will amount to one-sixth and not one-third. The reason for this is that the branch of Bhawani Prasad and the branch of his brother Raja Ram would have on partition one-half share each, and, therefore, the half-share of Bhawani Prasad divided between himself and his five sons would become one-twelfth each and not one-sixth each. Accordingly we remand the two following issues for decision by the lower appellate Court and return within the period of two months. No evidence need be taken in regard to these issues. But it will be open to the Court to send for the partition records if required.

1. Did the plaintiffs fraudulently conceal the fact that the shares of Bhawani Prasad and Ram Kishore in house No. 95 had been sold in auction-sale and did the plaintiffs fraudulently obtain a final decree in partition allotting the whole house No. 95 to the plaintiffs in order to defeat the auction-purchaser ?

2. If the partition is not binding, what were the shares of Bhawani Prasad and Ram Kishore in house No. 95 on the date of the aucton-purchase ?

Ten days will be allowed for objections on the findings. (On receiving the findings the Court allowed the appeal.)

S.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 47

SEN AND NIAMATULLAH, JJ.

Ram Sukh Pandey—Defendant — Appellant.

v.

Pirthi Singh and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2076 of 1927, Decided on 9th May 1930, from decree of Sub-Judge, Azamgarh, D/- 26-3-1927.

U. P. Land Revenue Act (1901), S. '233-K —Revenue partition between parties including widow—Separate patti in name of each party—Alienation by widow of her share—Declaratory suit that she had no proprietary interest was held not to contravene S. 233-K.

Revenue Court allowed partition between parties with the result that separate patti was formed in the name of each party. There was no clash of interest between parties which included one widow in revenue ·Court with regard to portion of property which became subject of partition and which was included in patti formed by revenue Court. Subsequently widow alienated her share. Other parties sued for declaration that she had no proprietary interest.

Held: that the widow was not the owner of property recorded in her name and the integrity of patti constituted by revenue Court was in no way approached upon and that the declaratory suit did not contravene S. 233-K, Land Revenue Act. (1930) *A.L.J.* 601, *Dist.* [P 48 C 2]

Shiva Prasad Sinha—for Appellant.

Harnandan Prasad—for Respondents.

Sen. **J.**—The sole point argued in this appeal is that the declaratory suit instituted by the plaintiffs-respondents offends against the provisions of S. 233-K, Land Revenue Act (Act 3 of 1901 local). Durga Singh had three sons Abhairaj Singh, Rajbali Singh and Gobind Singh. These were members of a joint Hindu family. Abhairaj Singh died leaving a widow Mt. Sahodra Kunwar who is defendant 1 in the suit. He had a son Ram Surat Singh. Ram Surat Singh died first, Ram Bali died next and Gobind Singh died last. Certain property was recorded in the revenue papers in the name of Mt. Sahodra Kunwar who had no legal title to the said property by right of inheritance under the Hindu law her right being confined to mere maintenance and no more. Gobind Singh applied for partition in the revenue Court and prayed that the share belonging to him which stood recorded in the name of Rajbali Singh and Mt. Sahodra Kunwar should be partitioned and formed into a separate patti. The revenue Court allowed a partition on these terms with the result that a separate patti was formed in the names of Gobind Singh, Rajbali Singh and Mt. Sahodra. There was no clash of interests between Mt. Sahodra and Gobind Singh in the revenue Court with regard to any portion of the property which became the subject of partition and which was included in the patti formed by the revenue Court. On 14th December 1925 Mt. Sahodra executed a sankalapnama in favour of Ram Sukh Pandey, the defendant-appellant in respect of one-third of the property which has been mentioned in Sch. B attached to the plaint. Pirthi Singh, uncle of Gobind Singh, Sarju Singh and Rambali Singh who are his first cousins instituted the present suit for a declaration that Mt. Sahodra Kunwar had no proprietary interest in the property in dispute and that no rights devolved upon Ram Sukh Pandey by virtue of the sankalapnama referred to above.

The suit was contested inter alia on the ground that it was not maintainable under S. 233-K, Land Revenue Act. The Court of first instance overruled this plea and granted the plaintiffs a decree. The lower appellate Court has affirmed the decree; hence this appeal by Ram Sukh Pandey, the donee.

Section 233-K, Land Revenue Act, provides that

> "no person shall institute any suit or other proceeding in the civil Court with respect to . . . partition or union of mahals except as provided in Ss. 111 and 112."

The patti which has been formed at the instance of Gobind Singh is a single unit. By passing a declaratory decree in favour of the plaintiffs that Mt. Sahodra Kunwar is not the owner of the property which stands recorded in her name in the patti aforesaid the integrity of the patti or the mahal constituted by the revenue Court is in no way approached upon. The declaratory suit therefore does not in any way contravene the provisions of S. 233-K, Land Revenue Act. Our attention has been drawn to a decision of this Court: *In re Ganga Prasad* v. *Beni Prasad* **(1).** The facts of this case were toto caelo different. In this case the plaintiff had applied for the formation of a separate patti by partition by the revenue Court relating to certain property and no prayer was made for the inclusion of the share which was claimed by the defendant vendees under a certain sale deed. It was held that where the plaintiff himself had applied to the revenue Court for the constitution of a separate patti of his share and had impleaded the defendants-vendees in the partition proceedings but had omitted to include the share which the defendants claimed under a deed of transfer, it was not open to the plaintiff to institute a suit in a civil Court for that portion of the property which had been allotted to the defendant vendees and put into a separate patti. We are clearly of opinion that S. 233-K, Land Revenue Act, is no bar to the present suit and the claim has been rightly decreed by the Courts below. We accordingly dismiss this appeal with costs including in this Court fees on the higher scale.

G.P./R.K. *Appeal dismissed.*

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(1) [1930] A. L. J. 60

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar

A. I. R. 1931 Allahabad 49

KING, J.

Shib Charan—Applicant.

v.

Emperor – Opposite Party.

Criminal Revn. No. 516 of 1930, Decided on 16th October 1930, against order of Sess. Judge, Meerut, D/- 19th June 1930.

Criminal P. C. (1898), Ss. 235 and 236 Ss. 235 and 236 are not mutually exclusive, but one can supplement the other.

Sections 235 and 236 are not mutually exclusive, but one can supplement the other. It cannot be said that whenever a person is tried for two or more offences committed in the course of the same transaction, S. 236 must be deemed to have been expunged from the Code. It is a general rule of interpretation that effect must be given to every part of a statute and hence S. 235 (1) should be supplemented by 236: *A. I. R. 1929 All. 202, Dist.*

Where therefore, the accused could have been charged under S. 236 with an offence under S. 411, I. P. C., in addition to an offence under S. 379, I. P. C., it follows that under S. 237 the appellate Court was justified in convicting the accused under S. 411, I. P. C. although he had not been expressly charged with that offence. [P 50 C 2]

K. D. Malaviya – for Applicant.
M Waliullah—for the Crown.

Order.—This is an application in revision against an appellate order of the learned Sessions Judge of Meerut convicting the applicant under S. 411, I. P C. The accused was charged in the trial Court with kidnapping a boy from the lawful guardianship of his father and with having stolen a hundred rupee note, under Ss. 363 and 379, I. P. C. The trial Magistrate convicted the accused under both sections. In appeal the learned Sessions Judge set aside the conviction under S. 363 on the ground that it was at least doubtful whether the boy whom the accused had taken away, was under the age of fourteen years on the date of the alleged offence.

With reference to the conviction under S. 379 the Judge found that the evidence did not prove that the accused himself, committed the theft of the note. The facts alleged by the prosecution were that the boy himself stole the note from his father, at the instigation of the accused, and made it over to the accused. On these allegations I agree with the learned Sessions Judge that the accused should have been charged with abetment of the theft under S. 379/109 and with dishonestly receiving stolen property under S. 411, I. P. C. The Judge found that there was no evidence that the accused instigated the boy to commit the theft, excepting the evidence of the boy himself, and did not think it safe to rely on the boy's statement in the absence of any corroboration. He was however satisfied that the accused received the note from the boy knowing it to be stolen property. He accordingly altered the conviction under S. 379 to one under S. 411, I. P. C. It has been argued on the merits that there is no evidence to prove the guilt of the accused under S. 411, I. P. C., apart from the boy's own statement which the learned Judge considered insufficient to prove the allegation that the accused instigated the boy to commit the theft, and therefore the boy's evidence should be held insufficient to prove tha the delivered the stolen note to the accused. The boy's statement that he delivered the hundred rupees note to the accused does however receive some corroboration from the facts that the accused, when he was arrested with the boy, had a note of Rs. 100/- in his possession, and that he unsuccessfully tried to conceal the fact that he had the note in his possession. In these circumstances I think it was perfectly open to the Court to find that the boy's statement, about handing over the stolen note to the accused, was true. The accused must have known that this note was stolen property. I think there are no grounds whatever for setting aside the conviction under S. 411 upon the merits.

It has been further argued that the learned Sessions Judge had no jurisdiction to alter the conviction under S. 379 to one under S. 411, I. P. C. It is conceded that under S. 235, Criminal P. C., the Magistrate was empowered to charge the accused with offences under Ss 363 and 379 and to try him at one trial on both charges, as the alleged offences were so connected together as to form the same transaction. It is argued however, that when the provisions of S. 235 are untilized, by way of an exception to the general rule laid down in S. 233, then no other section (such as S. 236) which imports an exception to that general rule can also be brought into use. In other words, the provisions of Ss. 235 and 236 are said to be mutually exclusive. It is urged, therefore that as the provisions of S. 235 have been relied upon for the purpose of trying the two offences under Ss. 363 and 379, no recourse can be had to the provisions of S. 236, and, therefore the provisions of S. 237 also cannot be utilized for the purpose of altering the conviction under S. 379, I. P. C. to one under S. 411, I. P. C. I have been referred to the ruling in *Janeshar Das* v. *Emperor* (1) in which it was held by a single Judge of this Court that the provisions of Ss. 234,235 and 236 were mutually exclusive. The facts of that case were very different from the facts of the case before me, and the main reason for holding that the trial in that case was illegal was that the two persons, who were being jointly tried, had been charged with three offences and each offence was framed in the alternative either of criminal breach of trust or abetment thereof. The result was that the accused had to meet six distinct sets of circumstances, and this was contrary to the spirit of the provisions of S. 233. In the present case no questions arise about undue multiplicity of charges, or about the joint trial of two or more offenders. The ruling therefore does not appear to be directly applicable to the present case although it does contain a remark that supports the applicant's contention.

In the present case the accused was alleged to have (1) instigated a boy to commit theft and (2) dishonestly received stolen property from the boy and (3) kidnapped the boy from lawful guardianship. These acts formed a series and were so connected together as to form the same transaction. Looking at the provisions of S. 235 (1) alone, apart from anything else in the Code, I think it is clear that the accused could (and in my opinion should) have been charged with, and tried at one trial for offences under Ss. 379/109, 411 and 363, I. P. C. As a matter of fact the Magistrate charged him with offences under Ss. 379 and 363, I. P. C. I think the Magistrate was wrong in framing the charge under S. 379, I. P. C., because no one alleged that the accused himself committed the theft.

Now the question arises whether the provisions of S. 236 could not be utilized as supplementing the provisions of S. 235 (1). Supposing the Magistrate were doubtful which of several offences the provable facts would constitute, e. g., whether they would constitute an offence of theft, or of abetment of theft, or of receiving stolen property in addition to the offence of kidnapping. Would he not, in such circumstances, be authorized under S. 235 (1) read with S. 236 in charging him with offences under Ss. 379, 379/109, 411 and 363, I. P. C., and in trying him for every such offence? I cannot see anything in the Code or in the requirements of justice which prohibits such procedure. On the contrary such procedure seems to me to be expressly authorized by the Code. It cannot be said that the accused would be embarrassed by having to meet a larger number of charges than the legislature contemplated. Illus. (a) to S. 236 shows clearly that a man may be charged, in respect of the same act, with theft, receiving stolen property, criminal breach of trust and cheating, i. e., with four charges in respect of one act. I cannot understand why Ss. 235 and 236 should be regarded as mutually exclusive so that whenever a person is tried for two or more offences committed in the course of the same transaction, S. 236 must be deemed to have been expunged from the Code. It is a general rule of interpretation that effect must be given to every part of a statute and I see no reason in the present case why S. 235 (1) should not be supplemented by S. 236. On this view the accused could have been charged under S. 236 with an offence under S. 411, I. P. C. in addition to an offence under S. 379, I. P. C. It follows that under S. 237 the appellate Court was justified in convicting the accused under S. 411, I. P. C. although he had not been expressly charged with that offence.

Even if I am wrong in my view, there is another reason for refusing to interfere in revision. The trial Court was clearly empowered to frame a charge under S. 411, I. P. C., in addition to the charge of theft, by reason of the provisions of S. 235 (1), Criminal P. C., alone, leaving section 236 out of account.

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(1) A. I. R. 1929 All. 202=116 I. C. 794=30 Cr. L. J. 687=51 All. 544.

Now under Ss. 535 and 537, Criminal P. C., I am prohibited from setting aside the conviction and sentence as invalid merely on the ground that no charge was framed under S. 411, I. P. C., or on the ground that a charge was wrongly framed under S. 379, I. P. C. unless I consider that a failure of justice has in fact been occasioned thereby. In this case there has been no failure of justice. The accused had to admit that, when he was caught with the boy, he had a hundred rupee note in his possession. His case was that the note belonged to him and that it had not been made over to him by the boy. The Court found that the note was stolen property received from the boy. It cannot be said that the accused was prejudiced by not having to meet a specific charge of receiving stolen property. The result of a re-trial upon a charge under S. 411 would be a foregone conclusion. For this reason also I reject the application. The applicant must surrender to his bail and serve the remainder of his sentence.

B.V./R.K. *Application rejected.*

A. I. R. 1931 Allahabad 51

BENNET, J.

Sunder Teli—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 552 of 1930, Decided on 13th August 1930, made by Addl. Sess. Judge Jaunpore, D/-30th July 1930.

Criminal P. C., S. 260—Jurisdiction to try summarily is derived from nature of charge.

The jurisdiction of the Court to try summarily a case prosecuted by the police is derived from the nature of the charge preferred by the police.

Where the police prosecute for theft of property not exceeding Rs. 50 and the Magistrate convicte the accused of the theft of property not exceeding Rs. 50, then there is no defect in the jurisdiction of the Magistrate to try the case summarily : 36 *Cal.* 67 ; 77 *I.C.* 992 and 5 *C. W. N.* 252, *Dist.*

Where the police prosecute an accused person for an offence triable summarily and where the Magistrate convicts that accused person of an offence triable summarily, any exaggeration as to the nature of the offence should not have any effect on the jurisdiction. [P 52 C 1, 2]

Saila Nath Mukerji—for Applicant.

Order.—This is a reference in revision made by the learned Additional Sessions Judge of Benares, recommending that the conviction and sentence in a summary trial of Sunder Teli before a Magistrate should be quashed and that another Magistrate should be ordered to re-try the case after framing proper charges. Probably the Additional Sessions Judge did not mean that the charges should be framed before the case was tried but that charges should be framed at the normal period after hearing the prosecution evidence. The facts in this case are that Mahomad Khan made a report in the thana to the effect that the following property had been stolen from his shop :

Six bags of salt valued at		— 43	0	0
One bag of chokar	—	— 2	12	6
Money amounting to	—	— 5	8	0

The total property alleged to have been taken is therefore worth Rs. 51-4-6. If this case had been tried on a complaint made by Mahomad Khan in Court, it is clear that it could not have been tried summarily, and three rulings produced by the learned counsel for Sunder Teli are to this effect. These rulings are *Fanindra Nath Chatterji* v. *Emperor* (1), *Chandra Mohan Das* v. *Emperor* (2), *Kailas Chandra Pal* v. *Joynuddi* (3). All these three cases deal with proceedings initiated in Court on complaint, that is under S. 190 (1) (a). But in the present case the Magistrate took cognizance under S. 190 (1) (b) upon a report in writing of the facts made by a police officer. No ruling has been produced to show that in the case of a prosecution by the police the question whether the trial is to be summary or otherwise depends on the first report made in the police station. Now in the charge sent to the Court by the police it was alleged thet the accused Sunder Teli had stolen from Mahomad Khan two bags of salt. There was no prosecution by the police of Sunder Teli in regard to the remaining 4 bags of sal or the bag of chokar or Rs. 5-8-0 cash. The reason why the police only prosecuted Sunder Teli for stealing two bags of salt is that on a search of the house of Sunder Teli only 2 bags of salt were found. Three of the remaining bags were found in the possession of a witness, who was the owner of the bags of salt. There was no evidence as to what had happened to the bag of chokar, and there was no evidence to confirm the statement that Rs. 5 8-0 in cash had been taken. Moreover it appears from the evidence that the accused Sunder Teli was not the only person who was concerned in the taking of property from the shop of Mahomad Khan. Other persons are alleged to have taken property at the same time, but Sunder Teli was the only person prosecuted, and the evidence against him put forward by the police was only as regards the finding of the two bags of salt in his house. It is true that the Magistrate in his finding held Sunder Teli liable for the theft of the six bags of salt. Apparently he did so because of the statement of the owner of the bags that the accused had taken away the three bags of salt which he gave back to the owner Lallan. No authority has been shown to me for the proposition that because Mahomad Khan, the owner of the shop, when called as a witness stated what he had stated in his first report, that is that property to the value of Rs. 51-4-6 was taken by the accused and his men, that therefore the jurisdiction of the Magistrate to try this case summarily would not exist. It was argued by the learned advocate for Sunder Teli that the statement of Mahomad Khan in evidence should be treated in a different way from the statements of other witnesses for the prosecution. But Mahomad Khan was not conducting the prosecution. He was merely a witness called by the police, who were prosecuting Sunder Teli. I do not see why the statement of Mahomad Khan should have the capacity of altering the jurisdiction of the Court in a way that the statement of any other witness in Court would not have. I consider that the jurisdiction of the Court to try summarily a case prosecuted by the police is derived from the nature of the charge preferred by the police. It is possible that if the Magistrate had come to the finding that property worth more than Rs. 50 had been stolen by this accused Sunder Teli, then the jurisdiction of the Magistrate to try the case summarily would have ceased, and it would have become the duty of the Magistrate to begin the trial again as an ordinary warrant case. But where the police prosecuted for theft of property not exceeding Rs. 50 and where the Magistrate convicted the accused of the theft of property not exceeding Rs. 50 then I consider that there is no defect in the jurisdiction of the Magistrate to try the case summarily. Accordingly I consider that the summary trial was not invalid on this ground.

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(1) [1909] 36 Cal. 67=12 C.W.N. 1041=8 Cr.L J. 227=1 I.C. 519.

(2) [1921] 77 I.C. 992=25 Cr.L.J. 528.

(3) [1901] 5 C.W.N. 252.

The other ground advanced by the learned Additional Sessions Judge is that the evidence of the complainant and his witnesses disclosed the offence of dacoity, because he says there was theft and extortion committed. "Extortion" is defined in S. 383, I. P. C., as putting a person in fear of any injury to that person, or to any other, and thereby dishonestly inducing the person so put in fear to deliver to any person any property. There is nothing in the judgment of the Magistrate which indicates that there was in this case any delivery of property by Mahomad Khan and to the accused. Accordingly therefore there could be no extortion. The learned counsel for Sunder Teli however suggests that the learned Additional Sessions Judge is mistaken in referring to the extortion, and that what he should have referred to was to para. 1 in the definition of "robbery" in S. 390, I. P. C. Theft is "robbery" under that paragraph if the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. Now there is no evidence at all that any of these things was caused to Mahomad Khan. The evidence is that the accused and six or eight men came and demanded payment of a sum of Rs. 8 alleged to be due from the brother of Mahomad Khan and threatened that if the money was not paid the house would be plundered. The accused and his compenions then entered the complainant's shop and threw out the contents on the road and carried the contents away. There is nothing stated at all that Mahomad Khan was put in fear of instant death or instant hurt or instant wrongful sestraint. The owner of the six sacks of salt, P. W., Lallan, was present and asked the accused not to take his sacks.

It is quite possible that Mahomad Khan did not take any action in the matter, because he saw that the owner of the salt was present. It would have to be proved that Mahomad Khan was put in fear of instant death or instant hurt or instant wrongful restraint before it could be held that the offence amounted to robbery. Accordingly I consider that even a technical offence of dacoity is not made out, and that the learned Sessions Judge was wrong in considering that there was such a charge shown by the evidence. Moreover, as I have stated already, I do not consider that where the police prosecuted an accused person for an offence triable summarily and where the Magistrate convicts that accused person of an offence triable summarily, any exaggeration as to the nature of the offence should have any effect on the jurisdiction.

For these reosons I refuse this application in revision and uphold the conviction and sentence by the Magistrate.

K.N /R.K. *Application refused.*

A. I. R. 1931 Allahabad 53

KING, J.

Mohammed Yusuf and *others* — Applicants.

v.

Abdul Majid—Opposite Party.

Criminal Revn. No. 140 of 1930, Decided on 16th July 1930, from order of Sess Judge, Aligarh, D/- 31st January 1930.

(a) Criminal P. C. (1898), Ss. 107 and 436 —Application under S. 107 is not complaint —Consequently S. 436 does not apply to persons discharged.

An application under S. 107 cannot amount to a complaint, because it does not allege that any person has committed an offence. It only alleges that there is a fear of a breach of the peace on the part of the opposite party and prays that action may be taken to prevent the apprehended breach of the peace; consequently S. 436, Criminal P. C., does not apply to the case of the persons, who were discharged, but were not accused of any offence. Under that section the Sessions Judge has no jurisdiction to set aside the order of discharge and direct further enquiry. The only section under which the Sessions Judge might take action, if he considers that the other party is wrongly discharged, is S. 438 by making a report to the High Court. [P 54 C 1,2]

(b) Criminal P. C. (1898), Ss. 107 and 438 —Proceedings under S. 107 primarily concern local authorities—High Court cannot interfer.

The question whether it is necessary in the interests of keeping the peace to take security from a party is essentially a question which primarily concerns the District Magistrate and the local police. It is not a case in which the Sessions Judge or the High Court could interfere. [P 54 C 2]

M. A. Aziz—for Applicants.
M. Waliullah—for the Crown.

Order.—This is an application in revision against an order passed by the learned Sessions Judge of Aligarh, setting aside an order of discharge passed by a Magistrate of the First Class and directing further inquiry to be made under S. 107, Criminal P. C.

It appears that there were two parties who were hostile to each other, one party consisted of Abdul Majid and his associates and the other party consisted of Mohammad Yusuf and his associates. Mohammad Yusuf made an application to the Magistrate under S. 107 for having the opposite party bound over to keep the peace. This was followed by a similar application made by Abdul Majid that security for keeping the peace should be taken from Mohammad Yusuf and his party. Both the applications were sent to the police for inquiry. The police reported that there was fear of a breach of the peace, but the breach of the peace was to be apprehended from the side of Abdul Majid and his party, and that there was no apprehension from the side of Mohammad Yusuf's party. The Magistrate proceeded with the application against Abdul Majid and his party and bound over Abdul Majid and two other persons under S. 107. As regards the counter application, he dropped further proceedings on the strength of the police report and did not proceed to take any further evidence as against Mohammad Yusuf and his party.

Abdul Majid and the two other persons bound over along with him appealed to the Sessions Judge, and at the same time Abdul Majid applied to him in revision praying that the order discharging Mohammad Yusuf and his party under

S. 107 should be set aside, and that further inquiry should be made as against them.

The learned Sessions Judge dealt with the appeal and with the revision in one judgment. He upheld the order passed against Abdul Majid and his two associates and dismissed their appeal. In the revision case he remarked that the Magistrate had discharged the accused persons on the strength of the police report. The learned Judge further observes:

> "In my opinion it seems proper that Abdul Majid's evidence should be heard against these men, and if it is found that these three men are likely to disturb the peace, they should be bound over under S. 107, Criminal P. C. I therefore set aside the order of discharge against Qudrat Ullah, Mohammad Yusuf and Amanat Ullah and send the case back to the Court below for trial on the merits."

It has been urged for the applicants that the learned Sessions Judge had no jurisdiction to set aside the order of discharge and to order further inquiry to be made under S. 107.

In my opinion this contention is well founded. The only section under which the Judge could be considered to have passed his order is S. 436, Criminal P. C. Under that section the Sessions Judge in exercise of his revisional powers can direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make further inquiry into any complaint which has been dismissed under S. 203 or sub-S. (3), S. 204, or into the case of any person accused of an offence who has been discharged.

The powers thus conferred upon the Sessions Judge under S. 436 do not apply to the action which he has taken in the present case. The application made by Abdul Majid under S. 107 cannot be held to be a complaint. The word "complaint" is defined in S. 4, Cl. (h) of the Code as follows : "Complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person whether known or unknown, has committed an offence. The application made by Abdul Majid under S. 107 cannot amount to a complaint, because it does not allege that any person has committed an offence. It only alleges that there is a fear of a breach of the peace on the part of the opposite party and prays that action may be taken to prevent the apprehended breach of the peace.

Moreover the application was not dismissed under S. 203. That section only applies to the dismissal of a complaint, and I have already shown that an application under S. 107 cannot be held to be a

> "complaint within the meaning of the Code. S. 204, sub-S. (3) is clearly not applicable to the facts of this case. The last sentence of S. 436 also does not apply since the persons who were discharged were not "accused" of any offence."

It is conceded indeed by the learned Assistant Government Advocate that the Sessions Judge had no jurisdiction under S. 436 to set aside the order of discharge and to direct further inquiry. The only section under which the Sessions Judge might have taken action, if he had considered that Mohammad Yusuf and his party had been wrongly discharged, was under S. 438 by making a report to the High Court. It has been suggested by the learned Assistant Government Advocate that this application may now be treated as a report made to the High Court under S. 438. This course is out of the question. The application is made against the Judge's order and it cannot possibly be treated as a reference made by the Judge himself.

Even if the Judge had made a reference under S. 438, I should not have interfered in revision. The question whether it is necessary in the interests of keeping the peace to take security from Mohammad Yusuf and his party is essentially a question which primarily concerns the District Magistrate and the local police. The police reported that in their opinion there was no necessity for taking security from Mohammad Yusuf and his party. The Sub-divisional Magistrate considered that it was unnecessary to take further action against them. If the District Magistrate had thought it necessary to take further action he could have permitted the institution of fresh proceedings. It is not the sort of case in which the Sessions Judge or the High Court should, in my opinion interfere. I set aside the order which is the subject matter of this application, and restore the order of discharge passed by the Subdivisional Magistrate.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 55

MEARS, C. J., AND SEN, J.

Emperor

v.

Nanhua Dhimar and *others*—Opposite Parties.

Criminal Ref. No. 71 of 1930, Decided on 9th July 1930, made by Sess. Judge, Moradabad, D/- 27th January 1930.

(a) Penal Code (1860), S. 362—Offence of kidnapping from lawful guardianship is not continuing offence — Criminal P. C. S. 182.

The offence of kidnapping from lawful guardianship is not a continuing offence. As soon as the minor is actually removed from the custody of his or her guardian, the offence is committed. The offence is not a continuing one as long as the minor is kept out of guardianship. [P 55 C 2]

(b) Criminal P. C. (1898), Ss. 180 and 182—Abduction is continuing offence—Accused can be tried in any of Courts within whose jurisdiction offence takes place—Penal Code, S. 366-A.

Abduction is a continuing offence. A girl is abducted not only when she is first taken from any place but also when she is removed from one place to another. [P 55 C 2, P 56 C 1]

N and his wife induced *R*, a twelve years old girl, to leave *m*, in their company, with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person. Later on they were joined by *D*, *B* and *K*, and removed *R* from place to place subsequently selling her. All the accused were tried at *m*.

Held: that the offence being a continuing one could be tried at *m*. [P 56 C 1]

That as *D*, *B* and *K* were parties to inducement to *R*. they could be tried at *m*. although the part played by them was outside the jurisdiction of that Court. [P 56 C 1]

That *D*, *B* and *K* could be charged of having abetted the offence and could be tried in the Court within whose jurisdiction the principal offence took place: 22 *I. C.* 730 and *A. I. R.* 1925 *Oudh* 328, *Rel. on.* [P 56 C 2]

M. Waliullah—for the Crown.

Sen, J. — Nanhua Ahyria, Mt Sukhao, Nanhua Dhimar, Bihu Chamar and Kesri Chamar were committed to the Court of Sessions of Moradabad by a Magistrate of the 1st Class of the same district to take their trial on charges, in the alternative, under Ss. 366 and 366-A, I. P. C.

Mt. Ram Kali is a maiden daughter of one Ganga Ram Ahyria. She is about 12 years old. She lived with her parents at Moradabad. Mt. Sukhao is the sister of Ganga Ram Ahyria, and is the wife of Nanhua Ahyria. Nanhua and his wife Mt. Sukhao are residents of Hapur which is within the jurisdiction of the Sessions Judge of Meerut.

On 14th August 1919, Nanhua Ahyria and his wife came to Moradabad and induced Mt. Ram Kali to leave Moradabad in their company with intent that Mt. Ram Kali may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person. They took her to Hapur where they were joined by Nanhua Dhimar and Bihu Chamar. Nanhua Ahyria, Mt. Sukhao, Nanhua. Dhimar and Bihu Chamar took Mt. Ram Kali with them to Hafizabad, a village in the district of Gujranwala in the Punjab. Here they were joined by Kesri Chamar who is a resident of Hapur. From Hafizabad all the five above mentioned persons went to Rampur which is another village in Gujranwala District and is 14 miles from Hafizabad. Here they sold the girl to Barkat Ram, a Rajput Jat of Rampur for Rs. 300 representing to him that Mt. Ram Kali was a woman of the same caste as Barkat Ram. About six weeks later, the girl was recovered from the possession of Barkat Ram.

The learned Sessions Judge of Moradabad has tried Nanhu Ahyria and Mt. Sukhao and convicted them under S. 366-A, I. P. C. He has referred the cases of Nanhua Dhimar, Bihu Chamar and Kesri Chamar to this Court with the recommendation that the commitment of these persons be quashed as no offence was committed by these persons within the jurisdiction of the Court of session at Moradabad.

This reference came up before Dalal, J. He fully considered the questions involved in the reference and gave his opinion thereon. He however referred this matter to a Bench of two Judges.

We are in substantial accord with the views of Dalal, J.

It is to be remembered that the offence of kidnapping from lawful guardianship is not a continuing offence. As soon as the minor is actually removed out of the custody of his or her guardian the offence is completed. The offence is not a continuing one as long as the minor is kept out of guardianship. But unlike kidnapping abduction is a continuing offence, and has been held to be a continuing offence in *re Ganga Dei* v. *Emperor* (1) which has been followed in *Sunder Singh* v.

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(1) [1914] 15 Cr. L. J. 154=22 I. C. 730.

Emperor (2). It has been held in these cases that a girl is being abducted not only when she is first taken from any place put also when she is removed from one place to another.

There may be abduction without the removal of a person from lawful guardianship. As has been pointed out by Dalal, J. there is a close resemblance in the texts of Ss. 362 and 366-A. We are of opinion that some of the salient ingredients of the two offences are common and that we must hold that an offence under S. 366-A is a continuing offence.

Section 182, Criminal P C. inter alia provides that where an offence is a continuing one and continues to be committed in more local areas than one . . . . . it may be enquired into or tried by a Court having jurisdiction over any of such local areas.

The learned Sessions Judge has found that Nanhua Ahyria and Mt. Sukhao had committed an offence under S. 366-A, I. P. C. within his jurisdiction. The offence being a continuing one, the other persons, who joined Nanhua Ahyria and Mr. Sukhao at Hapur and Hafizabad and participated in the sale of the girl to Barkat Ram, are equally guilty with them. Nanhua Ahyria and his wife had prevailed upon a minor girl to leave Moradabad and go with them to Hapur. On reaching Hapur, the inducement which had commenced at Moradabad did not cease but continued to exist. The same inducement continued at Hafizabad and Rampur. If Nanhua Dhimar, Bihu Chamar and Kesri Chamar were parties to the inducement and had prevailed upon the minor girl to go from one place to another with intent that she may he, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person, all the ingredients necessary for the offence under S. 366-A are present in their case. We are therefore, of opinion that although the part played by these three persons was outside the jurisdiction of the Moradabad Sessions Court, the learned Sessions Judge of Moradabad had jurisdiction to try the case against these persons.

There is yet another aspect of the case, which may be considered. The three accused persons either intentionally aided or engaged with Nanhua Ahyria and his wife in the commission of an offence under S. 366-A. They are clearly guilty of abetment. Illustration (a) to S. 180, Criminal P. C. is instructive:

> "A charge of abetment may be enquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed or by the Court within the local limits of whose jurisdiction the offence abetted was committed."

The offence abetted was one under S. 366-A, I. P. C. which was committed by Nanhua Ahyria and his wife within the jurisdiction of the Moradabad Court. Assuming that the abetment took place either at Hapur, Hafizabad or Rampur, the charge of abetment against Nanhua Dhimar Bihu Chamar and Kesri Chamar could be enquired into and tried by the Moradabad Court within the local limits of whose jurisdiction the principal offence was committed. The learned Sessions Judge may well be justified, and if he so chooses, in charging these three persons in the alternative for an offence of abetment, that is to say under S. 366-A coupled with S. 109, I. P. C.

In the absence of more detailed particulars it is difficult to say whether any charge could be brought against all or any of the three accused persons under S. 368, I. P. C. The venue for trial of a case under S. 368, I. P. C. is evidently the Court within whose jurisdiction the kidnapped or abducted person has been wrongfully concealed or confined. If Mt. Ram Kali was wrongfully concealed or confined at Hapur, Hafizabad or Rampur, the Court of Session at Moradabad would have no jurisdiction to try the accused nnder S. 368, I. P. C. The offence under S. 372, I. P. C. is distinct from that under S. 366-A, I. P. C. All the five accused persons who were committed to the Court of Session could be tried for an offence under S. 372, I. P. C. This offence however was committed at Rampur and was beyond the jurisdiction of either the Court of Session or that of a Magistrate of the First Class of the Moradabad district.

In view of what we have said above, the learned Sessions Judge of Moradabad has jurisdiction to try the case against Nanhua Dhimar, Bihu Chamar and Kesri Chamar under Ss. 366-A/109 or 366-A, I.P.C. and the trial therefore must proceed.

R.M./R.K. *Order accordingly.*

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(2) A. I. R. 1925 Oudh 328=86 I. C. 72=26 Cr. L. J. 695.

A. I. R. 1931 Allahabad 57(1)

NIAMATULLAH, J.

Thakari Mallah—Defendant—Applicant.

v.

Ram Tahal Tewari—Plaintiff—Opposite Party.

Civil Revn. No. 269 of 1929, Decided on 10th December 1929, from order of Sm. C. C. Judge, Gorakhpur, D/- 8th April 1929.

Stamp Act, S. 12—Cancellation of adhesive stamp by signature of executant made by scribe under his direction and on his behalf is sufficient compliance.

The signature of an illiterate executant of a pro-note made by a scribe on an adhesive stamp under the direction of and on behalf of the executant and in token of cancellation thereof is sufficient compliance with law as to cancellation. [P 57 C 2]

S. D. Sinha—for Applicant.

Shiva Prasad Sinha - for Opposite Party.

Judgment.—This is a revision arising out of a Small Cause Court suit brought by the plaintiff-respondent on foot of a pro-note. In defence the execution of the pro-note and receipt of consideration were denied. Circumstances under which the defendant signed a blank paper were alleged. The learned Judge of the Court below overruled the defence and held the execution of the pro-note and the passing of consideration duly proved. Accordingly he decreed the suit.

The present revision has been filed mainly on the ground that the adhesive stamp on the pro-note in suit was not concelled in the manner required by S. 12, Stamp Act, and for that reason the pro-note could not be enforced being inadmissible in evidence. This objection was not taken before the trial Court. On the merits I do not think it has any substance. The adhesive stamp on the pronote in question bears the signature of the executant in the handwriting of the scribe of the pro-note. The executant is illiterate. S. 12, Stamp Act, provides that: "whoever executes any instrument on any paper bearing an adhesive stamp shall at the time of the execution, unless such stamp has already been cancelled in the manner aforesaid, cancel the same so that it cannot be used again".

Sub-S. 3 of the same section refers to one of the modes of cancelling an adhesive stamp, i. e,. by signing across the stamp. The learned advocate for the applicant contends that if an executant is illiterate and cannot therefore sign across the stamp he must put his thumb-mark thereon, and in the absence of a thumb-mark or anything done by himself the stamp cannot be deemed to have been duly cancelled. I am unable to accept this contention. An illiterate person can direct the scribe of the pro-note or anyone else to sign across the adhesive stamp on his own behalf. Such signature will be quite as good as his own signature for the purpose of cancellation. If the question had been raised before the trial Court perhaps other facts would have been brought to light to show that the adhesive stamp in this case was written on under circumstances which make it a valid cancellation. Even assuming the facts as they appear on the face of the document, I think that the signature of the executant made by the scribe on the adhesive stamp under his direction in that behalf and in token of cancellation thereof is sufficient compliance with law. For these reasons this revision is dismissed with costs.

V.B./R.K. *Revision dismissed.*

A. I. R. 1931 Allahabad 57(2)

KING, J.

Matllob Hasan and *others*—Petitioners.

v.

Mt. Kalawati and *others* — Opposite Parties.

Civil Appln. No. 204 of 1930, Decided on 29th July 1930.

(a) U P. Land Revenue Act (3 of 1901), S. 111—Partition under S 111 (1) (b)—Question of proprietary title referred to civil Court—Appeal against civil Court decision pending — Partition proceedings continued under S. 111 (2) by revenue Court cannot be stayed by High Court under Civil P. C., O. 41, R. 5.

Partition proceedings were initiated under S. 111 (1) (b), Land Revenue Act (1901). Assistant Collector referred the question of proprietary title arising therein to civil Court for determination. Civil Court declared title in favour of applicant for partition. Partition proceedings were continued under S. 111 (2). Appeal against civil Court decision was pending. *Held* : that Civil P. C., O. 41, R. 5 cannot be construed so as to empower High Court to stay proceedings in revenue Court which is not subordinate to High Court. [P 58 C 2]

(b) U. P. Land Revenue Act (3 of 1901), S. 112—Stay of partition proceedings.

High Court can stay partition proceedings in revenue Court if terms of S. 112 are applicable. [P 58 C 2]

Iqbal Ahmad, Mukhtar Ahmad and *Mansur Alam* - for Applicants.

Shabd Saran—for Opposite Parties.

Judgment.—This is an application for stay of further proceedings in a partition case pending before an Assistant Collector of Moradabad. In this case it appears that an objection was made involving a question of proprietary title, and the Court took action under S. 111 (1) (b), Land Revenue Act of 1901, and required the applicant for partition to institute within three months a suit in the civil Court for the determination of such question. The applicant for partition accordingly did institute a suit in the civil Court and got a declaration of title in her favour. An appeal from this civil Court decree has been filed and is now pending before the High Court. Meanwhile the Assistant Collector is continuing the partition proceedings in accordance with S. 111 (2), that is to say, he is dealing with the case in accordance with the decision of the civil Court, i. e., the civil Court of first instance. The appellant before this Court prays that the partition proceedings in the revenue Court may be stayed, pending decision of the appeal. It appears to me that the High Court has no jurisdiction to stay such proceedings of the revenue Court. If the Assistant Collector, instead of referring the question of proprietary title to the civil Court for determination, had elected to enquire into the merits of the objection himself as he was authorized to do under S. 111 (1) (c) and had passed a decree, then under S. 112 the High Court could have issued a precept to the Collector desiring him to stay partition pending the decision of an appeal against the decree. It is argued that if the High Court can stay the partition pending an appeal against the Assistant Collector's decision it would be very anomalous if the High Court cannot stay the partition pending an appeal against the civil Court's decision. I grant that the position does seem anomalous. I do not know why the legislature has thought fit to empower the High Court to stay the partition in the former case only, and not in the latter. The reasons for staying partition might be equally cogent in either case.

In the case of *Ram Charitra* v. *Mohan Dei* (1) Ryves, J., expressed the view that the revenue Court was wrong in completing the partition without awaiting the final decision of the civil Court. He held that the revenue authorities :

> "were clearly wrong, and that they did not act in conformity with the provisions of S. 111 (2) for the case was not dealt with in accordance with the decision of the civil Conrt as there had been no final decision of the civil Court."

I think it unnecessary to express any opinion whether the Assistant Collector is exercising a proper discretion, or is acting according to law, in proceeding with the partition case without awaiting the final decision of the civil Court, since I think that the High Court has no power to stay proceedings.

In the first place there is nothing in the Civil Procedure Code, applicable to the facts of this case. O. 41, R. 5, empowers an appellate Court to stay proceedings under a decree appealed from. As the partition proceedings are "in accordance with" the decree under appeal they might be held to be proceedings "under" that decree. But, even if this liberal interpretation is accepted, I do not think that O. 41, R. 5, can be construed so as to empower the High Court to stay the proceedings of a revenue Court, which is not subordinate to the High Court. I think it contemplates proceedings of Court subordinate to the appellate Court which passed the order.

It is further suggested that this Court could issue an injunction to the parties to the appeal restraining them from continuing the partition proceedings during the pendency of the appeal. O. 39, R. 1 has no application to the facts of this case, and it is clearly not a case in which the exercise of any "inherent powers" could be contemplated.

In the second place I think this application is expressly barred by the provisions of S. 233 (k), Land Revenue Act. This application is a "proceeding" with respect to partition of mahals, and there is nothing in S. 111 or S. 112 which confers jurisdiction upon a civil Court to take cognizance of it.

In short the High Court can stay partition proceedings in a reveune Court if the terms of S. 112 are applicable, but cannot do so any other circumstances. In the present case the terms of S. 112 are not applicable and I hold that the High Court has no jurisdiction to stay the proceedings.

I dismiss the application with costs.

G.P./R.K. *Application dismissed.*

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(1) A. I. R. 1923 All. 210=71 I. C. 488=45 All. 309.

A. I. R. 1931 Allahabad 59 (1)

MUKERJI AND BENNET, JJ.

Ram Ghulam—Applicant—Appellant.

v.

Kailash Narain — Opposite Party—Respondent.

First Appeal No. 192 of 1928, Decided on 11th December 1929, from an order of Dist. Judge, Jhansi, D/-16th July 1928.

Provincial Insolvency Act, S. 28 — Joint family property — On father's insolvency even son's share can be sold by receiver—Hindu law, joint property, father.

On the insolvency of the father, the receiver is entitled to sell not merely the share of the father that would fall to him at partition but entire property in the father's hands belonging to the whole family consisting of himself and his son : *A. I. R.* 1926 *All.* 447 and *A.I.R.* 1926 *Mad.* 994 (*F.B.*), *Foll.* and *A. I. R.* 1925 *P. C.* 18 ; *A.I.R.* 1926 *All.* 262, *Ref.* [P 59 C 2]

K.N. Laghate—for Appellant.

S. C. Das—for Respondent.

Bennet, J. — This is an appeal against an order brought by Ram Ghulam minor son of an insolvent Mulchand. It is claimed by the appellant that there was a partition between him and his father and that the property in dispute was allotted to appellant, and his mother gave some vague evidence to that effect. Two lambardars gave evidence that there had been no partition, and there is also the fact to be taken into account that the appellant is only a boy of 14 years of age, and therefore it is improbable that a partition between him and his father would have taken place. Accordingly we agree with the finding of fact of the learned District Judge that there has been no partition between the appellant and his father.

A further point was taken that on the insolvency of a Hindu father the interest of his son in the joint family property does not vest in the receiver, and that the share of the son should be discharged. This argument of the appellant was supported by the ruling in *The Allahabad Bank Limited, Bareilly* v. *Bhagwan Das Johari* (1), and reference was made to the ruling of their Lordships of the Privy Council reported in *Satnarain* v. *Bihari Lal* (2). A later ruling of this Court reported in *Om Prakash* v. *Moti Ram* (3) interprets the ruling of the Privy Council in a different sense, and the interpretation placed upon that ruling in *Om Prakash* v. *Moti Ram* (3) has been followed in a Full Bench ruling reported in *T.S. Balavenkata Seetharama Chettiar* v. *Official Receiver, Tanjore* (4). Following the ruling of *Om Prakash* v. *Moti Ram* (3) we find that the receiver is entitled to sell not merely the share of the father that would fall on him at partition but the entire property in the father's hands belonging to the whole family consisting of himself and his son. Accordingly we dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

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(1) A. I. R. 1926 All. 262 = 92 I. C. 309 = 48 All. 343.

(2) A. I. R. 1925 P.C. 18 = 84 I. C. 883 = 52 I. A. 22=6 Lah. 1 (P.C.).

(3) A. I R. 1926 All. 447 = 94 I. C. 175 = 48 All. 400.

(4) A. I. R. 1926 Mad. 994=97 I. C. 825 = 49 Mad. 849 (F.B.).

A. I. R. 1931 Allahabad 59 (2)

SEN AND NIAMATULLAH, JJ.

Bank of Upper India, Ltd. — Defendant—Appellant.

v.

Arif Husain— Plaintiff—Respondent.

Second Appeal No. 1205 of 1927, Decided on 21st March 1930, from decree of Sub-Judge, Meerut.

(a) Part Performance — Doctrine cannot create or annul a title.

The doctrine of part performance cannot create or annul a title. Where there is a legal defect in an agreement between the parties by reason of its not being registered but the parties have acted on the terms of the agreement and in arrangement of their rights in accordance with the said terms, equity steps in. In such cases equity wiil support transaction clothed imperfectly in those legal forms to which finality attaches after the bargain had been acted upon. [P 61 C 2 ; P 62 C 1]

Where the statute makes it imperative that certain conditions must be fulfilled the non-fulfilment of these conditions cannot be supplied by invoking the doctrine of part performance : *A. I. R.* 1914 *P. C.* 27 ; *A. I. R.* 1928 *All.* 641 (*F. B.*) and *A. I. R.* 1928 *P. C.* 273, *Ref.* [P 62 C 1]

(b) Limitation Act, Art. 60—Applicability.

Article 60, does not apply to a suit for recovery of money deposited under an agreement that it shall be payable at a specified time. [P 62 C 2]

Ram Nama Prasad— for Appellant.

M. Waliullah—for Respondent.

Sen, J.—Syed Zafar Husain made a fixed deposit of Rs. 800 in the Bank of Upper India Limited at Meerut on 1st March 1910. The deposit was for a period of three months only and the stipulated rate of interest was 3 per cent per annum.

The fixed deposit receipt which has been exhibited in this case as No. 4 is worded as follows:

"Received from Syed Zaffar Hussain village Dholri, District Meerut, the sum of Rs. 800 only as a deposit subject to three months' notice of withdrawal bearing interest at 3 per cent per annum from 24th February 1910 payable on 1st January and 1st July of each year."

Syed Zaffar Hussain died on 10th June 1910. He left a widow Mt. Husain Bandi, a daughter Amtul Zainub, aged about 4 years and a son Arif Husain aged about 2 years. These were his heirs under the Mahomedan law and were entitled to the amount of the deposit together with interest.

It ought to be noticed that Syed Zaffar Husain died before the fixed deposit had matured for payment.

Mt. Husain Bandi the widow had left this country and lived in Iraq from 1913 to 1917. She died in 1917, the exact date of her death cannot be ascertained from the record. Mt. Amtul Zainub died on 14th October 1921.

The present suit was commenced by Arif Husain for recovery of the amount of the fixed deposit on 18th March 1926. Plaintiff was a minor at the date of the suit and the suit was instituted by one Syed Mohammad Raza as the next friend of the plaintiff.

The plaintiff alleged that at the date of the suit he was the only person who was entitled to the money his mother and his sister having predeceased him.

The Bank of Upper India, Limited closed its doors and went into voluntary liquidation on 8th October 1914. A meeting of the creditors was held which drew up a composition scheme This scheme was sanctioned by this Court under S. 153, Companies Act on 2nd June 1915. In pursuance of this scheme an option was given to the creditors either to accept fully paid up preference shares in the bank or to take debentures of the bank carrying interest at the rate of 4½ per cent per annum according to the face value of their deposits. The High Court directed that this option was to be exercised on or before 5th January 1917. If the depositors did not exercise the option on or before that date they were to forfeit their rights to preference shares in the bank and were entitled to debentures only.

No notice of these proceedings were given to the heirs of Syed Zaffar Husain. But the composition scheme appears to have been sanctioned by this Court in due process of law under S. 153, Companies Act. It was therefore binding upon the heirs of Syed Zaffar Husain. Not having exercised the option to accept preference shares on or before 5th January 1917 they became entitled to hold debentures from the bank carrying interest at the rate of 4½ per cent per annum according to the face value of their deposits.

The debenture-holders appear to have appointed three trustees to act for and look after their interests. A formal deed of trust was executed on 18th December 1915. The effect of this document was that a floating charge was created in favour of the debenture-holders on all the assets belonging to the Bank of Upper India. We do not know what the powers of the trustees were under this deed of trust.

On or about 31st January 1917 a meeting of the debenture-holders was held and resolutions were passed modifying the terms of the original deed of trust dated 18th December 1915. The original trust deed was modified by a supplementary trust deed which was executed on 18th June 1917 and which was sanctioned by the High Court. The terms of the supplementary deed were rather drastic. The object was to transfer the liability from the Bank of Upper India Limited to two other bodies, namely, the Trust of India, Limited and the Alliance Bank of Simla, Limited. The supplementary trust deed provided that each debenture holder of Rs. 100 was to get Rs. 40 per cent cumulative preference shares of the Trust of India Limited and Rs. 60 per cent fixed deposit receipt in the Alliance Bank of Simla, Ltd.

The heirs of Syed Zaffar Husain do not appear to have been represented at the general meeting in which the terms of the supplementary deed were mooted and ultimately adopted. It does not appear that the trustees of the debenture-holders were within their authority in assenting to a modification of the original deed of trust and to a substitution of the liability of the Bank of Upper India Ltd. by that of the Trust of India Ltd., and the Alliance Bank of Simla, Ltd. No debentures appear to have been issued to the heirs of Syed Zaffar Husain as ought to have been issued after 5th January 1917. The plaintiff contends that his right against the Bank of Upper India

Ltd. remains unaltered by the supplementary trust deed which is not binding upon him.

The tactics adopted by the Bank of Upper India Ltd., were dilatory and obstructive. Upon the plaintiff claiming the money, the Bank insisted upon the plaintiff producing a succession certificate. A succession certificate was produced in due course. The Bank then repudiated the plaintiff's claim.

Upon the original fixed deposit receipt being produced in support of the plaintiff's claim, the defendant Bank refused to admit its genuineness and put the plaintiff to its proof.

A written statement attested by Mr. H. Hunter, liquidator, has been produced in this case which consists of 26 paragraphs. Various pleas were taken in defence but it is necessary to notice only two of the pleas which are material for the purpose of this appeal. The defendant contended that the liability of the Bank having been transferred to the Trust of India Ltd. and the Alliance Bank of Simla Ltd. there was no subsisting cause of action against the defendant. It was also contended that the plaintiff's claim was time barred.

These contentions were overruled by the trial Court which substantially decreed the plaintiff's claim. The plaintiff had claimed a sum of Rs. 1,373-11-0. The trial Court decreed the claim for Rs. 1,333-11-0. On appeal by the Bank, the lower appellate Court has affirmed the decision.

Holders of fixed deposits who did not surrender their receipts were treated as unconverted depositors.

Ten lakhs of rupees were set apart in the Upper India Bank accounts to meet the claims of the unconverted depositors.

Syed Zaffar Husain's deposit formed part of this sum of ten lakhs of rupees.

Syed Zaffar Husain was not represented at the meeting of the debenture-holders dated 31st January 1917. It does not appear that the trustees of the debenture-holders had any authority to represent the heirs of Syed Zaffar Husain or to negotiate about their securities with a third party. The assets of the Bank of Upper India do not appear to have been transferred in due course of law to either the Trust of India or the Alliance Bank Ltd. A deed of release bearing an eight annas stamp appears to have been executed with the set design of conveying the assets of the Bank of Upper India to the Trust of India Ltd. This document was unregistered and therefore could not effectively operate to transfer the assets to the Trust of India Ltd. We are clearly of opinion that the plaintiff's cause of action as a holder of debentures in pursuance of the composition scheme sanctioned by the High Court on 2nd June 1915 under S. 153, Companies Act, remains unimpaired. The original rights of the parties under the fixed deposit dated 1st March 1910, became replaced by the rights which came into existence under the aforesaid order of the High Court. The plaintiff and the other coheirs became therefore the debenture-holders of the defendant company. They cauld not lose those rights except either by a fresh contract between the parties or by operation of law. The plaintiff or his other coheirs did not surrender their rights to a third party under a fresh contract. Indeed, there was no novation of contract. The original rights as secured by the order of the High Court dated 2nd June 1915 did not cease to exist by operation of law. The so-called deed of release was a mere waste paper. The supplementary deed of trust was clearly in the teeth of S. 212, Companies Act, which provides that:

> "Any arrangement entered into between a company about to be, or in the course of being wound up voluntarily, and its creditors shall, subject to any right of appeal under this section be bindng on the company if sanctioned by an extraordinary resolution and on the creditors, if acceded to by 3/4ths in number and value of the creditors."

The resolution mooted in the meeting of the trustees dated 31st January 1917 was not acceded to by 3/4ths in number and value of the creditors. This was therefore not an arrangement which could be binding upon the creditors. It therefore could not take away the right of the plaintiff and his other coheirs. Reliance has been placed upon the doctrine of part performance as an answer to the objection that the directions of the statute as contained in S. 212 have not been complied with. The doctrine of part performance cannot create or annul a title. Where there is a legal defect in an agreement between the parties by reason of its not being registered but the parties have acted on the terms of the agreement and in arrangement of their rights in accordance with the said terms equity steps in. In such cases equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon: *Muhammad Musa* v. *Aghore Kumar Gangoli* (1). Where the statute makes it imperative that certain conditions must be fulfilled, the non-fulfilment of these conditions cannot be supplied by invoking the doctrine of part performance.

The assets of the Bank .of Upper India Ltd., consisted of moveable and immoveable property of the value of more than Rs. 100. There could be no transfer or release in favour of the Trust of India Ltd., or the Alliance Bank of Simla, Ltd. without an instrument in writing duly registered. It has been held by a Full Bench of this Court in *Ram Gopal* v. *Tulsi Ram* (2), that the doctrince of part performance cannot override the positive rules of law embodied in the Transfer of Property Act. This principle does not appear to have been kept in view in *re Hunter* v. *Damodar* (3). The decision of one of the Judges in that case must be taken to have been overruled by the Full Bench decision in *Ram Gopal's* case (2); and also by a recent pronouncement of the Privy Council in *John H. Arseculeratre* v. *B. M. Perera*, *A. I. R.* 1928 *P.C.* 273 at *p.* 275, it has been held by their Lordships of the Judicial Committee that the doctrine of part performance has no application when non-observance of a statutory provision makes the transaction ineffective. We are clearly of opinion that the plaintiff has a subsisting cause of action against the defendant-appellant.

Syed Zaffar Husain died before the fixed deposit became mature for payment. Of his heirs only one, namely, Mt. Husain Bandi the widow, was entitled to recover a share of the deposit because she was a major. She was away from the country when the Bank of Upper India Ltd. went into liquidation and she died in a foreign land. Mt. Amtul Zainub died a minor. Plaintiff was a minor at the death of his father and continued to be a minor at the date of the present suit.

The lower appellate Court has relied upon Art. 60, Lim. Act, and held that the suit was within limitation as being within three years from the time when the demand was made by the plaintiff for his money. The demand was made in 1925. Art. 60, Lim. Act prescribes a period of three years from the date when he demand is made in a suit:

> " for money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable."

The money payable under the fixed deposit was not subject to an agreement that it was payable on demand. It was not money of a customer in the hands of the banker " so payable," that is payable on demand. On the other hand, it was money payable by the Bank at a specified time, namely, upon the expiry of three months from the date of the deposit. Art. 60, Lim. Act, is therefore not applicable to a suit of this description. The plaintiff's claim however is saved from the operation of limitation by a variety of reasons. The cause of action accrued to the plaintiff during his minority and the disability has not ceased. Under the composition scheme sanctioned by the High Court ten years' time was allowed for the debentures to mature for payment. The period of debentures expired on 1st April 1925. The suit was instituted on 18th March 1926. It is clearly within time. This appeal is without force and is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 62

SEN AND NIAMATULLAH, JJ.

Nathan Lal and *others* — Plaintiffs — Appellants.

v.

Durga Das—Defendant — Respondent.

Second Appeal No. 2199 of 1927, Decided on 16th May 1930, from decree of Dist.Judge, Bulandshahr, D/- 31st August 1927.

(a) Transfer of Property Act (1882), S. 100 —Stipulation in lease allowing lessee to deduct portion of rent as repayment of debt already borrowed by lessor from him creates charge on property leased.

In order to constitute a charge it is not necessary to employ any technical terms; where the intention of the parties concerned was to indicate in unambiguous language that a definite fund should be employed for the discharge of a particular debt or claim and there is no ambiguity either as to the amount of the debt or the amount of the claim out of which the debt has to be satisfied, the transaction amounts to a charge. Under S. 100 a charge is no more than a security upon property, but it is not to be confounded with a mortgage, because there is no transfer of an interest in immovable property. [P 54 C 9]

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(1) A. I. R. 1914 P. C. 27=28 I. C. 930=42 I. A. 1=42 Cal. 801 (P.C.).

(2) A. I. R. 1928 All. 641 (F.B.).

(3) A. I. R. 1924 All. 772=81 I. C. 508=46 All. 759.

A stipulation therefore in a registered lease to the effect that the lessee should deduct from the annual rent certain portion as repayment of a sum of money already borrowed by the lessor from him, creates a charge on the property leased and is not merely a personal covenant. If therefore subsequent to the execution of the lease, a creditor of the lessor obtains a money decree against him and at auction sale purchases the property leased out, he purchases it only subject to the charge created by the stipulation in the lease : *In Ex-parte Wills*, 2 *Cox. C. C.* 233 and *In Cradock* v. *Scottish Provident Institution*, 63 *L. J. Ch.* 15, *Rel. on.* [P 64 C 2]

(b) Transfer of Property Act (1882), S. 8—Involuntary transfers.

Section 8, does not in terms apply to involuntary transfers; but the principle .laid down therein may be extended to such transfers. [P 64 C 2]

(c) Transfer of Property Act (1882), S. 6 — Registered lease containing stipulation creating charge in favour of lessee — Property sold at auction — Auction purchaser must be deemed to have purchased with constructive notice of charge.

Where a registered instrument of lease contains a stiputation whereby a charge is created in the property leased in favour of the lessee, and subsequently the property leased is sold in execution of a money decree, the auction purchaser must be deemed to have purchased the property with constructive notice of the existence of the charge. [P 64 C 2]

(d) Agra Tenancy Act (1926), S. 193 (c)—Set-off.

A plea of payment is not a plea of set off. [P 65 C 1]

K. N. Katju—for Appellants.

Panna Lal and *S. N. Gupta*—for Respondent.

Sen, J. — Mt. Janki Kuer and Nand Kishore were the proprietors of "khata khawat" No. 1 of mahal Baqimanda, Mauza Muhiuddinpur Buklana, in equal moieties. On 8th August 1923, they executed a lease in favour of L. Durga Das for a term of five years, i. e., from 1331 F. to 1335 F. The rent agreed to be paid by the lessee to the lessors was Rs. 4,000. It was stipulated that out of the said sum of Rs.4,000 the lessee was to deposit in the Government Treasury Rs. 1,969 for the Government revenue every year, and the balance of Rs. 2,031 was payable to Nand Kishore and Mt. Janki Kuar in equal shares. On or about the time when the lease was executed Nand Kishore borrowed Rs. 2,500 from the lessee, but left that amount with him for payment to one Mangal Sen, in whose favour he had executed a promissory note for Rs. 2,100.

Under the terms of the lease Rs. 1,015-8-0 was payable to Mt. Janki Kuar. As regards his share of the rent, Nand Kishore entered into the following arrangement with the lessee. It was agreed upon that out of the rent due to Nand Kishore, i. e., Rs. 1,015-8-0 annually, the lessee would be entitled to deduct Rs. 500 per year with interest on the amount of Rs. 2,500 advanced by him to Nand Kishore at the rate of one rupee per cent per mensem. One Niadar Mal held a simple money decree against Nand Kishore, in execution of which he got the interest of Nand Kishore in the leased property attached; and eventually the said property was purchased by the plaintiffs on 21st May 1924. The present suit was instituted under S. 102, Agra Tenancy Act, for recovery of Rs. 1,100 principal and interest for 1332 F, being the share of rent due to Nand Kishore for that year. They claimed Rs. 1,015-8-0 principal and Rs. 84-8-0 interest.

The suit was contested on the ground that the plaintiffs, as the transferees of the interest of Nand Kishore, were bound by the terms of the lease and that they were not entitled to recover the whole of Nand Kishore's share of rent for 1332 F. but only so much of it as was payable to him after the deduction stipulated for in the lease. In brief, the defendant contended that, according to the terms of the lease, the lessee was entitled to deduct Rs. 500 together with Rs. 240, being interest on Rs. 2,000, which was then due out of the sum advanced to the lessor at the time of the lease.

The Court of first instance overruled this contention and decreed the plaintiffs' claim in its entirety. The judgment proceeds upon the ground that the stipulation referred to above was of the nature and character of a personal covenant and did not constitute a charge on the property leased. The stipulation in question therefore was personally enforceable against Nand Kishore but could not be enforced against his transferees. The lower appellate Court has taken a different view. It held that the plaintiffs, as the transferees of Nand Kishore, must be taken to take the property purchased by them subject to the conditions which bound the property at the time of the auction sale.

The principle question which arises in the case is as to whether a charge has been created upon the property by the lease, dated 8th August 1923. The answer to this question depends upon the construction of the lease. The covenant contained therein that the lessee should appropriate to himself a portion of the rent payable by him towards the satisfaction of a debt due to him is a material term in the lease and, as such, is as much binding on the successors-in-interest of the lessor as upon the lessor himself. It is clear it was not open to the lessor to sue the lessee for recovery of the entire rent for 1332 F. in defiance of this provision. It is equally clear that no suit for ejectment was maintainable against the lessee for non-payment of that sum. A charge does not involve the transfer of the interest in the property subject thereto and arises from the circumstance that certain property, moveable or immovable, or any interest in such property, is indicated with certainty as the fund out of which a certain claim is to be met or satisfied, the fund so indicated being the security for the claim. In *Ex-parte Wills* (1), the facts were these: *A*, having borrowed money of *B*, by way of security made a lease of certain lands to *C* and assigned rent received on that lease to *B*, but did not convey to him any further interest in the land. It was held that the transaction amounted to a mortgage. The principle enunciated herein is applicable to the facts of this case, the position of a charge holder being analogous to that of a simple mortgagee. In *Cradock* v. *Scottish Provident Institution* (2), it was held by Romer, J., that

> "an equitable charge upon land may be created by an instrument in writing which showed the intention of the parties that a security should be created, although it contained no general words of charge."

The facts which gave rise to this decision are instructive:

> "A father, upon the marriage of his daughter, executed a deed whereby he covenanted to pay his daughter an annuity, and for the purpose of securing annuity appointed a receiver of the rents and profits of lands to which he had an estate for life with a direction to apply the moneys received as specified in the deed."

It was held that the deed created a charge upon the father's life estate in the lands.

In order to constitute a charge it is not necessary to employ any technical terms; where the intention of the parties concerned was to indicate in unambiguous language that a definite fund should be employed for the discharge of a particular debt or claim and there is no ambiguity either as to the amount of the debt or the amount of the claim out of which the debt has to be satisfied, the transaction amounts to a charge. Uuder S. 100, T. P. Act, a charge is no more than a security upon property; but it is not to be confounded with a mortgage, because there is no transfer of an interest in immovable property.

It has been argued by Dr. Katju that the plaintiffs-appellants are the transferees of immovable property under the auction purchase, and having regard to the provisions of S. 8, T. P. Act, they must be taken to have acquired the entire interest in the immovable property in utter disregard of any charge that might have been created upon the property. S. 8, T. P. Act, does not in terms apply to involuntary transfers; but the principle laid down therein may be extended to such transfers. The language of S. 8 however does not support his contention and is, in fact, against it, because all that it provides is that a transfer of property passes to the transferee all the interests which the transferor is then capable of transferring. If, then, on the date of auction purchase, the property was subject to a charge or burden, the transferee is not clothed with a higher interest in the property than what the transferor was capable of passing.

It has further been contended that, assuming that a charge was created upon the property under the lease dated 8th August 1923, the charge in question could not be enforced against him, because he was a transferee without notice. This plea does not arise from the pleadings. Upon a true construction of the lease, a charge was created in favour of the lessee. The said charge being contained in a registered instrument, the auction-purchasers must be deemed to have purchased the property with constructive notice of the existence of the charge. We are therefore of opinion that the contention put forward is without any force, being opposed to principle and unsupported by authority.

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(1) [1790] 2 Cox. C. C. 233.

(2) [1893] 63 L. J. Ch. 15.

It is next contended that the plea put forward by the defendant vendee upon the terms of the lease as regards the payment of the debt due to him amounts to a plea of set-off and, as such, it offends against S. 193, Cl. C, Agra Tenancy Act. The argument proceeds on the assumption that the defendant pleaded a set-off in this case. We are clearly of opinion that no plea of set-off was put forward or was intended to be advanced. All that the defendant contended was that part of the claim had already been satisfied by reason of the stipulation contained in the lease. A plea of payment is not a plea of set-off, and the two matters are not to be confounded. These were the only points argued in this appeal. They are without force. We dismiss this appeal with costs, which will include counsel's fees in this Court on the higher scale.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1931 Allahabad 65

MUKERJI AND BENNET, JJ.

Ram Narain-Kishun Dayal—Plaintiffs—Appellants.

v.

Ram Prasad and *others*—Defendants—Respondents.

First Appeal No. 324 of 1926, Decided on 9th May 1930, from decree of First Sub-Judge, Cawnpore, D/- 10th March 1926.

*** (a) Civil P. C. (1908), O. 41, R. 5 (3) — Security bond executed in favour of presiding officer of Court—Title as well as name of presiding judge omitted from bond — But reference made in bond to Court—Bond held to be valid and assignable by Court.**

The common form of a security bond is a bond in favour of the presiding officer of the Court either expressed by name with qualification that he is the presiding officer of that Court or expressed as Judge of that district. [P 67 C 2]

Pending revision in the High Court a security bond was executed and execution stayed. Although form No. 2, App. G, Civil P. C., directs title to be put as the heading of the bond still the title as well as the name of the presiding officer of the Court were omitted. But in the body of the bond, there was reference to the Court of the Judge in whose favour the bond was executed.

Held: that the mere omission of the title and the name of the presiding officer of the Court would not make the bond invalid. The bond therefore was valid and could be assigned by the Court: *A. I. R.* 1919 *P. C.* 55, *Expl.* and *Dist.* [P 67 C 1]

*** (b) Civil P. C. (1908), S. 11 — Hypothecation bond executed to stay execution can be enforced by suit only — Proceeding to enforce such bond will not be barred by any decision in previous execution proceedings — Civil P.C., O. 41, R. 5.**

Liability on a hypothecation bond executed to stay execution proceedings can be enforced, not in the execution proceedings but only by a separate suit. Hence any decision given in the execution proceedings cannot operate as res judicata against a proceeding started on the basis of the hypothecation bond: *A. I. R.* 1925 *All.* 117, *Dist.* [P 85 C 2]

(c) Civil P. C. (1908), O. 30, R. 4—Suit brought against firm of two partners—One partner dying after submitting written statement but before suit was decreed—His legal representative not brought on record—Decree passed is not executable against his personal estate.

Where a suit is brought against a firm of two partners and one of them dies after having submitted his written statement but before the suit is decreed and his legal representatives are not brought on the record, the decree passed will not bind the personal estate of the deceased partner but is capable of execution only against the assets of the partnership, and not against the private estate of the deceased partner: *A. I. R.* 1927 *Bom.* 581, *Dist*; *A.I.R.* 1923 *Bom.* 66; *A. I. R.* 1924 *Bom.* 155 and *A. I. R.* 1929 *Mad.* 733 *F.B.*), *Ref.* [P 70 C 1]

B. E. O'Conor and *Ram Nama Prasad*—for Appellants.

K. N. Katju, *U. S. Bajpai* and *G. S. Pathak*—for Respondents.

Bennet, J.—These are two connected appeals brought by the plaintiff firm of Ram Narain-Kishun Dayal of Cawnpore against decrees of the learned First Subordinate Judge of Cawpore dismissing their two suits. The circumstances which gave rise to this litigation are as follows: There was a firm in Cawnpore by the name of Sitaram Nathmal and the plaintiff firm had dealings with it by supplying cloth, and the plaintiff firm brought a suit No. 280 of 1919 against the firm of Sitaram Nathmal. At that time there were two partners in that firm, Nathmal and Balmakund, and on 23rd June 1919 a written statement was filed on behalf of the firm by Nathmal stating that he was a partner in that firm.

Subsequently, at a date not shown, the parties in that suit agreed to refer the matter to arbitration. After the agreement Nathmal died in January 1920, and it is stated in the judgment that prior to that date no proceedings had been taken in arbitration. Subsequent to that date proceedings in arbitration took place, and an award was filed on 11th December 1920, and on that award a decree was framed against the firm Sitaram Nathmal. The award granted a sum to the plaintiffs of Rs. 68,136-1-0. By this dearee of 23rd December 1920, the decretal amount was to be paid in two instalments: one instalment at once and the other instalment within two months from the date of the decree. There was a revision proceeding in the High Court at the instance of the defendant firm. Execution applications were taken out in regard to each instalment, and execution was stayed on execution of two security bonds the one dated 12th January 1921 and the other dated 10th March 1921. These bonds were executed by two of the sons of Nathmal, Ram Prasad, on behalf of himself and his minor brother Chhotey Lal, and Lachhi Ram. These bonds hypothecated in the case of the bond dated 12th January 1921, a house 25/11, and in the case of the bond dated 10th March 1921, a house 48/107 and a grove. The application in revision was dismissed. The decree-holders then applied for execution of their decree in respect of both instalments on 23rd July 1921 : see p. 75 of the paper book. That application stated that summons should be served on Balmakund, but an objection was filed on behalf of Ram Prasad and Lachmi Narain the two major sons of Nath mal. Their objection was disallowed by the learned Subordinate Judge on 3rd January 1922, but in that proceeding he held :

"the share of their minor brother Chhotey Lal is not liable to be sold and attached in satisfaction of the decree in question."

The present plaintiffs took this execution order in appeal to this Court, but as they did not make Chhotey Lal a party, their appeal was dismissed. Accordingly the decree-holders put up for sale the 2/3 of the property of Nathmal owned by his two adult sons Ram Prasad and Lachhi Ram and the 2/3 share in house 55/11 was sold for Rs. 15,700. This had been hypothecated for Rs. 37,402-13-6, and accordingly, in Suit No. 217/25 the plaintiffs sue for the balance of Rs. 21,702-13-6, and they asked that a decree for that amount should be passed, and if the defendants do not pay, the hypothecated property not already sold, that is one-third share of Chhotey Lal the minor son of Nathmal, should be sold. Now this one-third share of Chhotey Lal was attached by Messrs. Ganesh Das-Ram Gopal of Calcutta in execution of a simple money decree against Nathmal Parshadilal and at an auction-sale this one-third share of Chhotey Lal was purchased by Munna Lal. who is defendant 5 in Suit No. 217 of 1925, and he is the contesting respondent in this case. The circumstances in the Appeal No. 325 of 1926, are similar, and the real contesting respondents are the purchasers of the one-third share of Chhotey Lal which was sold in execution, that is defendant 5 Jitmal who purchased the grove and defendants 6 and 7 who purchased the share of the house.

The learned Subordinate Judge has dismissed the suits of the plaintiffs on various grounds. Firstly, he has held that the security bonds were not valid because they were in favour of the Court and he held that such a bond was invalid and also that it could not be assigned by the Court. Secondly he has held that the proceedings in execution on the objection of the two elder brothers in which it was held that the share of the minor brother could not be attached and sold in execution of this decree are a bar by the principle of res judicata against the plaintiffs raising the question in this suit. He further held that the properties in question were not the assets of the business.

The first question which we will discuss in these appeals is whether these security bonds are valid bonds, and whether they have been validly assigned by the Court. The learned Subordinate Judge relied on a ruling of their Lordships of the Privy Council reported in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (1). In that case there was a security bond which had been drawn up in the year 1902 previous to the Civil Procedure Code of 1908. As their Lordships remarked at that period there was no definite form in which security bonds on an application to stay execution should be framed. The bond in question did not purport to be in favour of any person, but merely stated that the applicants furnished security and declared that the hypothecated property should serve as security and be liable to the extent of a lakh of rupees. It was argued that the mortgage might be valid because the bond might be taken to be in favour of the Court. Their Lordships said :

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(1) A. I. R. 1919 P. C. 55.

> "The Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains therefore, that there is an unquestioned liability, and that the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties that the property charged be sold unless before a day named the sureties find the money."

In this case before their Lordships it is shown on p. 160 that the question was whether it was necessary that a separate suit should be brought to enforce the liability against the sureties. The finding of their Lordships was that it was not necessary that such a separate suit should be brought, and accordingly they directed that the words:

> "the property hypothecated by the instrumen of security of 16th September 1902 is liable"

should be added to the decree of the trial Court. This shows that although their Lordships criticized the the language of the security bond, they did not consider that it was a bond which was null and void. Further at p. 168 (of 42 *All.*) their Lordships remarked that the form in appendix "G" No. 3, present Civil P. C. of 1908 should obviate the difficulty arising in future, although it was not quite clear whether the form should be in favour of a party or an officer of the Court. Now in the present security bond printed at p. 63 a comparison with form No. 2, Appendix "G," Civil P. C., will show that the Code directs the title to be put as a heading of the bond. But such title is blank in the present bond. It should have apparently been addressed to the presiding officer, the Subordinate Judge of Cawnpore. In the body of the bond there is a reference to the Court of the Subordinate Judge of Cawnpore and it states:

> "We, the executants therefore stand as sureties of our own accord and do hereby hold ourselves and our heirs and representatives liable to the said Court . . . . . . When called upon to do so . . . . . We hereby hypothecate house number so and so."

We consider that the mere omission of the title from this document and the name of the presiding officer does not make it an invalid document, and that we should presume that the formality prescribed by the form exists. As noted by their Lordships of the Privy Council the obligee would be an officer of the Court and not the Court itself. There is statutory provision for such security bonds in favour of the presiding officers of the Courts in India. Thus, in S. 34 (a), Guardians and Wards Act, it is provided that a guardian should give a security bond to the Judge of the Court, and the form for this security bond is contained in the General Rules (Civil) of 1926 for civil Courts subordinate to the High Court of Judicature at Allahabad, Vol. I, where in R. 23 at p. 252 it is laid down that the form shall be that in R. 1 on p. 231. The expression used here is :

> "I, *E. F.*, do hereby engage and bind myself to the said Judge and his successors in office to stand security etc."

Another case in which a security bond is taken in favour of the presiding officer of a Court is under S. 233, Succession Act, where the form of the bond is given on p. 233 of the same General Rules. That form states :

> "We *A. B.* of . . ., *C. D.* . . ., are bound into G. H. Esq. . . . . . . the Judge of the District Court of . . . . . and to his successors in office in the sum of rupees."

These examples show that in India the common form of a security bond is a bond in favour of the presiding officer of the Court either expressed by name with the qualification that he is the presiding officer of that Court or expressed as Judge of that district. Accordingly we consider that the security bonds in question are valid documents and they were duly transferred by a registered deed of transfer by the Additional Subordinate Judge to the plaintiff firm. Accordingly we consider that under those security bonds duly transferred the plaintiffs are legally entitled to bring the present suits.

The next matter which is made a ground of appeal, is that the former proceedings in the execution department terminating in the order of the Subordinate Judge on 3rd January 1922, to the effect that the share of Chhotey Lal was not liable to be attached and sold in satisfaction of the decree in question, is not a bar to the present suits under the rule of res judicata. The decree of which execution was sought was a decree against a firm of Sitaram Nathmal, and in that firm Chhotey Lal was not a partner. There are three applications for execution on the record in none of which notice was to be served on Chhotey Lal. The application in question is printed at pp. 75 and 76 of the paper book, and the only mention of Chhotey Lal is that contained at p. 75 to the effect that the security bond was executed by his brother in his name, but in column 9 "against whom the decree is to be executed" is stated:

> "firm Sitaram Nathmal of Kahukikothi. The summons will be served on Balmakund, son of Sanehi Ram, a partner of the firm judgment-debtor."

This matter is of some importance because in para. 11 of the plaint it is incorrectly stated that the application for execution was against defendant 2 Chhotey Lal along with other persons and the learned Subordinate Judge has been mistaken on this point. When the execution proceedings were going on an objection was filed by Ram Prasad and Lachhi Ram and Chhotey Lal was not a party to that objection. This is shown by the heading at p. 81 of the order of the Subordinate Judge on the objection. An appeal was taken against the order of the Subordinate Judge of 3rd January 1922 and the decree-holders did not make Chhotey Lal a party to that appeal presumably because he had not been a party in the execution Court, but the order in appeal of this Court printed at p. 99 shows that the appeal was dismissed on the ground:

> "The decree-holders have not chosen to make Chhotey Lal a party to this appeal, and they can therefore obtain no relief against him as he is not represented in the proceedings."

Later an application for a review of this order in appeal was made, and Mukerji, J., considered that no review was necessary, and he states at p. 101:

> "In the present application for review of judgment it is said that Chhotey Lal was not a party in the Court below, and if the applicants want to proceed against Chhotey Lal, the judgment of this Court would be a bar to the trial of the question of Chhotey Lal's liability in the presence of Chhotey Lal.
>
> I do not presume to advise the applicants, but it seems to me their apprehension is baseless. All that we have said was that we were not going to decide anything against Chhotey Lal in his absence. We have given no judgment on the merits of the case. In the circumstances I do not see why, if the applicants have any remedy against Chhotey Lal, that remedy should be barred, because we refused to hear the appeal."

Under these circumstances we consider that these proceedings in execution are not a bar to the present proceedings because Chhotey Lal was not a party to the execution proceedings. Also the decree-holder was only seeking to enforce a personal liability as is clearly stated by his counsel at p. 79, whereas in the present proceedings the plaintiff is seeking to enforce the liability of the hypothecation bond of the property. An order in execution deciding a matter in issue will be res judicata in subsequent execution proceedings as was held in *Dwarka Das* v. *Muhammad Ashfaq Ullah* (2), where it was laid down that after a notice to the judgment-debtor the judgment-debtor could not raise the question again in subsequent execution proceedings. But the present suit is not an execution proceeding. It is also to be noted that O. 34, R. 14, lays down that where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. Under the principle of this rule there is reason for holding that the present proceeding to enforce the hypothecation liability on this property is correctly a suit and not an execution proceeding. Accordingly therefore the decision in the execution proceedings would not be res judicata for the present suits, because the present suits are for enforcement of a liability which it would not be possible to enforce in the execution Court.

We may also point out that the order of the Subordinate Judge was apparently passed under O. 21, R. 23 (2). The procedure in hearing objection to applications for execution must be similar to the procedure in hearing objections to attachment. O.21, R. 63, provides that a party against whom such an order is made may institute a suit to establish his right. We consider that this principle would govern the execution order in question and there would be no bar of res judicata to the present suits.

The main question on which the decrees of the learned Subordinate Judge dismissing these two suits was upheld by the learned counsel for the respondents was that because Nathmal had died during the hearing of the original suit No. 280 of 1919, by the plaintiffs and because the plaintiffs in that case had taken advantage of O. 30, R. 4, and had not joined the legal representatives of Nath Mal as parties to the suit, therefore, it was not open to the decree-holders to proceed in execution against the personal property of Nath Mal. It is admitted that O. 21, R. 50

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(2) A. I. R. 1925 All. 117=80 I. C. 722=47 All. 86.

does not make any clear provision on this point. For the appellant-plaintiff it was claimed that even though the legal representatives of the deceased partner had not been brought on the record, still the decree could be executed against his personal estate. It is to be noted that the present case is differentiated from those in various rulings which were quoted, because in the present case when a written statement was filed in the suit against the firm that written statement was filed by Nathmal, who filed it as a partner in the firm: see attestation at p. 43 of the Printed Book ("I, Nath Mal, one of the proprietors of the firm "Sitaram Nathmal" defendants do declare.") Accordingly Nathmal would come within the words "any person . . . . . . who has admitted on the pleadings that he is a partner" which are contained in O. 21, R. 50 (1) (b) as one of the persons against whom a decree passed against a firm may be executed. For the respondents it was contended that the words "any person" must be taken to mean a person who was alive at the time of execution. In the present case Nathmal had died before the award and decree and execution proceedings. It must be admitted that the provisions in O. 21, R. 50, are defective on this point. The exempting clause of R. 50 is (4):

> "save as against any property of the partnership a decree against a firm shall not release, render liable to or otherwise affect any partner therein unless he has been served with a summons to appear and answer."

It could not be contended that Nathmal would be exempted under this sub-clause, because he did appear and answer. The learned counsel for the respondents relied on the case of *Ellis* v. *Wadeson* (3). In that case the facts were that an action was brought against a firm named Wadeson and Malleson in which the partners at the time that the action was brought were Malleson and Nesbitt. After the issue of the writ, appearance thereto and statement of claim, Malleson died. The surviving partner, Nesbitt, put in a defence on his own behalf, and the plaintiffs applied to a master at chambers for leave to sign judgment in default unless the defendant Nesbitt amended his defence to a defence on behalf of the firm and the defendant Nesbitt appealed. In the Court of appeal it was held that the order was correct and that the defendant should amend his defence by making a defence on behalf of the firm. In the course of the judgment various points were considered, and at p. 718 it is laid down:

> "If the legal personal representatives of a deceased partner are not added expressly as defendants, and the action is brought against the firm in the firm's name, then judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets."

It is on this passage that the learned counsel for the respondents relies. It is true that there is in the English law no provision such as is contained in O. 30, R. 4, but it does not follow that that provision is intended to make the personal estate of a deceased partner liable if his legal reprentatives are not made parties to the suit. It is not, we consider, only open to the legal representatives to contend that a deceased person was not a partner, but it would be open to them also to make a general defence in the suit. In the present case when Nathmal died the proceedings continued against the firm and the firm was properly represented by the surviving partner Balmakund, but the personal estate of Nathmal was not represented by anyone and accordingly we consider that to make that personal estate liable it should have been represented after the death of Nathmal. There have been conflicting rulings in the Courts in India on the question of liabilities of the estate of a deceased partner. One of these cases is *Mathura Das Gangi* v. *Ebrahim Fazalbhoy* (4) which followed the rule in *L. Wadeson's* case, but the case in 51 *Bom.* was a case where the firm had been dissolved to the knowledge of the plaintiff before the institution of the suit by reason of the death of a partner, and he did not bring his suit against the legal representatives of the deceased partner. It was held that it was necessary to add the legal representatives of the deceased partner in order to obtain judgment against the private estate of the deceased partner, as opposed to a mere judgment against the partnership assets. This ruling in 1927 differed from rulings reported in *Jivraj Lallubhai* v. *Bhagwan Das Govardhan Das* (5) and *Moti Lal*

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(3) [1899] 1 Q. B. 714.

(4) A. I. R. 1927 Bom. 581=105 I. C. 305=51 Bom. 986.

(5) A. I. R. 1923 Bom. 66=68 I. C. 627.

Jasruj v. *Chand Mal Hindu Mal* (6). The Full Bench case of *Yusuf* v. *Badsha* (7) follows the case in *Mathura Das* v. *Ebrahim Fazalbhoy* (4).

We consider that, as the legal representatives of the deceased Nathmal were not brought on the record before the arbitration award and the decree passed on it, that decree cannot be executed against the private estate of Nathmal, and that that decree is only capable of execution against the assets of the partnership. It was stated in the plaints of the present suits that the property in question was property purchased by Nathmal out of the assets of the firm. But that statement is shown by the evidence to be incorrect. Balmakund, the surviving partner, gave evidence on p. 18 of the paper book in which he stated that the price of the house No. 55/11 was paid from the cloth shop, but in cross-examination he stated that the price of the house was debited to Nathmal's account in the partnership, and that he, Balmakund, had no concern with the house. He also stated that the grove was purchased by Nathmal, and that no other property was purchased with money from the cloth shop, and by inference therefore the house in the other suit would not be even purchased with money taken from the cloth shop accounts. The plaintiff produced the vendor Manni Lal who stated that he sold the house No. 55/11 to Sitaram Nathmal in October 1916, but in cross-examination the vendor admitted that he did not remember in whose name the sale deed of the house was written. By some strange omission the plaintiff has neglected to produce certified copies of these sale deeds although these could easily have been obtained in the office of the Sub-Registrar. As regards the partnership Balmakund states that his wife's father Jitmal had invested money in the partnership along with Nathmal and that his wife was the heir of her father and that he (Balmakund) received a salary of Rs. 62-9-0 per mensem and that he was also a partner in the cloth business in profits. By this we understand that Balmakund received a share of profits on behalf of the capital owned by his wife in this firm. Accordingly the learned counsel for the appellant is not correct in his allegation that the firm of Sitaram Nathmal was owned solely by Nathmal, because it is clearly shown that either Balmakund or his wife also owned a share in the firm. Accordingly the two houses and the grove are property which belonged to Nathmal in his private capacity and not to Nathmal as a partner in this firm. It is also in evidence that Nathmal had received all his property by will from his father and therefore it was his self-acquired property, and on his death it would descend on his sons by inheritance and not as joint family property.

The question now is what right had Ram Prasad and Lachhi Ram, the two brothers of Chhotey Lal, minor, to hypothecate the share of Chhotey Lal which was one-third in this property by the security bonds in question. We have held that the decree which had been passed on the arbitration award was a decree which was capable of being executed only against the assets of the partnership. Accordingly it could not be said that it was for the benefit of the minor Chotey Lal that his property which he had obtained by inheritance from his father and which had no liability whatever under that decree should be hypothecated as a security bond to delay execution of that decree. The transactions therefore of the security bonds were not in the interests of the minor Chhotey Lal, and accordingly they were not transactions by which his interest in this property is bound. No personal liability could attach to Chhotey Lal under the security bonds because he was a minor. Accordingly there is neither personal liability nor liability of his estate under these security bonds. We consider therefore that the two cases of the plaintiff will fail on this ground. Accordingly we consider that the decrees of the learned Subordinate Judge dismissing the suits of the plaintiff were correct decrees and we dismiss these appeals with costs.

S.N./R.K. *Appeal dismissed.*

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(6) A. I. R. 1924 Bom. 155=77 I. C. 1055.
(7) A. I. R. 1929 Mad. 733=119 I. C. 603=52 Mad. 885 (F.B.).

* A. I. R. 1931 Allahabad 71

MUKERJI AND BENNET, JJ.

Panna Lal and *another*—Creditors—Appellants.

v.

Official Receiver and *others*—Insolvents—Respondents.

First Appeal No. 146 of 1929 and 125, 126, 159, 162 and 168 to 174 of 1929, Decided on 28th October 1930, from order of Dist. Judge, Jhansi, D/- 19th May 1929.

*** Provincial Insolvency Act (1920), S. 37—S. 37 does not allow insolvency Court on annulling insolvency to proceed to distribute assets of insolvent among any of creditors.**

Section 37 does not allow an insolvency Court on annulling an insolvency to proceed to distribute the assets of the insolvent among any of the creditors. The distribution of assets is a proceeding in insolvency and by annulling the insolvency, the Court comes to the conclusion that it will not proceed with the insolvency. Having come to that conclusion the course open to the Court is either to return property to the debtor on condition that he furnishes security which will make it available to the creditors to take their remedy under the ordinary civil law, or pending such security or for some other reason the Court may direct the property of the insolvent in the hands of the receiver to vest in a certain person. But the words "to vest in such person" do not mean distributing the property among the creditors. Such vesting is only for the purpose apparently of making the property available to creditors to proceed through the civil Court. [P 71 C 2]

Hari Ram Jha—for Appellants.

Bennet, J.—These are appeals brought by certain creditors against an order of the learned District Judge of Jhansi sitting as an insolvency Court dated 19th May 1929 in which he has refused to add the names of the applicants as creditors to whom distribution shall be made of the assets of a certain firm. This firm Abdulla Usman-Abdul Ghaffer was adjudicated insolvent in April 1927 on the application of certain creditors. The insolvent firm did not apply for discharge and accordingly on 29th April 1929 the Court directed that the insolvency should be annulled and that the assets in the hands of the receiver should be distributed among the creditors. That order has not been brought in appeal before us, but the applicants desire that they should also be added to the creditors to whom distribution should be made. After this order had been made the applicants applied to be added to the creditors and their applications were refused in the order of 19th May 1929 now before us in appeal. We consider that the order of 29th April 1929 was an order which was without jurisdiction because S. 37, Prov. Ins. Act, merely directs :

> "Where an adjudication is annulled, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare."

We consider that this section does not allow an insolvency Court on annulling an insolvency to proceed to distribute the assets of the insolvent among any of the creditors. The distribution of assets is a proceeding in insolvency and by annulling the insolvency, the Court comes to the conclusion that it will not proceed with the insolvency. Having come to that conclusion, the course open to the Court is either to return the property to the debtor on condition that he furnishes security which will make it available to the creditors to take their remedy under the ordinary civil law, or pending such security or for some other reason, the Court may direct the property of the insolvent in the hands of the receiver to vest in a certain person. But the words: "to vest in such person" do not mean distributing the property among the creditors. Such vesting is only for the purpose apparently of making the property available to creditors to proceed through the civil Court. Although the order of 29th April 1929 has not been brought before us in appeal, still it is open to us to alter that order under the powers of this Court under S. 115, Civil P. C. Accordingly, we set aside that order except for the portion which directs that from the assets in the hands of the receiver the fee due to the receiver will be paid and whatever may be due to successful objectors will be allowed. Having therefore set aside the portion of the order which directs distribution among the creditors, we remand this case to the District Judge for passing a suitable order under S. 37, Prov. Ins. Act, which shall either vest the balance of the property in such person as he may appoint or will revert the balance of the property to the debtor under suitable conditions if any.

In appeal No. 169 the Official Receiver will receive the costs in the remaining appeals. The appellants whose case has failed will pay their own costs. No one has appeared on the other side. These appeals therefore fail and are dismissed.

G.P./R.K. *Appeal dismissed.*

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* A. I. R. 1931 Allahabad 72

MEARS, C. J., AND SEN, J.

(*Major*) *Anthony Ullyssess John* and *others*—Plaintiffs—Appellants.

v.

Agra United Mills Ltd. and *another*—Defendant and Plaintiff—Respondents.

First Appeal No. 237 of 1929, Decided on 3rd November 1930, from order of Addl. Sub-Judge, Agra, D/- 5th September 1929.

*** (a) Civil P. C. (1908), O. .40, Rr. 1 and 4—Receiver removed from office by Court—No appeal lies.**

Where Court appointing a receiver under O. 40 removes him from his office there is no right of appeal under O 43: (1903) *A. W. N.* 67, *Foll.* and *A.I.R.* 1926 *Cal.* 593, *Diss. from.* [P 73 C 1]

(b) Civil P. C. (1908), S. 115 — S. 115 applies to jurisdiction — High Court will not interfere in revision unless grave injustice be the result.

Section 115 is not directed against conclusions of law or fact in which jurisdiction is not involved. It applies to jurisdiction alone, the regular exercise or non-exercise of it or the illegal assumption of it. The High Court will not exercise its extraordinary powers under S. 115 unless it is satisfied that either grave injustice or great inconvenience would otherwise be the result: *A. I. R.* 1917 *P. C.* 71, *Rel. on.* [P 72 C 2]

(c) Civil P. C. (1908), O. 40, Rr. 1 and 4—Receiver can be dismissed by Court.

The Court which has the power of appointing a receiver is also invested with the power of dismissal. [P 73 C 2]

(d) Practice — Appeal—Right of appeal—It cannot be inferred by rule of logic.

Where a right of appeal has to be expressly conferred by statute, it cannot be presumed to exist by recourse to a rule of analogy or a rule of logic: *A.I.R.* 1926 *Cal.* 593, *not Foll.* [P 73 C 2]

B. E. O'Conor and *Ram Nama Prasad*—for Appellants.

B. Malik and *Lakshman Sarup* — for Respondents.

Mears, C J.—This appeal and the connected application for revision under S. 115, Civil P. C., are directed against an order passed by the Additional Sub-Judge of Agra, dated 5th September 1929. The initial question which calls for determination is whether the order is open to appeal or to revision in the alternative.

The appellants during the pendency of Suit No. 84 of 1927, in which they figured as plaintiffs, applied for the appointment of a receiver under O. 40, R. 1, Civil P. C. This application was granted on 30th November 1927 and one Mr. Raina was appointed. By order dated 17th January 1928 the salary of the receiver was fixed at Rs. 600 per mensem. The Court below did not definitely indicate in any of the aforesaid orders as to which of the parties should be liable to pay the salary or from what assets or funds the salary should be payable. The receiver was appointed at the instance of the plaintiffs and they appear to have understood that the salary of the receiver was payable by them. The plaintiffs paid Rs. 12,000 in all for the salary of the receiver. On 10th August 1929, the receiver by, a written petition brought to the notice of the Court that for four months his salary had remained unpaid, and that he had not succeeded in definitely ascertaining the intention of the plaintiffs about the continuance of his services.

This Court had by its orders, dated 2nd and 15th May 1929, sanctioned a scheme for the working of the Agra United Mills conditionally upon Genda Lal guaranteeing a minimum profit of Rs. 1,60,000 a year. In answer to the receiver's petition, the plaintiffs contended that they were not liable for the receiver's salary, that the said salary should be paid out of the income of the mills and that in any case they (the plaintiffs) would not be responsible for his salary after 10th September 1929. This application led to a serious contest on the part of the defendants. The Court below repelled the contentions of the plaintiffs and accepted the contention of the defendants in the following terms on 5th September 1929:

> "I allow the contention of the company. The plaintiffs' application is rejected. I order the plaintiffs to deposit the money in Court before 7th September 1929. As the plaintiffs in their application 453 C have stated that they will not be responsible for receiver's salary after 10th September 1929 so I order that the receiver give up his work and office and after 10th September 1929 · he will cease to exist."

The order in question could have been more happily worded, but there is no difficulty in ascertaining its import.

The plaintiffs have appealed. They have also filed as an alternative measure an application for revision if it be held that the order was not open to appeal.

We are clearly of opinion that the appeal and the application for revision ought to be dismissed. A right of appeal is a creature of statute. O. 40, R. 1, Civil P. C., provides inter alia for the appointment of the receiver. Order 43, R. 1, provides that

> "an appeal shall lie from the following orders under the provisions of S. ·104, viz. an order under R. 1 or R. 4, O. 40."

Mr. O'Conor for the appellants has not relied upon R. 4, O. 40, because obviously that rule has no application to the case in hand. R. 1 (1) (a), O. 40, refers clearly to the appointment of the receiver, but is silent as to his removal. There is nothing therefore either in O. 43 or in any other part of the Code of Civil Procedure which prescribes a right of appeal in the case the receiver being removed or dismissed. We are clearly of opinion that where a Court appointing a receiver under O. 40, Civil P. C., removes him from his office there is no right of appeal under O. 43 of the said Code. Our view is supported by a Bench ruling of this Court in *re Sant Saran Das* v. *Gulab Das* (1). This decision proceeded upon a construction of S. 588 of the old Clvil P. C., (Act 14 of 1882), which corresponds to O. 43 of the Code now in force. The relevant texts of the two codes are identical.

It is not necessary to speculate upon the reason why no appeal has been provided from an order dismissing a receiver. It is enough that the statute has not conferred a right of appeal from such order. In the case last mentioned the learned Judges were of opinion that no appeal was allowed because the order was "so purely mechanical." Cases are conceivable where the the receiver or the opposite party might put up a serious contest against the proposed removal of the receiver. We are inclined to think that this is an instance of a casus omissus and that the right of appeal was not provided for in the Code by inadvertence.

The appellants rely upon a decision of the Calcutta High Court in *Sripati Datta* v *Bibhuti Bhusan Datta* (2). This decision undoubtedly favours the contention of the appellants. We regret however that we cannot follow it. This decision proceeds upon the ground that under S. 16, General Clauses Act (Act 10 of 1897), the power to appoint includes the power to remove or dismiss and that therefore the right to appeal from an order of appointment must be held to include the right of appeal from an order of dismissal. We cannot follow this reasoning and we do not see what the principle underlying S. 16, General Clauses Act, has to do with the right of appeal. Where a right of appeal has to be expressly conferred by statute it cannot be presumed to exist by recourse to a rule of analogy or a rule of logic.

The application for revision under S. 115, Civil P. C., is equally untenable. Apart from technicality the order sought to be revised appears to us to be substantially just. This Court is reluctant to exercise its extraordinary power under S. 115, Civil P. C., unless it is satisfied that either grave injustice or great inconvenience would otherwise be the result. As pointed out by Lord Atkinson in *Bala Krishna Udayar* v. *Vasudeo Ayyar* (3) that S. 115 is not directed against conclusions of law or fact in which jurisdiction is not involved. S. 115 applies to jurisdiction alone, the regular exercise, or non-exercise of it, or the illegal assumption of it. Ex hypothesi the Court which has the power of appointing a receiver is also invested with the power of dismissal. The power of dismissal having been exercised by the Court having jurisdiction to do so, its discretion cannot be questioned by an application for revision. As the result we dismiss both the appeal and the revision with costs which in this Court will include fees on the higher scale.

G.P./R.K. *Appeal dismissed.*

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(1) [1903] A. W. N. 67.

(2) A. I. R. 1926 Cal. 593=92 I. C. 940=53 Cal. 319.

(3) A. I. R. 1917 P. C. 71=40 I. C. 650=44 I. A. 261=40 Mad. 793 (P. C.).

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MUKERJI AND BENNET, JJ.

Abdul Shakur Khan—Plaintiff—Appellant.

v.

Mt. Rafiqunnissa and *others*—Defendants—Respondents.

Letters Patent Appeal No. 93 of 1929, Decided on 4th April 1930, from judgment of Ashworth, J., D/- 20th February 1929.

Civil P. C. (5 of 1908), S. 11, Expl. 4—In 1915 *A* executing mortgage in favour of *H* for Rs. 150 at 1 per cent per mensem—Receiver of estate of *H* insolvent selling mortgage right to *M*—*M* sub-mortgaging his rights in 1922 to plaintiff for Rs. 200 at Re. 1-8-0

per cent per mensem—Suit on ground that by transfer made in 1922 plaintiff had become possessed of interest owned by *H* under mortgage of 1915 dismissed—Second suit based on sub-mortgage made in 1922 is not barred.

On 4th April 1915, *A* executed a simple mortgage in favour of *H* for Rs. 150 with 1 per cent per mensem interest. Receiver of estate of *H* insolvent sold the mortgage rights to *M*. *M* made a sub-mortgage of the mortgagee rights on 20th June 1922 to plaintiff for Rs. 200 at Re. 1-8-0 per cent per mensem. A suit was brought on the ground that by the transfer of 20th June 1922 plaintiff had become possessed of the self-same interest which had been owned by *H* under the mortgage of 1915. The suit was dismissed as being not maintainable as framed. A second suit was consequently brought which was based on the sub-mortgage of 20th June 1922.

Held: that the title on which the second suit was based was entirely different from the title on which the first suit was based and further what was claimed in the former suit was not identical with what was claimed in the latter suit and therefore the second suit was not barred as res judicata: *A.I.R.* 1928 *All.* 714, *Dist.* and 19 *All.* 517, *Ref.* [P 76 C 2]

M. Waliullah and *A. P. Pande*—for Appellant.

Haribans Sahai—for Respondents.

Bennet, J.—This is a Letters Patent appeal by Abdul Shakur Khan, plaintiff, whose suit for sale on the basis of a mortgage has been decreed by the two lower Courts but has been dismissed by a learned single Judge of this Court. On 4th April 1915, Abdul Razzaq executed a simple mortgage in favour of Abdul Haq for Rs. 150 with 1 per cent per mensem interest. On 20th June 1921, the receiver of the estate of Abdul Haq insolvent sold the mortgagee rights to defendant 1 Mt. Rafiqunnissa. On 20th June 1922, Mt. Rafiqunnissa made a sub-mortgage of the mortgagee rights to the plaintiff for Rs. 200 at Re. 1-8-0 per cent per mensem.

In Suit No. 207 of 1925, the plaintiff sued as owner of the mortgagee rights under the mortgage of 4th April 1915, and based his suit on that mortgage. On 21st October 1926, the District Judge in first appeal dismissed the suit of the plaintiff on the following grounds :

> "The plaintiff in this case does not care to sue on foot of his mortgage and so his suit cannot lie. I therefore find that the suit as framed is not maintainable."

The plaintiff has now brought the present suit in his capacity of mortgagee of mortgagee rights under the mortgage of 4th April 1915. The learned single Judge of this Court has held that the present suit of the plaintiff is barred by the rule of res judicata, because in his former suit the plaintiff should have made his rights as mortgagee of mortgagee rights a ground of attack. He has thus applied Expl. 4 to S. 11, Civil P. C., against the plaintiff.

On the other hand it is alleged for the plaintiff that he is not barred by the rule of res judicata because the plaintiff in the present suit is not litigating under the same title under which he was litigating in the former suit. S. 11, Civil P. C. applies where the parties are "litigating under the same title." The learned advocate for the respondent alleges, on the other hand, that this matter of litigating under the same title must be governed by Expl. 4, and that the plaintiff ought to have litigated in his former suit under both titles, both of which might have been made grounds of attack. He has referred among other rulings to *Imam Khan* v. *Ayub Khan* (1). In that case a plaintiff sued as an owner, and it was held that he was not an owner, and in a subsequent suit the plaintiff sued as a mortgagee. It was held that the subsequent suit was barred by the rule of res judicata because he should have sued in his former suit also in his capacity of mortgagee. But this decision does not at all consider the point raised by the expression "litigating under the same title" which is now contained in S. 11, and was contained in the corresponding S. 13 of the former Civil P.C. The learned counsel for the respondents has further referred to a ruling of this Bench reported in *Tamizuunissa Bibi* v. *Syed Muhammad Husain* (2). In that case a person called *T* had sued for possession of certain property against a person called *M*. *M* had two capacities partly as a mortgagee and partly as a purchaser, of the rights of ownership. *M* did not plead in defence his right to remain in possession as usufructuary mortgagee and the suit was decreed finally against *M* in favour of *T*. Subsequently *M* brought a suit against *T* for possession on the grounds of the usufructuary mortgage in favour of *M*. This Bench held that the subsequent suit was barred by the rule of res judicata because in defence of the suit of *T* for possession *M* should have brought forward in defence each and every title under which *M* was entitled to retain possession. Now the present case differs fundamentally from the ruling quoted, because in the present case the plaintiff was a plaintiff in both suits and not a defendant in the former suit. A plaintiff need not set up in his suit each and every title under which he might claim. On the other hand a defendant against whom possession is claimed ought to set up each and every ground under which he is entitled to retain possession. Accordingly I consider that no authority has been shown for the proposition that the present plaintiff is barred by the rule of res judicata. It appears to me that the suit of the present plaintiff under the title of a mortgagee of the mortgagee rights under the mortgage of 1915 is a suit under an entirely different title from the suit formerly brought by the plaintiff as owner of the mortgagee rights under that mortgage. Accordingly I consider that the present plaintiff is not barred by S. 11, Civil P. C. No other ground except res judicata has been urged against the suit by the plaintiff. Accordinly I would allow this Letters Patent appeal with costs and restore the decree of the lower appellate Court.

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(1) [1897] 19 All. 517=(1897) A. W. N. 143.

(2) A. I. R. 1928 All. 714=113 I. C. 745=50 All. 306.

Mukerji, J.—I entirely agree with my learned brother that the present appeal must be allowed. The facts are given in the judgment of my learned brother and I need only state them briefly for the purpose of my judgment. To start with: a simple mortgage of a certain property was made by one Abdul Razzaq in favour of one Abdul Haq on 4th April 1915. A sum of Rs. 150 was borrowed for a term of two years, and it was to be repaid after two years with interest at 12 per cent per annum. Abdul Haq the mortgagee was adjudged an insolvent and the receiver sold all his interest as a mortgagee in the property to Mt. Rafiqunnissa, defendant 1 in the case. She happens to be the widow of Abdul Razzaq but that fact has no material bearing on this case. Mt. Rafiqunnissa borrowed money from the present plaintiff, and she made a sub-mortgage of her interest in the property as a simple mortgagee in consideration of a sum of Rs. 200 on 20th June 1922. She agreed to pay interest at 18 per cent per annum. The plaintiff Abdul Shakur Khan was advised to bring a suit for recovery of the money due on the mortgage of 4th April 1915, against those holding the mortgagor's interest in the property and also against Rafiqunnissa and also against a subsequent transferee. This suit was brought as Suit No. 207 of 1925. The suit was based on the ground that by the transfer of 20th June 1922, Abdul Shakur Khan had become possessed of the self-same interest which had been owned by Abdul Haq under the mortgage of 1915. A defence was raised that the document of 1922 did not give the plaintiff a right to maintain a suit for sale on foot of the mortgage of 4th April 1915. The learned Munsif did not enter into the question seriously. He held that either it was an assignment of the mortgage of 1915, or it was a sub-mortgage and in either case, the plaintiff was entitled to claim the money which he did claim. Having decided all other points in favour of the plaintiff he decreed the claim.

There was an appeal and the learned appellate Judge came to the conclusion that the plaintiff was not an assignee of the mortgage of 1915 and he could not sue on the basis of that mortgage. In the result he dismissed the suit as being not maintainable "as framed." The learned Judge threw out a hint that a proper suit to bring was in the form laid down in Sch. 1, Appendex. D, Form 9, Civil P. C.

The plaintiff Abdul Shakur Khan has now brought a suit in the form suggested by the appellate Judge in his judgment of 21st October 1926. The present suit is based on the sub-mortgage of 20th June 1922. Primarily the plaintiff claimed the money due to him on the mortgage of 1922. This is very important to note. He does not claim the money which was due to Abdul Haq on foot of the mortgage of 1915. This is an essential difference between the first suit and the second suit. Then the plaintiff says that if his mortgagor, namely Mt. Rafiqunnissa did not pay the money due to him on the mortgage of 1922, the mortgagors of Abdul Haq should be directed to pay the money into the Court which may be found due on foot of the mortgage of 4th April 1915, and out of that mortgage money so paid, the plaintiff shouid be paid whatever may be due to him on foot of the sub-mortgage of 20th June 1922.

Both the Court of first instance and the lower appellate Court found that there was no flaw in the claim of Abdul Shakur Khan and decreed his suit. A learned single Judge of this Court came to the conclusion that the suit of Abdul Shakur Khan was barred by res judicata having regard to the provisions of Expl. 4, S. 11, Civil P. C.

It has been urged before us that this decision of the learned single Judge is not correct, and I am of opinion that this contention ought to prevail. To start with, Expl. 4 can apply only where the subject-matter of the two suits is identical. Expl. 4 runs as follows :

> "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

For an effectual application of the explanation, evidently, the subject matter of the suits must be the same in both the cases, only the fresh ground, on which the claim or defence is based in the second case, has to be different. Where the subject-matter is not identical Expl. 4, from the very language used, cannot apply. In this particular case, although what is claimed is a sum of money, it is not the identical sum that is claimed in the two suits. The sums are different ; they have been calculated differently; they have been calculated on the basis of different deeds. The principal amounts are different. The rates of interest are different and other terms of the deed are different. How then can it be said, that the ground of attack alone is different in the second suit, and, otherwise, the claim is the same as the claim in Suit No. 207 of 1925 ?

It has been urged that because the plaintiff had mentioned in Suit No. 207 of 1925, the document exeeuted in his favour, dated 20th June 1922, therefore it was his duty to have so framed his case as to cover the present claim. It is possible that the plaintiff could have combined two alternative cases, when he instituted Suit No. 207 of 1925. The procedure probably would have been cumbersome ; but I need not express any opinion on that point. The question for decision is whether the subject matter of the two suits were identical, and what was claimed in the former suits has been claimed in the second suit, only on a different ground ; for that is the ground on which the learned single Judge of this Court has allowed the defendants' appeal and dismissed the suit. I have tried to show that Expl. 4 does not apply to the circumstances of this case.

As pointed out by my learned brother, the title on which the second suit is based is entirely different from the title on which the first suit is based. Further I have pointed out that what was claimed in the former suit is not identical with what is claimed in the later suit. In the circumstances the plea of res judicata cannot succeed. I would therefore agree in allowing the appeal with costs.

By the Court.—We allow the appeal, set aside the judgment of this Court and restore the decree of the lower appellate Court. The appellant will have his costs at both hearings in this Court.

P.N./R.K. *Appeal allowed.*

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BANERJI AND NIAMATULLAH, JJ.

Fazal Rab—Plaintiff—Appellant.

v.

Manzoor Ahmad—Defendant—Respondent.

Second Appeal No. 571 of 1927, Decided on 27th May 1930, from decision of Addl. Sub-Judge, Allahabad, D/- 15th December 1926.

(a) Transfer of Property Act (4 of 1882), Ss. 74 and 95 - Suit by puisne mortgagee on his mortgage — Prior mortgagee who is party need not set up his rights unless they are impugned—Where he is party and validity of his mortgage denied by puisne mortgagee, mortgaged property can be deemed to be sold free from incumbrance if he allows puisne mortgagee's allegation to prevail—There is no difference in principle whether rights of prior mortgagee himself or those of persons subrogated to his possession by redemption of prior mortgage are called in question—Equity of redemption purchased by plaintiff and some others, who executing simple mortgage with stipulation of personal liability—First mortgage redeemed by plaintiff alone—But he did not set up his rights as charge-holder in suit by second mortgagee on his mortgage—Suit decreed and property sold —Property could only be held to be sold free from prior incumbrance so far as charge apportionable on his own share is concerned.

In general a prior mortgagee is not a necessary party to a suit by a puisne mortgagee on his mortgage. If for any reason he is a party he need not assert his rights as a prior mortgagee, unless he has reason to think that his rights are called in question. It is only if the prior mortgage is expressly or by necessary implication impugned that he is called upon to defend his right as a prior mortgagee. Under ordinary circumstances a puisne mortgagee is entitled to sell the right, title and interest of his mortgagor as they were on the date of his own mortgage, and the purchaser will get no more than such rights, whether the property is specifically sold subject to such charge or no mention is made of it. It is otherwise if the existence of the prior mortgage or its validity is denied by the puisne mortgagee and the prior mortgagee being a party does not assert his rights and allows the former's allegations to prevail, in which case the decree of the Court may be open to the construction that the mortgaged property is to be sold free from incumbrance. In any subsequent conflict between the prior mortgagee and the auction-purchaser as to whether the property was taken by the latter free from incumbrances the dispute has to be settled by an appeal to the rule of res judicata. There is also no difference in principle whether the rights of the prior mortgagee himself or those of the person subrogated to his position by redemption of the prior mortgagee are called in question by the auction-purchaser.

Certain persons including the plaintiff purchased the equity of redemption and together executed a simple mortgage with stipulation of personal liability. The plaintiff alone redeemed the prior mortgage. Suit by a second mortgagee on his mortgage was decreed and the property sold. In that suit though the plaintiff was a party, his rights as a charge holder were not impugned but the defendant-auction-purchaser relied on the fact that the plaintiff did not set up his prior rights.

Held: that though the plaintiff could not keep alive the charge so far as the charge apportionable on his own share was concerned, still the defendant could not maintain that he purchased free from obligations arising from the first mortgage so far as the shares of the co-mortgagors of the plaintiffs were concerned: 10 *Cal.* 1035 (*P.C*) and *A. I. R.* 1920 *P. C.* 81, *Rel. on*; 24 *All.* 429, *Expl.* [P 80 C 2]

(b) Transfer of Property Act (4 of 1882), S. 101—Scope.

Section 101, like the general rule of merger applies to cases where the whole property, subject to an incumbrance in favour of a person, is acquired by him in full ownership. [P 81 C 1]

(c) Transfer of Property Act (4 of 1882), S. 76—Scope.

The doctrine of subrogation is subject to important equitable exceptions and is not ordinarily applied in favour of a mortgagor paying off a prior incumbrance which he was personally bound to pay or against an intermediate charge-holder, to whom he is personally bound to pay. [P 81 C 1, 2]

Mukhtar Ahmad—for Appellant.

S. Majid Ali—for Respondent.

Niamatullah, J.—This is a plaintiff's appeal from the decree passed by the Additional Subordinate Judge of Allahabad upholding that of a Munsif of that District in a suit for declaration or, in the alternative, for possession, brought by the appellant, which has been dismissed by both the lower Courts. Idi owned a 1-anna and 1-pie share in mahal Idi, village Ingua. His brother, Rajab, owned a 6-pies share in the same mahal. By a deed dated 15th January 1866, Idi mortgaged with possession a number of specified plots to one Shamsuddin, agreeing to pay a certain rate of interest which could not be satisfied out of the usufruct of the mortgaged property. A balance of Rs. 54-13-9 was therefore payable by the mortgagor every year out of his own pocket, which he agreed to pay with the principal at the time of redemption. Subsequently, Idi sold 7-pies out of his share to Alopi and the remaining 6-pies to Kanhai Lal and Jawahir Lal.

Alopi sold the 7-pies share purchased by him to the plaintiff's father, Madad Ali, Ilahi Baksh, Abdus Shakur and Raza Husain in equal shares, the share of the plaintiff's father being $1\frac{3}{4}$-pies. The vendees had no money of their own for payment of the consideration, Rs. 800, and executed for that sum a bond in favour of Alopi, the vendor, hypothecating the share purchased by them. Madad Ali died some time afterwards, and the plaintiff stepped in his shoes. Later on, the plaintiff purchased from Kanhai Lal and Jawahir Lal the 6-pies share which the latter had purchased from Idi. The plaintiff thus became owner of $7\frac{3}{4}$-pies share in the mahal.

A partition was made of Mahal Idi some time before 1907. Seven pattis were formed of the entire mahal, three of which were: (1) patti belonging to the plaintiff; (2) patti Raza Husain, including his share and that of Abdus Shakur purchased from Alopi; and (3) patti Hafiz Ahmad, including the share of Ilahi Baksh purchased from Alopi. The plots mortgaged by Idi under the deed dated 15th January 1866, were distributed among all the seven pattis.

The plaintiff instituted Suit No. 61 of 1907 for redemption of the mortgage, dated 15th January 1866, and redeemed the mortgaged property on payment of Rs. 3,167-8-0 on 14th April 1911. The trial Court seems to have been in error in thinking that Alopi Din was not party to the redemption suit. It is conceded by the parties before us that he was. The plaintiff managed to obtain possession of all the lands which then lay in the seven pattis.

Dakhni Din, son of Alopi, brought suit No. 37 of 1911 (his father having died in the meantime) for enforcement of the mortgage, dated 9th September 1882, against the representatives of the mortgagors, including the plaintiff, whose $1\frac{3}{4}$-

pies share had been hypothecated under the deed. The suit was decreed, the property was sold in execution of the decree and purchased by the defendant Manzur Ahmad, who took possession of the shares belonging to the mortgagors, viz., 1¾ pies out of the plaintiff's patti, entire patti Raza Husain, entire patti Hafiz Ahmad. In doing so he attempted to take possession of the plots which the plaintiff had redeemed from Shamsuddin, the mortgagee under the deed of 5th January 1866, and which partly lay in the three pattis. He struggled to retain his hold on these plots by resisting the claim of the defendant before the revenue Courts in suits for arrears of rent, but eventually failed in his effort to keep possession. This is the finding of the Courts below, though the plaintiff's case still is that he is in poseession. We must accept the finding that he is not in possession. On 15th January 1926, the plaintiff brought the suit out of which the present appeal has arisen for the declaration that he is entitled to possession of the plots he redeemed from the mortgagee under the deed of 1866, which had priority over all other subsequent deeds. In the alternative, he claimed that if he be found to be out of possession, a decree for possession be passed in his favour.

The principal defences which it is necessary to mention at this stage are: (1) the plaintiff omitted to disclose in Dakhni Din's suit (No. 37 of 1911) the fact that he had redeemed the mortgage of 1866 and did not assert his right to remain in possession till he was paid the amount of prior incumbrance apportionable on the land purchased by the defendant in good faith without knowledge of any charge in plaintiff's favour; (2) the plaintiff being the owner of the property redeemed by him, the mortgage.ceased to exist by operation of the rule of merger . . . . the plaintiff not having kept alive the charge to set it up as a shield. We have stated the defence in substance. The written statement is a confused mass of pleas jumbled up in a manner which makes it difficult to disentangle them one from another. In giving effect to the defendant's pleas the Courts below do not formulate the law on which they profess to base their view. We shall endeavour to mention their opinion on each point as it is discussed by us.

But before we do so, it is desirable to restate, as briefly as possible, the position of the parties in relation to the land in dispute. Idi owned a 13-pies fractional share of the entire mahal, which was joint. He mortgaged in 1866, to Shamsuddin, a number of specified plots. Of the 13-pies to which the mortgaged plots appertained, the plaintiff acquired 7¾-pies and the remaining 5¼-pies became vested in other persons. A second mortgage was made of 7-pies by those other persons and the plaintiff, who hypothecated 1¾-pies out of his 7¾-pies. The plots mortgaged in 1866, so far as they appertained to the 7-pie share, became subject to a second mortgage; but the plaintiff's 6-pies share was free from the second mortgage and therefore the plots, so far as they appertained to this 6-pies share, was not subject to any second mortgage. The plaintiff redeemed the mortgage of 1866 and obtained possession on 14th April 1911. It was thus a case of one of several mortgagors redeeming the whole of a mortgage. Then the second mortgagee enforced his mortgage and 7-pie share was sold and purchased by the defendant. The plaintiff, who was a party to the suit of the second mortgagee did not assert his right to retain possession which he had obtained by redeeming the prior mortgage of 1866. Tht defendant dispossessed the plaintiff. The question is whether the plaintiff is entitled to possession of so much of the land as appertained to the 7-pie share sold to the defendant, till he (the plaintiff) is paid a proportionate amount of what he had to spend in obtaining redemption of the mortgage of 1866.

It cannot be disputed that, on 14th April 1911, when the plaintiff redeemed the mortgage of 1866, the plots affected by that mortgage belonged to the owners of the 13 pies originally owned by Idi. The plaintiff, one of such cosharers, who redeemed the whole, became entitled to retain possession under S. 95, T. P. Act, till he is paid, by his co-mortgagors, their share of "the expenses properly incurred by him in so redeeming and obtaining possession." Referring to the rights of the plaintiff's co-mortgagors, the owners of pattis Hafiz Ahmad and Raza Husain, the lower appellate Court has ruled that the plaintiff had no doubt a right to claim a charge. But, in order to keep that charge alive, he ought to have maintained his possession and should not have given up possession till he was paid the proportionate mortgage money. But it seems that he never took care to remain in possession, and never during the course of all the proceedings and the cases that were fought between himself and the defendants he asserted that he was a charge-holder. Under S. 95, T. P. Act, in order to create a charge, it seems necessary that possession should have been obtained. The learned Subordinate Judge is not quite clear about the facts on which he based this view. One is led to think from the concluding words of the passage quoted above that the plaintiff never obtained possession. On the other hand, the impression conveyed by the earlier part of the passage is that the plaintiff voluntarily gave up possession. It is inconceivable to us that one or the other of these hypotheses could hold good. That Shamsuddin, the mortgagee under the deed of 1866, was in full and effective possession is common ground; that the plaintiff obtained possession by redemption is equally beyond question; and that it was not till 1918 that the defendant appeared on the scene after he purchased in execution of the decree obtained by the second mortgagee. Indeed the learned Subordinate Judge himself found at another place in his judgment that

> "after the purchase of the property by the defendant in the decree of Dakhni Din, he (plaintiff) was dispossessed from the property in spite of all his efforts to the contrary. He resisted the defendant in mutation and correction of papers proceedings unsuccesfully, but it is noteworthy that he never asserted that he was in possession of the property as a charge-holder . . . . Anyhow, it is perfectly clear that the defendant took possession through Court and ever since 1918 has been obtaining and realizing decrees for arrears of rent."

Whatever may be said as regards the plaintiff's omission to set up his right as a charge-holder, it has to be accepted as a fact that he was in possession for several years after he redeemed the mortgage of 1866 before he was dispossessed by the defendant. The view that by forcibly dispossessing the plaintiff he (defendant) can extinguish the charge, which undoubtedly existed under S. 95, T. P. Act, is wholly unacceptable to us and has no warrant for it. We fail to understand how it commended itself to the learned Additional Subordinate Judge, apart from other considerations such as the operation of the rule of merger to which we shall advert presently. Again, the right to possession was vested in the prior mortgagee Shamsuddin, and redemption by the plaintiff from him could not give any right of possession to anyone else. Unless, therefore the defendant acquired such right by his purchase in execution of the decree obtained by mortgagee the second mortgagee his action in ejecting the plaintiff was wrongful.

We have next to consider the question whether the plaintiff's omission to disclose his prior charge and right to possession over the shares of his co-mortgagors in the second mortgagee's suit and to have it declared in the execution proceedings that followed had the effect of extinguishing that charge and of depriving him of the right to possession. The answer to this question will depend on a consideration of the pleadings and the adjudication in the second mortgagee's suit for enforcement of his mortgage. In general, a prior mortgagee is not a necessary party to such an action. If for any reason he is a party he need not assert his rights as a prior mortgagee, unless he has reason to think that his rights are called in question. It is only if the prior mortgage is expressly or by necessary implication impugned that he is called upon to defend his right as a prior mortgagee. Under ordinary circumstances, a puisne mortgagee is entitled to sell the right, title and interest of his mortgagor as they were on the date of his own mortgage, i. e., in this case subject to the prior charge; and the purchaser will get no more than such rights whether the property is specifically sold subject to such charge or no mention is made of it. It is otherwise if the existence of the prior mortgage or its validity is denied by the puisne mortgagee and the prior mortgagee being a party does not assert his rights and allows the former's allegation to prevail in which case the decree of the Court may be open to the construction that the mortgaged property is to be sold free from incumbrance. In any subsequent conflict between the prior mortgagee and the auction-purchaser as to whether the property was taken by the latter free from incumbrance, the dispute has to be settled by an appeal to the rule of res judicata. This view is in conformity with what has been laid down by their Lordships of the Privy Council in *Radha Kishun* v. *Khurshed Hossein* (1). The earlier case *Sri Gopal* v. *Pirthi Singh* (2) which is sometimes quoted as an authority for the proposition that mere silence of the prior mortgagee as regards his rights under the prior mortgage and his failure to obtain recognition thereof have the effect of destroying such rights, depends upon the peculiar facts of the case and is not an authority for that broad proposition. It was quoted before their Lordships in course of the argument in *Radha Kishun* v. *Khurshed Hossein* (1) but has not been noticed in the judgment. Explanation to O. 34, R. 1, Civil P. C., was added for the first time in 1908: but we do not think that *Sri Gopal* v. *Pirthi Singh* (2) is based on the absence of a statutory rule of that kind. Nor can the auction purchaser plead want of notice of the prior mortgage and his own purchase in good faith where the prior mortgage is proclaimed by a registered instrument and possession of the prior mortgage and of the plaintiff subsequent to redemption. The least effort on his part could bring to light the existence of the prior mortgage and of the charge in favour of the redeeming co-mortgagor.

To revert to the circumstances of the case before us: we have to observe that there is no difference in principle whether the rights of the prior mortgagee himself or those of the person subrogated to his position by redemption of the prior mortgage, are called in question by the auction-purchaser. The latter must satisfy the Court that such rights were in question in the puisne mortgagee's suit and should be deemed to have been negatived. The defendant has failed to do so in this case. The question is not whether the plaintiff set up his prior rights. but whether the puisne mortgagee expressly or by necessary implication impugned them and the Court expressly or impliedly gave effect to his plea. We have not been referred to the pleadings or to the judgment in Suit No. 37 of 1911, and are not satisfied the plaintiff's rights as a prior chargeholder were at all in question or whether he litigaged in that character. He was a party because he was the representative of one of the mortgagors under the deed sought to be enforced. There was no occasion for him to make mention of the mortgage of 1866. He was entitled to presume that those concerned have acquainted themselves with it. There is nothing to show that the Court intended to sell and did sell the property free of incumbrance. Apparently the Court did not apply its mind to that question as it was not before it. Under these circumstances, the defendant cannot maintain that he purchased free from all obligations arising out of the mortgage of 1866.

The following remarks made by their Lordships of the Privy Council in *Radha Kishun* v. *Khurshed Hossein* (1) at p. 669 (of 47 *Cal.*) are apposite to the case before us:

> "Bakhtaur Mull's position, therefore, was that he was a prior mortgagee with a paramount claim outside the controversy of the suit, unless his mortgage was impugned. Consequently, to sustain the plea of res judicata, it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority.
>
> "But from the records of this suit it does not appear that anything of the kind was done, and, as has been observed, of things that do not appear and things that do not exist the reckoning in a Court of law is the same.
>
> "The Sahus, therefore, have failed to establish the conditions essential to their plea, and they alone are responsible for this defect. The plaint in Suit No. 100 of 1906, has not been produced, and his omission is not supplied by the summary of the plaint set out in the extract from the decree: Ex. J 37 C. That summary still leaves the contents of the plaint a matter of mere conjucture and certainly does not show that Bakhtaur Mull's mortgage was attacked."

The defendant merely relied on the plaintiff's inability to show that he asserted his rights and made no effort to show that his rights were impugned in the pleadings or the judgment and the decree passed in the case.

The next question that has to be considered is whether, after the redemption of the mortgage of 1866, the resultant charge in favour of the plaintiff was kept alive or merged in the plaintiff's ownership. Reference has been made in this connexion to S. 101, T.P. Act. In the first place, that section does not in terms apply, as this is not a case in which:

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(1) A. I. R. 1920 P. C. 81=55 I. C. 959=47 I. A. 11=47 Cal. 662 (P. C.).

(2) [1902] 24 All 429=29 I. A. 118=8 Sar. 293 (P. C.).

> "the owner of the charge or other incumbrance on immovable property is or become absolutely entitled to that property."

Here the plaintiff was already the owner of part of the property before he redeemed, and the remaining part thereof never became vested in him. The section, like the general rule of merger, applies to cases where the whole property subject to the incumbrance in favour of a person is acquired by him in full ownership. In the second place, the charge is not extinguished if the continuance of the charge or incumbrance is to his benefit. There is no evidence of any declaration, express or implied, by the plaintiff keeping the charge alive; but in view of the existence of a second mortgage it was obviously to his benefit that he should keep it alive.

As already mentioned, this is a case of the owner of part of the mortgaged property acquiring a charge on the whole property. In other words, it is a case of one of several co-mortgagors redeeming the whole and the proper rule to apply is S. 95, T. P. Act, which, unlike S. 101, does not impose any condition of the charge being kept alive. It is a necessary corollary from the general rule of contribution contained in S. 82, T. P. Act. This being so, the plaintiff was entitled to remain in possession of the plots which he had redeemed and which were assigned to the pattis of his cosharers, viz. pattis Raza Husain and Hafizuddin, till payment by the defendant who had acquired the interests of his co-mortgagors. It is clear to us that the defendant cannot have better rights than those whose interest he purchased.

As regards the plots lying in the plaintiff's own patti, the position is somewhat different. Of the 7¾ pies share 6 pies were free from the second mortgage. The plots included in this patti, so far as they appertain to such 6 pies share are not affected by the auction sale in favour of the defendant, who is not, in any case, entitled to exclusive possession of them. As to whether the defendant is entitled to possession of those plots to the extent of 1¾ pies share purchased by him, our answer is in the affirmative. The plaintiff cannot invoke the aid of any statutory rule contained in the Transfer of Property Act or in any other enactment. The doctrine of subrogation is subject to important equitable exceptions, and is not ordinarily applied in favour of a mortgagor paying off a prior incumbrance, which he was personally bound to pay, or against an intermediate charge-holder, to whom he is personally bound to pay. The plaintiff, whose father merely purchased the equity of redemption of Idi and paid off the prior mortgagee (Shamsuddin), cannot be said to have paid what he was personally bound to pay. The purchaser of the equity of redemption, unless he expressly saddled himself with the personal obligations of the mortgagor, cannot be deemed to be personally liable to the prior mortgagor, assuming the mortgage deed contained a personal covenant to pay. He has to discharge the incumbrance as the property of which he has become the owner is subject to it. The mortgage in favour of Shamsuddin was usufructuary, and we have not been shown anything to indicate that there was a personal covenant to pay.

The plaintiff was certainly bound personally to pay the simple mortgage in favour of Alopi, whose son enforced it by sale of the mortgaged property. Before such sale, at which the defendant purchased it, the plaintiff had discharged the prior incumbrance in favour of Shamsuddin. The question is whether the plaintiff can set up the charge so far as it rested on his own property against his own subsequent mortgagee, whom he was personally bound to pay. Though there is no statutory provision applicable to a case like this, their Lordships of the Privy Council have laid down a rule of justice, equity and good conscience which ought to determine the rights of the parties before us. In *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (3), where

> "the mortgagor's right, title and interest in certain immovables in the Deccan, subject to a first and a second mortgage, were sold in execution of a decree to a purchaser who afterwards paid off the first mortgage"

it was held that

> "as he had a right to extinguish the prior charge, or to keep it alive, the question was what intention was to be ascribed to him; and that, in the absence of evidence to the contrary the presumption was that he intended to keep it alive for his own benefit."

Where property is subject to a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course, according to the English practice, to have it signed to a trustee for his benefit, as against intermediate mortgagees, to whom he is not personally liable. But in India a formal transfer for the purpose of a mortgage is never made, nor is an intention to keep it alive ever formally expressed :

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(3) [1884] 10 Cal. 1035=11 I. A. 126=4 Sar. 543 (P.C.).

> "It was ruled in the English Court of Chancery in *Toulmin* v. *Steere* (4), that the purchaser from an owner of equity of redemption, with actual or constructive notice of another intermediate incumbrance, is precluded, in the absence of any contemporaneous expression of intention, from alleging that as against such other incumbrance, the prior mortgage, paid off out of the purchase money, is not extinguished. That case was not identical with this where the prior mortgage was not paid off out of the purchase money but was paid afterwards by the purchaser. The above ruling, however, is not to be extended to India, where the question to ask is, in the interest of justice, equity and good conscience there applicable . . . . . . ; what was the intention of the party paying off the charge ?"

In a comparatively recent case, viz., *Ayyareddi* v. *Gopalkrishnayya* (5), their Lordships treated it as settled law :

> "that where in India there are several mortgages on a property, the owner of the property, subject to the mortgage, may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt, but in this case there was no such personal covenant. It is further to be presumed, and indeed the T. P. Act, S. 101, so enacts, that if there is no indication to the contrary, the owner has intended to have kept alive the previous charge if it would be for his benefit."

Applying the above rule to the case before us, the conclusion arrived at is that on the redemption by the plaintiff of the mortgage of 1866, he acquired under S. 95, T. P. Act, a right to retain possession of the shares of his co-mortgagors till he was paid their portion of the expenses properly incurred by him in redeeming their shares; but in so far as the charge apportionable on his own share was concerned, he could not keep it alive as against Alopi, the second mortgagee, to whom he was personally liable to pay. The charge to that extent should be deemed to have been extinguished. It may be said, though it was not argued before us, that the plaintiff, who was one of the mortgagors personally liable to pay the mortgage money due to the second mortgagee, was so liable to pay the whole amount due to such mortgagee and could not claim a charge as against the second mortgagee, nor against the defendant, who purchased at a sale held in execution of a decree obtained on foot of the second mortgage. We do not think such a contention is sound. In the first place, S. 95, T. P. Act, embodying as it does a statutory rule, cannot be affected by any rule of equity, which can prevail only in the absence of a statutory rule and cannot override an imperative provision of the kind enacted in that section. In the second place, the rule which has been given effect to by their Lordships applies only so far as the property of the person paying is concerned. It is only an application of the general rule of merger which presupposes the coincidence of title to the property and the charge to which it was subject being vested in one and the same individual.

In view of the conclusions arrived at by us, this appeal must succeed to a large extent. The plaintiff has been found to be put out of possession by the Courts below and we must accept that position. The relief to which he is entitled is not declaration but possession of the property from which he has been wrongfully dispossessed. He has claimed such a relief in the alternative. Accordingly, we decree the plaintiff's claim to possession of all the plots in dispute, except those lying in his own patti, (i. e., patti Fazli Rab), as to which he is entitled to joint possession with the defendant, their shares in them being respectively 6 pies and $1\frac{3}{4}$ pies. The defence having partly succeeded, parties should, under ordinary circumstances, receive and pay costs in proportion to success and failure. To prevent minute distribution on that basis we think justice would be done in the case if we direct the plaintiff to receive half of his costs in all the Courts and the defendant to bear his own throughout. Counsel's fees to be taxed on the higher scale. Let a decree embodying these terms be prepared.

P.N./R.K. *Order accordingly*

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(4) [1817] 3 Mer. 210=17 R. R. 67.

(5) A. I. R. 1924 P. C. 36=79 I. C. 592=51 I. A. 140=47 Mad. 190 (P.C.).

*A. I. R. 1931 Allahabad 83

SEN AND NIAMATULLAH, JJ.

Bhola Nath-Shankar Das — Plaintiffs —Appellants.

v.

Lachmi Narain and *others*—Defendants—Respondents.

Second Appeal No. 77 of 1928, Decided on 29th October 1930, from decision of Dist. Judge, Farrukhabad, D/- 14th September 1927.

(a) Companies Act (1913), S. 4 (2)—Unregistered Trade Association is not unlawful.

A Trade Association cannot be said to be unlawful, merely because it has not been registered in conformity with the provisions of the Act. [P 84 C 2]

(b) Specific Relief Act (1877), S. 42—Courts cannot make declaratory decree outside limits of S. 42.

British Indian Courts have no general powers to make a declaratory decree outside the limits formulated by S. 42 and the said section cannot be utilized with the object of enunciating a truism. [P 84 C 2]

***(c) Contract Act (1872), Ss. 23 and 27—Agreement between traders to carry on business among members of their private association and to none else etc., does not offend against Ss. 23 and 27.**

A combination amongst the traders of a particular locality to do business only amongst their members, to pay part of the profits to a common fund etc., and levying of certain penalty for the breach of the conditions does not offend against the provisions of Ss. 23 and 27 and is not actionable per se merely because it brings profits to them and indirectly hurts a rival in trade : *Hilton* v. *Eckersley*, 6 *E. & B.* 47 and *Rogers* v. *Rajendro Dutt* ; 13 *Moore's P. C.* 209, *Ref.* ; 29 *Bom.* 107, *Foll.* [P 85 C 1, 2]

(d) Contract Act (1872), Ss. 23 and 27—Scope.

Where a claim is founded on a tort Ss. 23 and 27 do not apply. [P 85 C 1]

(e) Tort—Conspiracy—Meaning explained.

What is wrong in the case of an individual continues to be a wrong, if committed by an association of individuals by preconcert or conspiracy. A conspiracy consists in the agreement of two or more persons to do an unlawful act by unlawful means : *Mulcahy* v. *Reg*, 3 *H. L.* 306 at.317, *Foll.* [P 87 C 1]

(f) Tort — Conspiracy — Every one can trade freely though to another's detriment.

Every person has a right to a free course of trade and to conduct his business upon his own lines even though it results in an interference with the business of another person to his detriment : *Allen* v. *Flood*, (1898) *A. C.* 1, *Ref* ; *Mogul Steamship Co.* v. *McGregor*, 23 *Q. B. D.* 598, *Foll.* ; *Reynolds* v. *Shipping Federation & Co.* (1924) 1 *Ch.* 28, *Ref.* [P 89 C 2]

(g) Tort—Conspiracy — Procuring breach of contract is actionable.

If a person or combination of persons unlawfully procure a breach of contract, the matter is actionable provided that damage accrues therefrom : *Limley* v. *Gye*, 2 *El. & Bl.* 216, *Ref.* ; *South Wales Miners' Federation* v. *Glamorgan Coal Co. Ltd.* (1905) *A.C.* 239, *Rel. on.* [P 89 C 2]

(h) Tort—Conspiracy—Malice — Meaning explained.

Malice, in the sense of spite or ill-feeling, is not the gist of the action. An act that is legal in itself does not become illegal because it is prompted by an indirect or sinister motive : *Quinn* v. *Leathem*, (1901) *A. C.* 495, *Foll.*; *Sorrell* v. *Smith*, (1925) *A. C.* 700, *Ref.* [P 89 C 2]

(i) Tort—Conspiracy –Illegal interference with another man's mode of earning is not justifiable and is actionable.

Even though the dominating motive in a certain course of action may be the furtherance of one's business or of one's interest, one is not entitled to interfere with another man's method of earning his living, by illegal means. Illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy where they would not have been illegal if done by a single individual : *Quinn* v. *Leathem*, (1901) *A.C.* 510 and *Larkin* v. *Long* (1915) *A. C.* 814, *Ref.* [P 89 C 2]

(j) Tort—Conspiracy—Even lawful interference by unlawful method is actionable.

An unlawful interference with the business of another person with intent to hurt that person is actionable provided that damage results from interference. A lawful interference by unlawful methods with the same object and producing similar results is equally actionable: *Ware & De Freville Ltd.* v. *Motor Trade Association*, (1921) 3 *K. B.* 40 and *Temperson* v. *Russell*, (1893) 1 *Q. B.* 715, *Ref.* [P 89 C 2]

K. N. Katju and *R. C. Ghatak*—for Appellants.

P. L. Banerji—for Respondents.

Sen, J.—This is an appeal by the plaintiffs from the decree of the learned District Judge of Farrukhabad, reversing the decision of the Subordinate Judge of the same district in a suit in which the following reliefs were claimed :

"(a) It may be declared that the committee of the defendants is unlawful according to law. The principle on which they are working is against law and no British subject is bound by it nor are they competent to offer obstruction in the business of the plaintiffs.

(b) A perpetual injunction may be issued to the defendants restraining them from doing the acts mentioned in para. 3 of the petition of plaint ; and

(c) Rs. 1,000 as damages caused to the plaintiffs from the acts of the defendants may be awarded from the defendants."

Plaintiffs are members of a firm of commission agents who carry on business at Fatehgarh under the name and style of Bhola Nath-Shankar Das. The defendants are 17 in number and are members of an association unincorporated and unregistered, which is located in Lindsayganj market at Farrukhabad and is called Anaj Behohar Sabha. It is said that this case is an instance in point of trade union outrages ; and although the association has no legal recognition as a jural unit, its number and the compact of its members give weight to its concerted action and are according to the plaintiffs a source of danger to the public. The plaintiffs do not attribute unlawfulness to the association merely on the score that it is an unregistered body but they stoutly contend that its objects and methods are unlawful, the chief object of the association being to corner a monopoly and to drive out all rivals from the field by resource to unfair competition.

The heads of charges enumerated in para. 3 of the plaint are as follows :

"(1) That no one can open a shop in Bazar Lindsayganj without the permission of this committee.

(2) The permission for opening a shop is given in the month of Kuar and Phagun.

(3) If anyone carries on business or opens a shop without the permission of the committee, no one can sell goods to him or purchase goods from him.

(4) If anyone who has not opened a shop wants to purchase goods direct. he cannot do so without the medium of any such shop-keeper whom the committee might have permitted to open a shop.

(5) That weighmen who have obtained a license from the Municipal Board and who are themselves the owners of the phars (the open space in front of each shop) or who have taken phars on rent cannot sell the goods to or weigh the goods of the persons not permitted by the committee to make the purchase.

(6) If any weighman or shopkeeper sells goods to or purchases from any such person not allowed by the committee, then penal orders are passed against him, such as fine, suspension of all business and purchase and sale."

The plaintiffs further complained that the association was oppressive in the treatment of its constituents inasmuch as it made unlawful gains by arbitrarily levying perquisites like the following :

(a) Twelve annas per cent commission fee.

(b) Four annas per cent brokerage.

(c) One pice per rupee per parcha.

(d) One anna six pies per cent for Gaushala and Ramlila.

(e) Two chattacks of grain per maund for Karda.

(f) Four chattacks of grain per cart for Larka and

(g) two chattaks of grain per maund for Palladar.

The plaintiffs further alleged that they had entered into a contract with a third party to supply 500 bags of poppy seed. For the due performance of this contract they had contracted to purchase the stock from a number of persons at Lindsayganj. Tha defendants intervened and prevented the owners of the stock from selling the poppy seed to the plaintiffs. The result was that the plaintiffs next tried to make purchases outside Lindsayganj and entered into contracts with certain arhatias at Ghatia Ghat. Here also the defendants intervened and by their obstructive tactics prevented certain persons from selling the goods to the plaintiffs.

The suit was contested by all the defendants except two, namely, defendants 14 and 15. The defence amounted to a traverse of the material statements contained in the plaint. The Court of first instance repelled the contentions of the defendants, decided all the issues in favour of the plaintiffs and decreed the plaintiffs' claim for the declaratory relief and injunction as asked for and for Rs. 500 as damages. The lower appellate Court has reversed this decision. Hence this appeal.

It has been argued that the plaintiffs were entitled to a declaration that Anaj Behohar Sabha was an unlawful association inasmuch as it had not been incorporated and registered as required by S. 4 (2), Companies Act. The number of its members exceeds 20 and it may be assumed that the object of the association is gain or profit. The Sabha not having been registered under S. 4 (2), Companies Act (Act 7 of 1913), it can have no legal recognition as a jural unit and it cannot sue or be sued as a corporate body nor can it enter into a contract as such. But, while taking a stock of its disabilities, we are not prepared to hold that a trade association is unlawful merely because it has not been registered in conformity with the provisions of the Companies Act. We are further of opinion that it will be nothing short of an abuse of the provisions of S. 42, Specific Relief Act, to entertain a suit for a declaration of what appears to us to be a self-evident proposition that the committee is not a corporate unit because it has not been legally constituted. The British Indian Courts have no general powers to make a declaratory decree outside the limits formulated by S. 42, Specific Relief Act and the said section cannot be utilized with the object of enunciating a truism.

It has next been argued that the agreement, whereby the members of the Sabha are held together, is in defiance of the provisions of Ss. 23 and 27, Contract Act.

In *Hilton* v. *Eckersley* (1), Baron Alderson is reported to have said:

> "Prima facie it is the privilege of a trader in a free country, in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice."

The question is whether the defendants have crossed the line which the law permits. This border line is not in all cases capable of very sharp definement and is a fruitful source of aggressive claims and subtle defences. It was ruled by the Privy Council in *Rogers* v. *Rajendro Dutt* (2):

> "That it is essential to an action in tort that the act complained of should under the circumstances, be legally wrongful as regards the party complaining, that is, it must prejudicially affect him in some legal right; merely that it will however directly do a man harm in his interests, is not enough."

The matter we are now considering was in issue before the Bombay High Court in *re Fraser & Co.* v. *Bombay Ice Manufacturing Company* (3), the facts of which were parallel and the principle involved not dissimilar and the Court held that an agreement between manufacturers, not to sell their goods below a stated price, to pay profits into a common fund and to divide the business and profits in certain proportions is not avoided by S. 27, Contract Act and cannot be impeached as opposed to public policy under S. 23 of the Act. We are clearly of opinion that the constitution of the committee and its objectives do not offend against the provisions of Ss. 23 and 27, Contract Act. It is patent that the case of the plaintiffs is founded upon tort and not upon contract. Where the claim is founded upon a tort alleged against the defendant, Ss. 23 and 27, Contract Act, do not apply. The grievance is that the defendants by their organized and concerted action have by rule and level been crippling the plaintiffs in their trade and that they have been prevailing upon their constituents to obey their edicts to cut off the supply of materials from the plaintiffs as also the flow of customers. We cannot forget the emphatic statement of Bowen, L. J., that

> "no action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade : vide *Mogul Steamship Company* v. *McGregor* (4) at p. 619."

It is unfortunate that S. 27, Contract Act, has been moulded upon the New York Draft Code and seriously trenches upon the liberty of the individual in contractual matters affecting trade. We are however of opinion that S. 27 does not support the plaintiff's pretention. A combination amongst the traders of a particular locality is not actionable per se merely because it brings profits to them and indirectly hurts a rival in trade.

It has been argued that the demands made by the defendant company are of the nature of arbitrary perquisites and operate oppressively against the plaintiffs if they do not respond to the demands made by the defendants. These demands are seven in number and have already been referred to in our judgment. The Court of first instance held that these demands were arbitrary perquisites. The lower appellate Court did not agree with this view:

> "Payment on account of commission agency and brokerage prevails everywhere. Item (c) also is of a piece with the purchase of a peculiar brand of paper for writing petitions in Courts and one pice, per rupee, is a very small amount. Payments made for Gaushala and Ram Lila certainly entail a loss on the ultimate customer but no one grudges it. I do not wish to lay down that there is any religious consideration in it, but from a humanitarian point of view a payment for Gaushala is not an evil. In the Western Presidency they take it in the name of "Pinjrapole." This idea itself is a laudable one because it prevents cruelty to animals. Items (e), (f) and (g) are allowed everywhere. Instead of sifting the grain and throwing out the dust from it, it is much better to make a uniform allowance for it. Similarly the other two items are also reasonable ones. It therefore cannot be said that the aims and objects of the association are unlawful."

Without pausing to consider whether any particular item had a peculiar sanctity upon humanitarian grounds, we are clearly of opinion that the findings arrived at by the learned District Judge on this part of the case are reasonable and proper and are not open to any attack or criticizm on any ground of law. We must therefore accept the finding that the so-called perquisites are neither arbitrary nor oppressive.

It was next contended that the plaintiffs were the victims of an unlawful conspiracy on the part of the defendants who intermeddled with and ystematically prevented the due performance of contracts by third parties in favour of the plaintiffs. This part of the plaintiffs' case mainly rested upon oral evidence. The lower appellate Court discarded the statements of Madan Lal, Ajudhi, son of Khanjan and Babu Ram Sarup on the ground that they were pure hearsays and disbelieved Behari and Ajudhi, son of Paramsukh. As to Madho Ram it observed as follows:

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(1) [1855] 6 El. & Bl. 47 = 25 L. J. Q. B. 199 =2 Jur. (n.s.) 587=4 W. R. 326.

(2) [1859] 13 Moo. P. C. 209.

(3) [1906] 29 Bom. 107=7 Bom. L. R. 107.

(4) [1889] 23 Q. B. D. 598.

> "He gave direct evidence. He stated that the committee people did tell him that if he weighed plaintiffs' goods his market would be stopped. This statement is highly damaging to the defendants."

But in cross-examination this witness stated as follows:

> "If we do not agree to what the committee says the commitee men will neither sell to nor purchase goods from us. There is no other pressure. By turning us from the market I mean that the committee-walas will not sell to or purchase goods from us. If we had not cared whether the 12 committeewalas sold or purchased goods to or from us we could have weighed goods to the plaintiffs."

From this it would appear that the committee people did not interfere with the freedom of this witness and what they told him was that they would withdraw their custom. This is hardly a form of pressure that can be called threat or coercion. Noor Mohammad was the witness who attempted to prove the whole of the plaintiffs' case but he made his position clear in cross-examination. He stated that

> "the members of the committee had told the weighmen that the market would otherwise be closed for them. By it they meant that the committee people would not purchase goods from them. He further stated that the weighmen who did not mean to deal with the committee people could weigh goods for the plaintiffs."

After commenting upon this evidence, the Court below came to the following conclusion:

> "From the evidence of these witnesses it is not proved (a) that no one is entitled to open a shop without the leave of the committee (b) that no one is entitled to deal with a shopkeeper who opens a shop without their permission, (c) that no outsider is allowed to deal with a shopkeeper who opens a shop without their permission and (d) that no weighman is allowed to deal with an outsider."

The Court further finds that the rule about the election of the members twice a year once in Kuar and once in Phagun, doesnot entail the consequence that every one is compelled to become a member

The lower appellate Court winds up its analysis of evidence with the follow ing remarks:

> "There can be no doubt then that there is some sort of pressure brought to bear on members of the association, be they capitalist (the traders) or be they the labourers (weighmen) . . . Such of those traders who are members of the committee and who wished to deal with non-members are told by the committee that if they so wish they have to cease to become members. Similarly such of the weighmen who are members of the weighmen's association (part of the Traders' Association) and who wish to weigh for non-members are told that if they so wish they have to cease to become members and are further told that the patronage of the members of the Traders' Association shall be withdrawn from them . . ."

From the evidence discussed above it would appear that this capitalistic combination and combination of labour puts before its members a choice between two alternatives. They put this question to the members:

> "Do you wish to deal with outsiders and thus be obliged to cease to be members of the association, or do you wish to continue to be members and cease dealings with outsiders?"

Considering the many advantages by remaining as members of the Sabha as detailed in the evidence of Lachmi Narain defendant witness 1, the secretary of the Sabha, they choose the second alternative and refuse to deal with non-members. If they choose the other alternative they are first fined and then if necessary boycotted. The question is whether this is illegal. After discussing the evidence the Court dealt with the case in its legal aspect and answered the question in the negative. We agree with the view.

Dealing with the plaintiffs' claim for damages, the Court next proceeded to examine whether the defendants had procured certain breaches of contract with third parties for supply of goods to the plaintiffs. As to this the Court observes as follows,

> "The plaintiffs have given details of these several purchases but with the exception of one purchase they have not been able to prove any other. On the other hand the defendants have produced those persons whom the plaintiffs alleged to have been their vendors and these persons have denied that they entered into any contract of sale of goods. The plaintiffs' case therefore has not been proved."

As regards one of the purchases referred to above it is to be observed that the Court did not intend to find and as a matter of fact did not find that the defendants procured a breach of the contract. There is no room for cavil or criticizm in the finding of the Court below which appears to us to be perfectly clear and legitimate:

> "The question in other words is whether the defendants actually asked the vendors of the plaintiffs not to deliver goods to plaintiffs."
>
> My answer is "not." I have already found that what the association did was that it distinctly told the plaintiffs' vendors that if they supplied goods sold to the plaintiffs they would cease to be members of the association. It must therefore be said that there was no absolute negation in this case. There was no conspiracy on the part of the association to compel the plaintiffs' vendors not to supply goods to the plaintiffs. Now there is a great deal of difference between a third person asking a party to a contract to break the contract and a third person telling the same party to contract:
>
> "You may supply goods to the plaintiffs if you wish, but if you do so we will fine you, we will boycott you and we will turn you out of the association.' And this latter act was all that the defendants did."

Upon these findings the Court below came to the conclusion that there was no cause of action for a suit for damages or injunction against the defendants. We agree with this view. The following passage from Erle on Trade Unions, page 12, will bear quotation:

> "Every person has a right under the law as between himself and his fellow subjects to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising thereform and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description done, not in the exercise of the actor's own right but for the purpose of obstruction, would if damage should be caused thereby to the third party obstructed, be a violation of this prohibition."

We are of opinion that what is wrong in the case of an individual continues to be a wrong if committed by an association of individuals by preconcert or conspiracy and that a conspiracy consists in the agreement of two or more persons to do an unlawful act by unlawful means. This was the view taken in *Mulcahy* v. *Reg* (5) at p. 317. We agree with this view.

We do not think that any useful purpose will be served by embarking on a critical examination of the authorities dealing with the law relating to actions for conspiracy. While the cases have a common denominator, the case-law on the subject is very vast and the features of each case vary with the kaleidoscopic turn of circumstances. We shall however indicate the principles laid down in the important and oft-cited cases.

In *Limley* v. *Gye* (6), it was held that an action would lie for malicious procurement of the breach of any contract, if by the aforesaid procurement, damage was intended to result and did result to the plaintiff. Crompton, J., observed:

> "Where two or more parties were concerned in inflicting such injury, an indictment, or a writ of conspiracy at common law, might perhaps have been maintainable and where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case, the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action."

In the great case of *Allen* v. *Flood* (7), it was decided:

> "that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act, so as to make the doer of the fact liable to civil action; and therefore where the appellant had violated no legal right of the respondent, done no unlawful act and used no unlawful means in procuring the respondent's dismissal, his conduct was not actionable however malicious or bad his motive might be."

According to Lord Watson, there are only two grounds of legal liability: (1) If a person knowingly and for his own ends induces the commission of an actionable wrong; and (2) where the act induced is within the right of the immediate actor but may be to the detriment of a third party and the inducer procured his object by the use of illegal means directed against the third party.

Lord Macnaghten expressed his opinion in *Quinn* v. *Leathem* (8) at p. 508 that if all matters of merely passing interest be eliminated, *Allen* v. *Flood* (7) had merely repeated what had been laid down in *Stevenson* v. *Newnham* (9) at p. 297, namely, that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.

In *Mogul Steamship Co. Ltd.* v. *MacGregor* (4) it was held by the majority of the Judges that the association being formed by the defendants with the view of keeping the trade in their own hands and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill will towards them, was not unlawful, and that no action for conspiracy was maintainable. Bowen, L. J., enunciated the law in the following terms (p. 614):

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(5) [1868] 3 H.L. 306.

(6) 2 El. & B.L. 216.

(7) [1898] A.C. 1=67 L.J.Q.B. 119=77 L.T. 717=46 W.R. 258=62 J.P. 595.

(8) [1901] A.C. 495=70 L.J.P.C. 76=85 L.T. 289=50 W.R. 139=65 J.P. 708=17 T.L.R. 749.

(9) [1853] 13 C.B. 285=22 L.J.C.P. 110.

> "There seems to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no especial disadvantage as compared with others. No man whether trader or not, can however justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it."

Again, at p. 617:

> "The truth is that the combination of capital for the purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former."

We have no hesitation in holding that this view does not militate against the provisions of S. 27, Contract Act and that the basic principle of the two is not divergent.

In *Temperton* v. *Russell* (10), Lopes, L. J., observed:

> "I will state shortly what I believe to be the law on the subject. The result of the authorities appears to me that a combination of two or more persons to induce others not to deal with a particular individual, or enter into contracts with him, if done with the intention of injuring him is an actionable wrong if damage results to him therefrom."

The same rule was laid down in *Quinn* v. *Leathem* (8), which has already been referred to Lord Machnaghten observed (at p. 510).

> "Speaking for myself, I have no hesitation in saying that I think the decision in *Allen* v. *Flood* (7), was right, not on the ground of malicious intention—that was not, I think, the gist of the action but on the ground that a violation of legal right committed knowingly is a cause of action and that it is a violation of legal right to interfere with contractual relations recognized by law if there is no sufficient justification for the interference . . . . . The only other question is this: Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition and that it is founded on good sense . . . . . A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing (as Lord Fitzgerald observes) when one man has to defend himself against many combined to do him wrong."

Lord Brampton with his characteristic force and clearness expresses himself as follows:

> "Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful, if done separately without conspiracy may, with conspiracy, become dangerous and alarming just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but if administered frequently and in larger quantities with a view to harm may be fatal as a poison."

In *South Wales Miners Federation* v. *Glamorgan Coal Co., Ltd.* (11), it was held

> "that procuring a breach of contract is an actionable wrong unless there be justification for interfering with the legal right. According to Lord Lindley malice was not the gist of the action."

Where the word "malice" has been used in some of these cases, it must be held to connote no more than an intention to commit an unlawful act without reference to spite or ill-feeling, *Conway* v. *Wade* (12) and *Hodges* v. *Webb* (13), are not very helpful cases since they turned more particularly upon a construction of certain words in S. 3, Trade Disputes Act of 1906. But the last mentioned case is relevant in so far that it was held therein that in the absence of conspiracy or unlawful combination, a firm or even emphatic statement by one person that unless the person whom he is addressing consents to the adoption of a particular course which he can lawfully take, the speaker would do that which he was lawfully entitled to do, was not a threat for which the speaker could be held liable at law..

In *Larkin* v. *Long* (14), Lord Atkinson is reported to have observed:

> "The fact that members of a trade union are merely acting in obedience to a rule of their union believed by them to be for their benefit

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(10) [1893] 1 Q.B. 715=62 L.J.Q.B. 412=4 R. 376=69 L.T. 78=41 W.R. 565=57 J.P. 676.

(11) [1905] A.C. 239=74 L.J.K.B. 525=92 L.T. 710=53 W.R. 593=21 T.L.R. 441.

(12) [1909] A. C. 506=78 L. J. K. B. 1025=101 L.T. 248=53 S.J. 754=25 T. L. R. 779.

(13) [1920] 2 Ch. 70=89 L.J.Ch. 273=123 L.T. 80=36 T.L.R. 311.

(14) [1915] A. C. 814=84 L. J. P. C. 201=113 L.T. 337=59 S.J. 455=31 T. L. R. 405.

> is no defence to an action for the breach of any contracts they have entered into and still less is it a defence to the wilful and malicious infringement in combination of legal right of personal freedom of action which they claim for themselves, but which others are entitled to quite as fully and as absolutely as they are."

In *Ware & De Freville, Ltd.* v. *Motor Trade Association* (15) the finding was that the evidence produced by the plaintiffs was quite insufficient to establish the case of a conspiracy to injure. The following observation finds a place in the judgment:

> "The decisions in *Mogul Steamship Co. Ltd.*, v. *McGregor, Allen* v. *Flood* and *Quinn* v. *Leathem* are all in agreement to this extent, that a combination of persons to do some act, the object of which is to injure some third person is wrongful and actionable; so too is a combination of persons to do some act by unlawful means which will have the effect of injuring some third person."

If there is a combination made and threats used for the legitimate protection of trade interests no action would lie.

In *Reynolds* v. *Shipping Federation Ltd.* (16), it was held that where an agreement is entered into, not from a malicious desire to inflict loss on an individual or class of individuals, but from a desire to advance the business interests of employers and employed alike by maintaining the advantages of collective bargaining and control it was not unlawful and no action for conspiracy was maintainable by the plaintiff:

> "The agreement or combination was not against a particular individual but merely operated to exclude such individuals as might not from time to time satisfy a qualification which was within the reach of anyone who desires employment."

In *Sorrell* v. *Smith* (17), it was ruled that a combination of two or more persons for the purpose of injuring a man in his trade is unlawful, and if it results in damage to him is actionable. If the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it then no wrong is committed and no action will lie although damage to another ensues, provided that the purpose is not affected by illegal means. Viscount Cave, L.C., observed:

> "There is some authority for the view that what is unlawful in two is not lawful in one, and that the circumstance that two or more persons combine to cause the injury, while it may be very relevant, as evidence of the purpose and, as an aggrevation of the damage, is not itself an essential element in the cause of action."

There exists no uncertainty as to the legal principles regulating the rights of the parties to this action and the following propositions may be taken to be the settled law:

(1) Every person has a right to a free course of trade and to conduct his business upon his own lines even though it results in an interference with the business of another person to his detriment. (2) If a person or a combination of persons unlawfully procure a breach of contract, the matter is actionable, provided that damage accrues therefrom: (3) Malice in the sense of spite or ill-feeling is not the gist of the action. An act that is legal in itself does not become illegal because it is prompted by an indirect or sinister motive. (4) Even though the dominating motive in a certain course of action may be the furtherance of one's business or of one's interest, one is not entitled to interfere with another man's method of earning his living by illegal means. Illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy where they would not have been illegal if done by a single individual. (5) An unlawful interference with the business of another person with intent to hurt that person is actionable provided that damage results from interference. A lawful interference by unlawful methods with the same object and producing similar results is equally actionable.

We have set out in detail the findings of the learned Judge and his reasons in support thereof. It is perfectly clear that the defendants did not unlawfully or by illegal means procure any breaches of contract in favour of the plaintiffs. There was no conspiracy on the part of the defendants to compel the plaintiffs' vendors not to supply goods to the plaintiffs. A certain amount of pressure was brought to bear upon their constituents the object of which was that if the latter wished to continue to be members of the association they had to obey the edicts of the association and to cease to deal with outsiders. These persons had a choice of action. They were not the victims of any coercion on the part of the defendants. Where a person has a choice of one or other of two courses with their attendant advantages or disadvantages, coercion is not necessarily one of the elements involved in the transaction. There was no organized conspiracy on the part of the defendants to do harm to the plaintiffs. The association of the defendants was formed with the primary object of keeping the trade in their own hands and not with the intention of ruining the trade of the plaintiffs. The association therefore was not unlawful and there was no cause of action for a claim founded upon conspiracy. The plaintiffs are therefore not entitled to the relief claimed.

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(15) [1921] 3 K.B. 40.
(16) [1924] 1 Ch. 28.
(17) [1925] A. C. 700.

We accordingly dismiss this appeal with costs, including in this Court fees on the higher scale.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 90

MUKERJI AND BENNET, JJ.

Baramdeo Pandey—Plaintiff — Appellant.

v.

Debi Dat Singh and *others* — Defendants—Respondents.

Second Appeal No. 194 of 1928, Decided on 3rd July 1930, from decree of Dist. Judge, Azamgarh, D/- 29th October 1927.

Civil P. C., O. 20, R. 2 — Judgment by retiring Judge held to be validly pronounced by his successor in office.

A retiring Judge wrote a judgment and signed it on a date between the date of his resignation for retirement and its actual acceptance. The judgment was pronounced in Court by his successor on a subsequent date.

Held : that the judgment was validly pronounced : 35 *Mad.* 47 and 35 *Cal.* 756, *Ref.* ; 46 *Cal.* 978 and 33 *All.* 236, *Dist.* [P 91 C 2]

N. Upadhiya—for Appellant.

P. L. Banerji—for Respondents.

Mukerji, J.—This is a second appeal by a plaintiff against a decree of the lower appellate Court dismissing his suit. There are only three grounds of appeal and all are based on the same point that the presiding officer had no jurisdiction to pass a judgment, because he had retired from office on 4th October 1927. We are not referred to any notice in the Gazette or in the Civil List to show the actual date of retirement, but the counsel says that he has a letter from the Registrar of this Court to the effect that the retirement of the learned District Judge Chaudhri Abdul Hasan, took effect from 4th October 1927. We may however point out that this statement does not show on what date the resignation of the District Judge was actually accepted, and in the ordinary course it would be accepted at a date long subsequent to 4th October 1927, the date from which it had retrospective effect.

The judgment was signed on 9th October 1927, and was pronounced in Court by the successor of the District Judge on 17th October 1927. The short question before us is whether this judgment was validly pronounced under O. 20, R. 2, which states :

> "A Judge may pronounce a judgment written but not pronounced by his predecessor."

It was argued for the appellant that when the Judge who wrote the judgment retired, he ceased to be a Judge at all, and therefore he cannot be considered to be the predecessor of the Judge who pronounced the judgment within the meaning of O. 20, R. 2. No definite authority was shown for this argument. But reference was made to a number of rulings. In *Chinnu Pillai* v. *Kalimuthu Chetti* (1), there was a ruling of a Full Bench of the Madras High Court and at p. 51 it is stated that as one of the five Judges who heard the appeal argued had resigned office, the Chief Justice directed that the Bench which would deliver judgment would consist only of the four remaining Judges. No definite decision was made as to whether the judgment of the learned Judge who had resigned was a judgment valid in law or not ; but at p. 57 that judgment is appended and it was appended under the orders of the Chief Justice. No authority for the proposition can be deduced from this ruling.

A reference was also made to an English ruling, but as it was not shown that the rules of the High Court in England are similar, we cannot say whether anything could be deduced or not from this English ruling.

The appellant further relied on *Fort Gloster Jute Manufacturiug Co.* v. *Chander Kumar Das* (2). In this case there were two Subordinate Judges working in the same district and one had to go to another district for some days in the month. He wrote a judgment which was pronounced during his absence by the other Subordinate Judge. Clearly the other Subordinate Judge was not his successor within the meaning of O. 20, R. 2, and apparently on this ground the procedure was considered irregular, but it was held that such an irregularity was not material and would not give any right to a Court of appeal to reverse the decree of the lower Court. This is in accordance with S. 99, Civil P. C., which states that no decree shall be reversed on account of any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

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(1) [1912] 35 Mad. 47=9 I.C. 596 (F.B.).
(2) [1919] 46 Cal. 978=51 I.C. 405.

The two other rulings may be referred to, one of which is *Lachhman Prasad* v. *Ram Kishan* (3). In this it was laid down that where a judgment is written by a Judge, who is transferred, then his successor has discretion under O. 20, R. 2 either to pronounce the judgment or not to pronounce it and to come to a decision himself on appeal.

Another case in point is reported in *Satyendra Nath Roy* v. *Kastura Kumari Ghatwalin* (4), which was a decision of a Bench of five Judges. In this it was held that a judgment may be written by a Judge after he has been transferred or has gone on leave and may be pronounced by his successor. We note that in that case there was an interval of ten months after the Judge had gone on leave before he sent the judgment to his successor to pronounce, and it was held that the pronouncing of such a judgment was a correct procedure under S. 199 of the former Civil P. C., of 1882, which corresponds to O. 20, R. 2.

Some attempt has been made to draw a distinction between a judgment written after a Judge had retired and a judgment written while a Judge is on leave. It is true that when a Judge is on leave he will on return from leave take over charge again of his judicial office, but during the period that he is on leave he does not possess any judicial powers or functions or jurisdiction. We can see no distinction drawn between a writing of a judgment by a Judge who has gone on retirement. In fact if the distinction which the learned counsel seeks to draw were drawn, then it would lead to an absurd conclusion. If it were to be held that a judgment written on retirement is invalid but a judgment written on leave is not invalid, then there might arise a case of a judgment written during leave which is held to be valid, but owing to the officer subsequently going on retirement and his retirement dating back to the commencement of his leave, then the same judgment ought to be invalid.

We may note that R. 2 is without any qualification of the word "predecessor." On the argument of the learned counsel for the appellant the word "predecessor" would have to be qualified by some such phrase as

"who is still in service or who is on leave or who has been transferred."

As the rule is without any qualification, we consider that there is no authority for introducing such a qualification into the rule.

We consider therefore that the procedure of the lower appellate Court was perfectly correct. No other ground of appeal has been taken in the memorandum. Accordingly we dismiss this appeal with costs.

B.V./R.K. *Appeal dismissed.*

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(3) [1911] 33 All. 236=8 I.C. 1096.

(4) [1908] 35 Cal. 756=7 C.L.J. 666=12 C.W.N. 682 (F.B.).

A. I. R. 1931 Allahabad 91

SULAIMAN AND BANERJI, JJ.

Kishen Chand Singh—Applicant.

v.

Mukan Sarup and *others*—Opposite Parties.

First Appeal No. 93 of 1930, Decided on 29th July 1930, from order of Sub-Judge, Bulandshahr, D/- 6th February 1930.

(a) Civil P. C. (1908), S. 114 and O. 47, R. 4—Ground for review.

It is a wrong procedure for a lower Court to review its former order merely on the ground that a ruling of the High Court had not been brought to its notice on the previous occasion [P 92 C 1, 2]

(b) Agra Tenancy Act (1926), S. 273—Issue remitted to revenue Court for decision—Civil Court cannot go behind finding of revenue Court—It has to accept it.

A civil Court after remitting an issue to the revenue Court for a decision cannot go behind the finding of that Court. It has to accept its finding and proceed with the case. If the civil Court has got any doubt as to whether the suit relates to agricultural land, it ought to get itself satisfied if it is so or not before remitting the issue to revenue Court. [P 92 C 2]

S. N. Seth—for Applicant.

K. N. Katju and *Shiva Prasad Sinha*—for Opposite Parties.

Sulaiman, J.—This is an appeal from an order dated 5th February 1930 of the Court below cancelling a previous order dated 19th January 1929, under which an issue was remitted to the revenue Court under S. 273, Agra Tenancy Act. It is quite clear that at that time the Court must have been of opinion that the suit related to an agricultural holding and therefore an issue had to be remitted on the plea of tenancy raised by the defendant. The revenue Court on the receipt of the record inquired into the matter and recorded its finding and submitted it to the civil Court. After the receipt of the finding the defendant filed an application without indicating under what section it was made in which the Court was asked to treat the decision of the revenue Court as being ultra vires and to rehear the case on the merits. The learned Subordinate Judge entertained this objection and has set aside his former order and fixed a date for the disposal of the suit.

Subsequently the defendant filed a fresh application for a review of this last mentioned order, which was resisted by the plaintiff on the ground that O. 47, R. 9, Civil P. C., was a bar to it. The Court below accepted the plaintiff's objection and dismissed the application of the defendant as being barred by the provisions of that rule. There can therefore be no doubt that both the plaintiff and the Court below treated the order of 6th February 1930 as having been made under O. 47, R. 4, Civil P. C., and it was on that ground alone that a subsequent application of the defendant was dismissed. It therefore seems to us that we cannot allow the plaintiff now to change his ground and urge for the first time before us that his previous application had not been under O. 47, R. 1, at all. If the order passed was under O. 47 there can be no question that an appeal lies from the order granting the application.

On the merits this appeal must succeed. In the first place, the application was made by the plaintiff beyond time and there was no prayer for extension of time. It is also clear that the ground urged on his behalf was a ground which he could have known if he had been diligent and careful. In the second place, the Court below has acted wrongly in reviewing its former order merely on the ground that a ruling of this High Court had not been brought to its notice on the previous occasion. This itself is not a sufficient ground for his thinking that the holding was not an agricultural holding. Lastly, it seems to us doubtful whether it was open to the Court below to cancel its previous order after the revenue Court had inquired into the matter and submitted its finding under S. 273. It was for the Court to be satisfied that the suit related to an agriculatural holding before it remitted an issue and submitted the record to the revenue Court for decision. After the revenue Court reframed the issue and decided it and returned its finding, the civil Court could not go behind it. The section provides that :

> "the civil Court shall then proceed to decide the suit and accept the finding of the revenue Court on the issues remitted to it."

As the language of the section stands the civil Court is bound to accept it. That question should be taken to have been finally settled so far as the trial Court was concerned. It is not absolutely necessary to decide this point finally, but we are inclined to think that it would be too late for the trial Court to go back upon its previous order after the revenue Court had gone into the matter and recorded its finding in favour of one party. Of course if the Court below acted wrongly the mistake can be rectified on appeal. On all these grounds we must allow this appeal and setting aside the order dated 6th February 1930, direct the Court below to dispose of this case according to law. The appellant will have his costs of this appeal from the respondents.

B.V./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 92

SULAIMAN AND NIAMATULLAH, JJ.

Mt. Deoraji Kuer—Objector — Applicant.

v.

Jadunandan Rai — Decree-holder — Opposite Party.

Civil Revn. No. 182 of 1929, Decided on 1st July 1930, from order of Addl. Sub-Judge, Ballia, D/- 4th May 1929.

(a) Civil P. C., S. 73 — Application for rateable distribution after attachment — Attachment enures for benefit of all claimants provided applications for execution are filed before realization of assets—Asking for sale and distribution of sale proceeds proportionately is sufficient.

When an application for rateable distribution is made after the attachment has already taken place, the attachment really enures for the benefit of all claimants and is as effective as if it had been brought about separately by each of them, provided they had, before the assets were realized, applied for execution of their decrees. In such cases it is quite sufficient for them to ask that the sale should take place and the sale proceeds distributed among them proportionately. [P 94 C 1]

(b) Civil P. C., S. 73 — Separate application for rateable distribution is not necessary —Application for execution includes such prayer.

Section 73 does not require separate application for rateable distribution. Application which is really for the execution of decree itself includes a prayer for the distribution of the assets: *A. I. R.* 1929 *Nag.* 148, *Dist.* [P 94 C 1]

(c) Civil P. C., O. 21, R. 7 — Executing Court cannot question validity of decree.

The Court to which the decree is transferred for execution is not competent to inquire into the validity of the decree. [P 94 C 2]

Baleshwari Prasad—for Applicant.

K. Verma—for Opposite Party.

Sulaiman, J.—This is an application by a rival decree-holder from an order granting rateable distribution of the assets realized by the Court. The applicant had obtained a money decree against the judgment-debtor and his property had been attached by him and put up for sale at auction. The respondent decree-holder, who also had a money decree against the same judgment-debtor from another Court, got the decree transferred to the same Court which was executing the applicant's decree. After the execution of the decree had been transferred, he filed an application on 15th March 1929, describing it as an application for execution. It was in fact on a printed tabular form prescribed for applications for execution under O. 21, R. 11. All the particulars required for an application in execution were filled in from Cols. 1 to 9. In the last Col. 10 which has a heading "the mode in which the assistance of the Court is required" he stated that the only property which the judgment-debtor had had already been attached in execution of the other decree and was to be put up for sale on the 20th March following. He therefore prayed that the decree-holder should be paid his decretal amount by rateable distribution of the amount realized at the auction sale. He gave particulars of his own decree and the amount due from the judgment-debtor. It is not disputed that the office of the Court below treated this application as one for execution and the Court actually ordered it to be registered as such. After the assets were realized, the Court, in spite of the objection by the applicant to the contrary, ordered a rateable distribution.

The applicant has now come up in revision to this Court and it is urged on her behalf that the order of the Court below was either without jurisdiction or illegal because there had been no proper application for the execution of the respondent's decree before the assets were realized. This argument is based on the circumstance that in the prayer sought for there was no request either for the attachment of the property and sale or for the arrest of the judgment-debtor. The contention is that the only modes of execution of a money decree are attachment and sale or sale without attachment and arrest, and that unless one of these modes is specified there is no proper application for execution in accordance with law. Strong reliance is placed on a Nagpur case, *Balaji* v. *Gopal*, *A. I. R.* 1929 *Nag.* 148.

Under O. 21, R. 54, the way in which immovable property can be attached is by making an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. The order has to be proclaimed in the way prescribed in sub-S. (2) of that rule. It cannot be disputed that in the present case this procedure had already been adopted at the instance of the applicant himself. The property was already in custodia legis and there seems to us to have been no absolute necessity for a fresh attachment of the same property, that is to say, a fresh order issued to the judgment-debtor prohibiting him from transferring or charging it.

The explanation to S. 64 undoubtedly implies that a priority as against subsequent transferees is established by a claim for rateable distribution which is included in the claim for attachment. It seems to us to follow that one may have a claim for rateable distribution without a fresh attachment. As a matter of fact even in cases of money decrees it is not always necessary to have a fresh attachment. O. 38, R. 11, refers to one case where there need not be an order for attachment after the decree.

The real point to consider is the proper interpretation of S. 73, Civil P. C., under which the Court below has acted. That section requires that before the Court has received the assets there must have been an application to the Court for the execution of the decree for the payment of the money against the same judgment-debtor which had not been satisfied. If such an application has been made it is the duty of the Court to distribute the assets rateably among all such claimants. The only question which we have to consider is whether the application of 15th March 1919 can be said to have been an application for the execution of the decree within the meaning of S. 73. We may in this connexion point out that the language of this section is not so strict, as for instance, that of Art. 182, Lim. Act, which expressly uses the expression "in accordance with law." At the time when the respondent applied the property was already under attachment. In our judgment it was unnecessary for him to ask for a fresh attachment. When he wanted that the sale proceeds realized by the Court at auction should be distributed rateably he was by implication asking for the sale of the property and for the payment of the money due to him under the decree. His application was professedly one for execution of the decree and he wanted the realization of the amount due to him in the way which was most practicable at the time. We do not think that the mere fact that he omitted to ask for the attachment of the property afresh would justify us in saying that he had not applied for the execution of his decree.

When an application for rateable distribution is made after an attachment has already taken place the attachment really enures for the benefit of all claimants and is as effective as if it had been brought about separately by each of them provided of course they had, before the assets were realized, applied for execution of their decrees. In such cases it is quite sufficient for them to ask that the sale should take place and the sale proceeds distributed amongst them proportionately. As we interpret the application there was in substance an implied prayer for the sale of the property and rateable distribution. We may point out that S. 73 does not require a separate application for rateable distribution ; accordingly there can be no objection to including a prayer for the distribution of the assets in the application which is really for execution of the decree itself.

It only remains to refer to the *Nagpur* case quoted above. It appears that the only application which had been made in that case was one asking for rateable distribution, pure and simple, and there was no application even ostensibly under O. 21, R. 11. The learned Judges accordingly held that the application could not be treated as an application for execution and therefore the requirements of S. 73 had not in that case been complied with. The application before us is of an entirely different nature as discussed above. Even if there were any slight defect or irregularity in the form of the application that would not necessarily in every case make the application a void one. We are also convinced that substantial justice has been done in this case, and even if we had not taken the view that the Court below was right we would have been very loath .to interfere in revision. The next ground urged is that the decree obtained by the respondent was a collusive decree and the Court below should have gone into that question. We are of opinion that it would not have been within the power of the executing Court to inquire into this allegation. The respondent holds a decree which has not been set aside and in trying to see whether he is entitled to a rateable distribution the Court could not have started an inquiry into the alleged collusion between the parties to it. The respondent is a holder of the decree the execution of which has been transferred to the Court below and that Court would not be competent to inquire into the validity of the decree on any such ground. The application is accordingly dismissed with costs.

G.P./R.K. *Application dismissed.*

A. I. R. 1931 Allahabad 94

MUKERJI AND BENNET, JJ.

In the matter of the Official Receiver.

Misc. Ref. No. 284 of 1930, Decided on 8th July 1930, made by Dist. Judge, Moradabad.

Provincial Insolvency Act — Receiver—Remuneration of, how calculated.

Where an auditor, auditing the accounts of the official receiver, objected that the receiver, who was entitled to claim 5 per cent of the gross assets coming into his hands under the U. P. Government Notification, could only charge commission on the amount that was distributable among the creditors of the insolvent, after payment of the amount due to the mortgagee out of the sale proceeds of the mortgaged property sold by him free from mortgage, with the mortgagee's consent.

Held : that expression " gross assets " meant the entire amount realized by the official receiver irrespective of whether the whole was distributable or not among the creditors. [P 95 C 1]

Panna Lal and *Shabd Saran*—for Official Receiver.

Mukerji, J.—This is a reference from the District Judge of Moradabad. It appears that the auditor auditing the accounts of the Official Receiver took an objection that the Official Receiver had paid himself too much and in this way. The Official Receiver sold properties of the insolvents and among those properties were some which were encumbered. In the case of latter properties, sometimes the mortgagee agrees that the property should be sold free from incumbrance and he should be given the same right over the sale proceeds as he had over the mortgaged property. In the case of the last mentioned sale the Official Receiver realized 5 per cent over the entire amount of the sale price received by him. The auditor's objection is that the whole amount was not " distributable " among the creditors of the insolvents and the amount distributable was the money that was left after paying the mortgagee. The auditor's opinion was that 5 per cent could be charged only on what remained after deducting the amount paid to the mortgagee. In order to come to the right conclusion we have to read carefully the Notification of the Government dated 20th May 1925, being No. 607/VII-247. The language is as follows :

> " Under Cl. (4) of the said section of the said Act, the remuneration of the above-mentioned official receiver is fixed at Rs. 5 per cent of the gross assets coming into his hands subject to a minimum commission of Rs. 5 in each case. "

In our opinion the expression " gross assets " means the entire amount realized by the Official Receiver irrespective of whether the whole was distributable or not among the creditors. In this view the auditor's objection is not maintainable. This is our answer to the reference.

K.N./R.K. *Reference answered.*

✻ A. I. R. 1931 Allahabad 95

SULAIMAN AND KENDALL, JJ.

Sheopati Singh and *others*—Defendants—Appellants.

v.

Jagdeo Singh and *another*—Plaintiffs—Respondents.

First Appeal No. 494 of 1926, Decided on 25th February 1930, from decree of Addl. Sub-Judge, Basti, D/- 25th May 1926.

✻ **(a) Vendor and Purchaser—Money consideration kept with purchaser to be disposed of according to vendor's direction, when not so disposed of, can be recovered by vendor himself.**

Part of sale consideration which was money, belonging to the vendor, had been kept with the purchaser for payment to his nominee. It was not so paid.

Held : that if the amount has not been paid as directed, there is no reason why the vendor should not change his mind and recover the amount himself on the ground that, not having been paid as directed, it is his unpaid purchase money : *A.I.R.* 1927 *All.* 422, *Ref.* [P 97 C 1, 2]

(b) Part performance—Executant of usufructuary mortgage doing his whole part while mortgagee not doing so—Mortgagor is entitled to recover unpaid part of consideration and should not be asked to wait till redemption.

The executants of a usufructuary mortgage had performed the whole part of their contract by delivering possession of the property mortgaged to the mortgagee, while the mortgagee did not pay the whole of the mortgage consideration money.

Held : that it would not be fair for the executants to let the mortgagees remain in possession of the property although they had not paid the whole amount and only direct an account to be taken in future when a proper suit for redemption would be instituted and that the executants were entitled to recover the amount before redemption : 30 *All.* 252; 43 *Cal.* 59 and *A. I. R.* 1925 *Mad.* 62, *Ref.* [P 97 C 2 ; P 98 C 1]

Judgment.—This is a defendants' appeal arising out of a suit for recovery of Rs. 12,000, the principal amount of mortgage-money, and Rs. 6,000 as damages on account of a breach of contract. It appears that on 23rd September 1922, the plaintiffs Jagdeo Singh and Bishnath Singh, father and son, executed a document which represented a compound transaction of sale and mortgage for Rs. 20,050 in favour of the defendants-appellants. This deed is printed at page 35. Under it 5 annas 2½ pies share in Mudila Khurd in all was transferred, out of which 2 annas 1 pie share was sold for Rs. 11,050 and the remaining 3 annas 1½ pies share was mortgaged with possession for a period of twelve years in lieu of Rs. 9,000. The payment of consideration was not split up for the two transactions of sale and mortgage separately, but was stated as a consolidated sum of Rs. 20,050. Out of this amount the mortgagees had to pay Rs. 12,000 to one Ram Krishan a previous mortgagee of the property not covered by this deed, and the balance of the consideration was to be set off against another mortgage-deed as well as two promissory notes and a small amount which had been advanced as earnest money. On the same date a security bond was executed by the transferors in favour of the transferees, agreeing to indemnify the latter and pay interest at 2 per cent. in case they suffered loss on account of any portion of the property going out of their possession.

At the time when the deeds were executed a suit for the redemption of the property in the hands of Mathura Kurmi who was a prior mortgagee of the property transferred, was pending, and the present plaintiffs had already deposited the entire mortgage-money due to him under S. 83, T. P. Act. But later on 24th October 1923, Mathura Kurmi filed a written statement pleading that the transaction was not one of mortgage but of a sale out and out. This suit was decreed by the trial Court on 2nd May 1925, and Mathura's appeal was dismissed by the High Court on 21st December 1926.

It is an admitted fact that the defendants have not made the payment to Ram Krishan and they justify their non-payment by the circumstances that the money was payable on 30th April 1923, by which date the suit in the trial Court had not been decided, and that the final adjudication was not made till December 1926. The claim was contested on various grounds, but it has been decreed by the learned Subordinate Judge. In appeal several points have been urged before us. The first is that according to a correct interpretation of the sale-deed time was not of the essence of the contract and the defendants were not bound to pay the amount to Ram Krishan so long as Mathura Kurmi's suit had not been finally disposed of, but in any event the defendants would be liable to make compensation : S. 55, Contract Act. We are unable to accept this interpretation of the deed. The condition contained in the deed relating to the first item of the said consideration on page 38 is clear and is to the effect that the mortgagees had taken upon themselves the responsibility to pay the whole amount of the mortgage-money due to Ram Krishan at the proper time, i. e., Baisakh Sudi 15th, 1380 Fasli (corresponding to 30th April 1923). There was a clear undertaking to pay this amount on the date mentioned. As Mathura Kurmi was in possession of the property belonging to the executants, it was in their interest and for their benefit that the amount should be paid to Ram Krishan promptly, so that the executants might recover possession of the property. In these circumstances it cannot be urged that time was not of the essence of the contract and that the defendants could pay it at any future time according to their wish and pleasure. Even if no time had been fixed it was the clear duty of the defendants to pay the amount within a reasonable time : S. 46, Contract Act.

Section 92, Evidence Act, precludes the defendants from proving any contemporaneous oral agreement varying the condition entered in the deed that the amount should be paid on 30th April 1903. Although no subsequent oral agreement was expressly set up in the written statement, the defendant's pleader made a statement on 2nd October 1925, that such was the case, and oral evidence was led to that effect. That evidence has not been believed by the learned Subordinate Judge. So far as the other witnesses are concerned they speak of an oral contemporaneous agreement at the time when the sale deed was executed ; but the evidence of Hanuman Prasad the defendants' mukhtar-i-am is to the effect that even subsequently, after Mathura Kurmi had filed his written statement, he spoke to one of the plaintiffs Jagdeo Singh and told him that the money left in the hands of the mortgagees would not be paid till that case had been finally decided and that he agreed to it. Jagdeo Singh has not been examined, but his son Bishnath has been examined, and he denies any such agreement. It is not suggested that there was any fresh consideration given for this subsequent promise. We are unable to take a different view of the evidence from that which has been taken by the Court below, and we accordingly hold that the subsequent oral agreement has not been proved.

The next point urged on behalf of the defendants is that inasmuch as the plaintiffs have not paid off Ram Krishan they are not entitled to recover the amount from the defendants, and that in any case they cannot compel the defendants to pay the amount to them personally when it was left in their hands for payment to Ram Krishan.

The first difficulty is that the payments of various items of consideration have not been separately allocated in the deed. But it may be assumed in favour of the appellants that the amount which they have already discharged has gone to pay off the bulk of the sale consideration, inasmuch as part of the property has been transferred to them absolutely, and that the amount unpaid which is still in their hands represents a portion of the sale consideration and the whole of the mortgage-money. We are entitled to assume this in favour of the defendants because there is at least the legal evidence of Ram Subhag, one of the plaintiffs, that this was the arrangement, and there is no evidence to contradict his statement. As the deed is silent about this allocation oral evidence to clear up this ambiguity is certainly admissible.

It follows that Rs. 3,000 representing a part of the sale consideration and Rs. 9,000 representing the whole of the mortgage money have remained unpaid.

As regards the sum of Rs. 3,000 which represents a part of the sale consideration we do not see why the plaintiff's suit should be deemed to be premature merely because they have not paid Ram Krishan in the first instance. On this point there appears to have been some conflict of view in some cases. The latest case of *Lachman Das* v. *Ram Prasad* (1) is however in favour of the respondents. We would like to point out one further consideration which ought to decide this question of law in their favour. Part of the sale consideration represented money belonging to the executants, and it had been left in the hands of the vendees for payment to their nominees. If the amount has not been paid as directed, there seems to be no reason why the executants should not change their mind and recover the amount themselves on the ground that, not having been paid as directed, it is their unpaid purchase money. If the transferees had made the payment it would have been a different matter, but not having paid it within the time fixed or within a reasonable time thereafter they have not performed their contract, and part of the sale consideration therefore remains unpaid to the vendors. We therefore see no reason why the plaintiffs should not now be entitled to recover this amount. Their suit to recover this part of the money can in no sense be treated as premature.

As regards the amount representing the consideration for the mortgage money the matter would have been simple if the transaction were one of a simple contract to lend money. In such a case it has been held in several cases that a contract to lend money cannot be specifically enforced.

The case of a usufructuary mortgage however must stand on a different footing, particularly when the possession has been delivered and the stipulation is that the profits are to be set off against the interest. According to para. 2 of the deed in question the property had to be redeemed on the payment of the principal mortgage money only after the expiry of 12 years without any further accounting. The executants have delivered possession of their property to the transferees who have not paid the whole amount contracted to be paid. Thus the executants have performed the whole of their part of the contract and the transferees have not done so. It would not be fair to the executants to let the transferees remain in possession of the property although they have not paid the whole amount, and only direct an account to be taken in future when a proper suit for redemption is instituted. The suit is not really one for the specific performance of a mere contract to lend money but to compel the defendants to perform their parts of the contract when they have obtained delivery of possession of the property.

The cases relied upon by the learned advocate for the appellants, viz., *Phul Chand* v. *Chand Mal* (2), *Sheikh Galim* v. *Sadarjan Bibi* (3) and *Yadavendra*

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(1) A. I. R. 1927 All. 422=100 I. C. 1029=49 All. 680.

(2) [1908] 30 All. 252=5 A. L. J. 491=(1908) A. W. N. 105.

(3) [1916] 43 Cal. 59=29 I. C. 621.

Bhatta v. *Srinivasa Babhu* (4) were not cases of possessory mortgages, the second being one for a mere contract to mortgage. No case directly in point has been brought to our notice. In none of the cases above mentioned does it appear to have been argued that a mortgage is a conveyance and not a mere contract for sale, and that by not compelling the mortgagee to pay the whole amount remaining in his hands one would be compelling the mortgagor to offer a bigger security for a much smaller amount. We think that the executants are entitled to recover the amount, and cannot be compelled to wait till they have procured sufficient money to redeem the mortgage.

The next point that remains for consideration is whether the relief to be granted to the plaintiffs should be a decree directing the defendants to pay the amount to Ram Krishan or whether it should be a decree for that amount in favour of the plaintiffs themselves. We have already indicated our view as to the rights of a vendor in case of a sale deed under which money is left for payment to a prior creditor. We think that the same principle would apply to the case of a usufructuary mortgage. Where the previous encumbrance creates a charge on the property transferred, the transferee is entitled to retain the amount in his own hands in order to pay off the prior encumbrance in cases where the property is transferred free from such encumbrance. That is not the case here. The discharge of Ram Krishan's mortgage would be entirely for the benefit of the executants and would not affect the property transferred to the defendants, for, as remarked above, Ram Krishan's mortgage did not cover the property transferred to the defendants.

The learned advocate for the appellants has strongly urged that inasmuch as a security bond was taken on the same day under which part of the property transferred to the defendants by the sale deed was again hypothecated as a security, his client's security would be diminished or jeopardized if the amount is not paid by the plaintiffs to Ram Krishan. In the first place it is doubtful whether we should take into consideration the effect of another ducument which was executed separately, although on the same date, particularly when an indemnity clause without reference to any specific item of properties is to be found in para. 4 of the deed of sale itself. In the next place it seems to us that the main purpose of the execution of the security bond was to protect the transferees from the adverse result of the redemption suit pending against Mathura Kurmi. That litigation has resulted in favour of the parties to this suit. We also do not think that the security is substantially diminished on account of any apprehended diminution of the security in future. Such a fear therefore cannot be taken into consideration in this connexion. The last question that remains for consideration is the amount of damages to which the plaintiffs are entitled on account of the non-payment of money for these years. The learned Subordinate Judge has gone into this question with care, and has ascertained the total rent received from tenants and also estimated the profits which ought to be derived from the *sir* and khudkasht lands. His conclusion is based on the oral evidence as well as the entries in the khatauni, and after having examined the basis of his calculation we are satisfied that his conclusion must be accepted. In his opinion Rs. 2,800 would be the fair amount of damages.

In order to avoid further difficulties Mr. Peare Lal Banerji on behalf of the plaintiffs has agreed to the defendants depositing the whole of Rs. 12,000 in the Court below under S. 83, T. P. Act, within two weeks from this date as deposit to the credit of Ram Krishan or his heirs on behalf of the present plaintiffs. If the amount is not deposited within the time fixed the decree of the Court below for Rs. 12,000 in favour of the plaintiffs will stand. The decree of the Court below for Rs. 28,000 with interest and costs will, of course, stand. We accordingly uphold the decree of the Court below with this slight modification : that if Rs. 12,000 are deposited in the Court below within two weeks from this date as directed above the decree will be deemed to be satisfied to that extent. The plaintiffs will have their costs of this appeal from the defendants who will bear their own costs.

B.V./R.K. *Decree modified.*

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(4) A. I. R. 1925 Mad. 62=80 I.C. 5=47 Mad. 698.

A. I. R. 1931 Allahabad 99

MUKERJI AND BENNET, JJ.

Raghukul Tilak — Plaintiff — Appellant.

v.

Pitam Singh and *others*—Defendants—Respondents.

First Appeal No. 534 of 1926, Decided on 8th April 1930, against decision of Sub-Judge, Meerut, D/- 15th May 1926.

(a) Civil P. C., S. 11—Application.

The rule of res judicata cannot be applied to subsequent proceedings when the points raised in the subsequent proceedings were not raised in the earlier proceedings and specifically decided once for all. [P 100 C 1]

(b) Transfer of Property Act, S. 100—Definition of charge does not create personal liability, but where charge is the result of contract there may be personal remedy.

A simple mortgage carries a personal liability unless excluded by an express contract. But the same rule does not apply to a charge, for by the definition of charge no personal liability is created. But where a charge is the result of a contract there may be a personal remedy. [P 100 C 2]

(c) Transfer of Property Act, S. 55, Cl. (b) (5)—Apart from vendor's lien, purchaser is personally liable for purchase money.

The vendee is personally liable for the purchase money apart from the liability imposed on the property purchased by him, where title has passed to him as the result of the purchase under the provisions of S. 55, Cl. (b) (5): 28 *All.* 365, *Foll.* [P 100 C 2]

Iqbal Ahmad and *K. C. Mital*—for Appellant.

P L. Banerji and *Vishwa Mitra*—for Respondents.

Judgment—This is a plaintiff's appeal and it has arisen out of the following facts: The appellant Raghukul Tilak sold certain properties of his to the predecessors-in-title of the defendants respondents for a sum of Rs. 26,000 on 12th September 1919. The plaintiff received a sum of Rs. 8,000 in cash for the same and left the balance of the purchase money with the vendees for payment to certain creditors of his. Among these creditors was one Jamna Das with whom certain properties not sold to the vendees had been mortgaged to secure the loan. The purchasers did not pay Jamna Das and the result was that Jamna Das brought a suit for sale of the property mortgaged to him in 1921 and obtained a decree against the plaintiff for recovery of Rs. 8,927, mortgage money and costs, in all Rs. 9,935. Thereupon the plaintiff brought the suit out of which these proceedings have arisen, viz.. Suit No. 656 of 1921 for recovery from the defendants of the sum of Rs. 9,935, for which a decree had been obtained by Jamna Das. The learned Subordinate Judge before whom the suit came, decreed the claim into two portions. He split it up in this way. He granted a decree for sale by enforcement of the vendor's lien to recover Rs. 9,196-4-0 only. For the balance, viz. 738-12-0, he granted a personal decree against the defendants. The plaintiff recovered the sum of Rs. 738-12-0 personally from the defendants and then proceeded to sell the property sold to the defendants to realize the remaining sum. The property had already been subject to a prior mortgage, and as the defendants had not paid that mortgage also, the property, when sold, fetched a very small sum of money, namely Rs. 2,000. The property was purchased by the plaintiff, but the prior mortgagees have resold the property, with the result that the plaintiff has lost the sum of Rs. 2,000 which he had offered for the property.

After all these proceedings, the plaintiff came into Court with an application purporting to have been made under O. 34, R. 6, Civil P. C. His case was that the balance of the purchase money was still due to him and was still recoverable by him from the defendants and a personal decree should be passed against the defendants. The application wes resisted by the defendants. For the plaintiff it was contended that his right to apply for such a personal decree was res judicata in his favour and for the defendants it was contended that O. 34, R. 6, had no application to the facts of the case and spart from the lien granted by law to the plaintiff, the plaintiff had no right to recover the money personally from the defendants.

The learned Subordinate Judge held that the matter was not res judicata, but he further held that the plaintiff was not entitled to make the application under O. 34, R. 6. Civil P. C. The points that we have to determine in appeal are the very two points that were before the learned Subordinate Judge. The question of res judicata arises in this way: The plaintiff, when he brought his suit, appended the following prayer as relief (b) to his plaint:

"If the proceeds of the sale be insufficient to pay up the decretal amount due to the plaintiff at the time, he may be authorized to apply for a decree for the balance."

Exception was taken on behalf of the defendants to the reliefs sought by the plaintiff. But nothing specifically was said about the particular relief which we have quoted above. No issue was framed as to whether the plaintiff would be entitled or not to recover personally from the defendants, the balance, if there remained a balance, after the sale of the property over which he had a charge. The learned Subordinate Judge who tried the case does not mention even the existence of this relief in his judgment. He contented himself with passing a decree under O. 34, R. 4, Civil P. C. The decree that was framed followed the form No. 8 [series (d)] appended to Sch. 1 and gave the plaintiff liberty to apply for a personal decree for the amount of the balance.

On behalf of the appellants it has been contended that this decree having become final the plaintiff's right to apply under O. 34, R. 6, has been recognized once for all and the decree cannot be departed from. We are of opinion that S. 11, Civil P. C., does not in terms apply to this case. The present proceedings are only a part of the original proceedings and it cannot be said that the matter was decided either specifically or by implication in a previous suit. The rule of res judicata has been applied to subsequent proceedings when the points raised in the subsequent proceedings were raised in the earlier proceedings and were specifically decided. In the circumstances we do not think that we are in a position to apply the rule of res judicata and to hold that the plaintiff's right has been settled once for all and in his favour. As already indicated, the matter was never considered by the Court at all and it is pure accident that the whole of the form No. 8, Appx. (d) Sch. 1, has been copied in the decree.

The next question is whether the plaintiff is entitled to make an application under O. 34, R. 6, Civil P. C. It appears to us that the question whether a charge-holder has a personal remedy against the person over whose property he holds a charge is a matter of contract. In the case of a simple mortgage it has been recognized that in the absence of a contract to the contrary, a simple mortgage carries a personal liability. Where there is a simple mortgage, there is a presumption that there is a personal liability, and unless the personal liability is excluded by an express contract it will exist. No such rule applies to the case of a charge. A charge is defined in S. 100, T. P. Act, and the important portion is as follows:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property . . . . . ."

It is clear therefore that by the definition of charge no personal liability is created. But where a charge is the result of a contract, there may also be a personal remedy to be found. But every case must depend on its own facts. In this case, the learned counsel for the appellant has pointed out to us that the sale deed contains a personal liability to pay the amount of the consideration money. But, as we read the covenant, we understand that the covenant was meant to be a covenant of indemnity where the vendor has been damnified. It is not a covenant which could be taken as a part and parcel of the vendor's lien.

There is however a provision in the Transfer of Property Act itself by which the vendee is held personally liable for the purchase money apart from the liability imposed on the property purchased by him, where title has passed to him as the result of the purchase. S. 55, sub-S. 4, Cl. (b), relates to the creation of a charge. The same section, sub-S. 5, Cl. (b), relates to the personal liability. It runs as follows:

"The buyer is bound to pay or tender at the time and place of completing the sale the purchase money to the seller or such person as he directs . . . . . ."

It is the duty, under the statute which is quoted, of the vendee to pay down the purchase money to the vendor or to such person as the vendor nominates. The fact that the vendor nominates a third person to receive the money does not mean that the vendee's liability to pay to the vendor ceased. The third person receives and gives a discharge to the vendee on behalf of the vendor. But if the third person does not receive money, the vendee's liability does not cease. The personal liability of the vendee therefore is also a creation of the statute. In the case of *Uttam Ishlok Rai* v. *Ram Narain Rai* (1) the existence of this personal liability was affirmed by Banerji, J., as one of the two learned Judges who heard the appeal in the first instance: see *Uttam Ishlok* v. *Phulman Rai* (2). Although, in the Letters Patent appeal against the judgment, this question of the existence of personal liability was not specifically decided, the learned Judges of the Court of appeal expressed the opinion that if they had to decide the point, they would have agreed with Banerji, J. Thus we have in this Court an authority for the propcsition that apart from the vendor's lien, there is a personal remedy against the vendee and in favour of the vendor. No question of limitation having been raised, it seems to us to be clear that the plaintiff is entitled to succeed.

As to how far O. 34, R. 6, Civil P. C., is applicable to a claim arising under a suit for enforcement of the charge alone, the point does not arise for determination here and for the simple reason that the plaintiff did make a claim for a personal remedy in his very suit and although it was not adjudicated on then, it cannot be said that he omitted to make a claim.

In the result we allow the appeal, set aside the decree of the Court below and we make a personal decree against the defendants except in so far that none of them will be liable to be arrested in execution of the decree; the reason is that the only adult purchaser is dead and the remaining purchasers were minors at the date of the purchase. The appellant will have his costs in this Court and in the Court below.

S.N./R.K. *Decree set aside.*

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(1) [1906] 28 All. 365=3 A. L. J. 171=(1906) A. W. N. 44.

(2) [1905] 2 A. L. J. 379=(1905) A. W. N. 144.

A. I. R. 1931 Allahabad 101

MUKERJI AND BENNET, JJ.

Ram Charan—Plaintiff—Appellant.

v.

Bhairon and *others* — Defendants—Respondents.

Letters Patent Appeal No. 188 of 1929, Decided on 4th June 1930, from judgment of Boys, J., D/- 15th May 1929.

(a) Evidence Act, S. 67—Signature of attesting witness.

A signature of an attesting witness is proved to have been made, if it is shown to have been made at the request of the person in question by some other person who signed on behalf of the first person as attesting witness to a document: 24 *All.* 319, *Appl.* and 38 *All.* 461, *Ref.* ·[P 102 C 1]

(b) Transfer of Property Act (1882), S. 3—Attestation within meaning of Transfer of Property Act, S. 123.

Signatures of the Registering Officer and of the identifying witnesses fixed to the registration endorsement are sufficient attestation within the meaning of S. 123: *A. I. R.* 1929 *Mad.* 1, *Appl.* and 3 *I. C.* 905, *Ref.* [P 102 C 2]

S. C. Goyel and *S. B. L. Gaur*—for Appellant.

P. L. Banerji—for Respondents.

Judgment.—This is a Letters Patent appeal by the plaintiff against a judgment of a learned single Judge of this Court dismissing his suit for possession of a house. The plaintiff Ram Charan alias Ram Das claimed this house partly on the ground that he was a son of the last owner Lalai and partly on the basis of a deed of gift from Lalai to the plaintiff on 8th November 1908. The defendants are in possession of the house by virtue of various sale deeds from Mt. Saraswati, sister of Lalai the last male owner. The lower appellate Court found that that plaintiff had failed to prove that he was the son of Lalai, but it found that plaintiff was entitled to the house through the deed of gift from Lalai.

In second appeal it has been held that that deed of gift is invalid as it has not been proved to have been duly attested by two witnesses as required by S. 123, T. P. Act. In support of this finding, the learned counsel for the defendants has referred to *Param Hans* v. *Randhir Singh* (1). In that case, in reference to a mortgage deed it was held that a document was not shown to be duly attested when one of the two witnesses whose names appeared on the document as attesting witnesses was not shown to have been present at execution, and was not shown to have authorised the scribe to sign for him or to have signed himself or to have put his mark on the document. In the present case the document shows that it was written by a scribe called Durga Prasad Pandey who is now proved to be dead. There are the signatures of a number of attesting witnesses stated in the document to be by the pen of Durga Prasad. Of these, one has been called Umrao and he has given evidence that the attesting witnesses were present when Lalai executed the document. On the document appears the signature of Lalai which purports to have been written by the pen of Lalai. Umrao states that Lalai made this signature in his presence, and that the attesting witnesses made their marks. In the Full Bench case of *Deo Narain Rai* v. *Kukur Bind* (2) it has been held that a signature is proved to have been made if it is shown to have been made at the request of the person in question by some other person who signed on behalf of the first person as executant of the document. This we consider will also apply to the signature of an attesting witness to a document. Accordingly we consider that in the present case the document itself and the evidence of Umrao do show that the document was properly attested by the attesting witnesses. The only point which is urged against this attestation is that Umrao stated that he and other witnesses had made their marks. It is argued that the document does not show that there are any marks of attesting witnesses. As the document is torn and has a number of holes, it is not possible to say whether there are or are not such marks on it, but in any case, even if the document were intact and it was clear that there were no such marks, we consider that this difference in the statement of witness would only be a matter on which the lower appellate Court might come to a conclusion that the evidence of a witness was not worthy of credit. It is for the lower appellate Court to come to that conclusion or not and in the present case it held that the witness is worthy of credit and that matter is not a matter which may be raised again in second appeal.

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(1) [1916] 38 All. 461=35 I. C. 748.

Further we may point out the change introduced in law subsequent to the ruling relied on by the learned counsel for the defendant, by S. 2, T. P. Amending Act, 27 of 1926. This Act has introduced a new definition of the word "attested" in S. 3, T. P. Act. This definition now covers the personal acknowledgment from the executant of a signature or mark. Consequently in *Veerappa Chettiar* v. *Subramaniya Aiyar* (3) it has been held that the signatures of the registering officer and of the identifying witnesses fixed to the registration endorsement under Ss. 58 and 59, Registration Act, Act 16 of 1908, are a sufficient attestation within the meaning of S. 59, T. P. Act. This ruling of course will also cover a gift attested under S. 123, T. P. Act. We may also refer to the case of *Bunkates Sewak Singh* v. *Ram Das* (4), in which it was held that when the executant of a mortgage deed acknowledged the execution of the deed before witnesses who attested it, there was a sufficient compliance with the provisions of S. 59, T. P. Act. The attestation in question was before the Sub-Registrar and the witnesses who attested it were witnesses who identified the executant. In the present case there has been a registration before the Sub-Registrar and his endorsement shows that there was an identification by two witnesses. Those witnesses have not in fact been called, but under the amended S. 68, Evidence Act, it is not necessary to call an attesting witness where a document has been registered, unless its execution by the person by whom it purports to have been executed, is specifically denied. There is no such denial here and it is admitted that the executant died on 8th November 1908. Accordingly it was not necessary to call one of the attesting witnesses and the evidence of the witness Umrao is sufficient to prove the execution of the document. We may also refer to S. 60, sub-S. 2, Registration Act, which states that one certificate is admissible for the purpose of proving that the document has been duly registered and that the facts mentioned in the endorsement have occurred, as mentioned therein.

We consider therefore that for both these reasons in the present case there has been sufficient compliance with the particulars of the law in regard to attestation. Accordingly we allow this Letters Patent appeal and dismiss the appeal of the defendant in this Court and restore the judgment of the lower appellate Court with costs to plaintiff in both appearances in this Court.

S.N./R.K. *Appeal allowed.*

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(2) [1902] 24 All. 319=(1902) A. W. N. 127 (F. B.)

(3) A. I. R, 1929 Mad. 1=116 I. C. 367=52 Mad. 123.

(4) [1909] 3 I. C. 905.

A. I. R. 1931 Allahabad 103

BANERJI, J.

(*Sher*) *Ahmad Khan*— Plaintiff—Applicant.

v.

Ali Bux—Defendant—Opposite Party.

Civil Revn. No. 69 of 1930, Decided on 16th June 1930, from order of Addl. Munsif, Muzaffarnagar, D/- 25th January 1930.

(a) Provincial Small Cause Courts Act (9 of 1887), S. 17—Petition to set aside ex parte decree—Security bond for judgment-debtor's appearance presented without seeking Court's direction—Subsequent deposit of dedecree amount by judgment-debtor as directed by Court—Neither of these things held to be sufficient compliance of S. 17.

Petition to set aside an ex parte decree was presented. Security bond undertaking to produce before the Court judgment-debtor when required was executed. But the direction of the Court was not sought for when security bond was presented. Subsequently the judgment-debtor deposited the decree amount in cash as directed by the Court.

Held: that neither the furnishing of security for the appearance of the judgment-debtor before the Court nor the subsequent payment of cash into Court can be deemed to be sufficient compliance with requirements of S. 17: *A. I.R.* 1922 *All.* 29; *A. I. R.* 1923 *All.* 270, *Ref.* and *A. I. R.* 1925 *All.* 379, *Dist.* [P 104 C 1]

(b) Provincial Small Cause Courts Act (9 of 1887), S. 17—S. 17 is mandatory—Non-compliance with its provisions amounts to illegality.

The provisions of S. 17 are mandatory and non-compliance with those provisions amounts to an illegality and cannot be ignored on the ground that it is a mere irregularity. [P 104 C 1]

A. P. Pandey—for Applicant.

Panna Lal—for Opposite Party.

Judgment.—This is an application in revision against an order of the Additional Munsif of Muzaffarnagar exercising jurisdiction as Judge of the Court of Small Causes.

On 6th August 1929, a decree for Rs. 157-10-0 was passed ex parte in favour of the applicant Sher Ahmad Khan against Ali Bakhsh the opposite party who was the defendant. Ali Bakhsh was arrested in execution of the decree and brought before the Munsif. On 26th October 1929, Ali Bakhsh presented a petition to the Court to set aside the ex parte decree and to comply with the provisions of S. 17, Provincial Small Cause Courts Act, a security bond was executed by Genda Mal in which Genda Mal undertook to produce before the Court when called upon to do so the judgment-debtor and on failure of his ability to produce the judgment-debtor he would pay up the amount due to the decree-holder. The Court fixed 23rd November 1929, for hearing the application to set aside the ex parte decree. On that date the decree-holder pointed out to the Court that no security bond had been filed in pursuance of S. 17, Provincial Small Cause Courts Act. On 4th January 1930, the Court directed the defendant to deposit the amount of the decree in cash and he did so on 23rd January 1930. On 25th January the ex parte decree was set aside and it is against this order that the present application in revision has been filed.

It has been contended by Mr. Pandey for the petitioner that in this case there was really a non-compliance with the provisions of S. 17, Provincial Small Cause Courts Act and in any event it was the duty of the judgment-debtor to have obtained an order from the learned Judge on 26th October 1929 whether the security that was being offered could have been offered by the judgment-debbtor in lieu of the deposit of the sum of money which had been decreed in favour of his client the plaintiff. Mr. Pandey has referred me to the cases of *Sri Bhagwat Chaudhri* v. *Balakran Saithwar* (1) and *Badlu Singh* v. *Panthu Singh* (2), in support of his contention that there has been a non-compliance with the provisions of S. 17, Provincial Small Cause Courts Act. He has further referred to the case of *Jhabbu Misir* v. *Havaldar Tiwari* (3), in support of his contention that the Court's direction as regards security could have been taken when an application for setting aside an ex parte decree was presented to the Judge of the Court of Small Causes.

It seems to me that S. 17, Provincial Small Cause Courts Act, lays down an imperative rule that when a judgment-debtor seeks to set aside an ex parte decree he must at the time of presenting his application either deposit in Court the amount due from him under the decree or give security to the satisfaction of the Court for the performance of the decree or compliance with the judgment as the Court may direct. In this case, in my opinion, there has been no compliance with the provisions of S. 17. I have had the security bond read out to me and it appears to me that the bond was a bond which was contemplated under the provisions of sub-R. (3), R. 40, O. 21, Civil P. C., and it was not a security contemplated under S. 17, Provincial Small Cause Courts Act. Moreover the direction of the Court was admittedly not sought for when the security bond was presented.

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(1) A. I. R. 1922 All. 29=65 I. C. 596.

(2) A. I. R. 1923 All. 270=71 I. C. 474.

(3) A. I. R. 1929 All. 840.

Mr. Panna Lal on behalf of the judgment-debtors contends that inasmuch as the learned Small Cause Court Judge directed cash to be deposited in Court and as cash was deposited subsequently there had been a compliance with the provisions of S. 17. He further contends that when notice was directed to be issued upon his application of 26th October 1929 it must be deemed that the Court had accepted the security; otherwise it would not have directed process to issue.

He has also contended that the Court should not interfere in revision in a case like the present because at most there was a mere irregularity and not an illegality in the case.

I am unable to accept the contention of Mr. Panna Lal. I have already stated that in my opinion the provisions of S. 17 are mandatory and a non-compliance with those provisions in my opinion amounts to an illegality and cannot be ignored on the ground that it is a mere irregularity. Mr. Panna Lal has further argued and in support thereof he has referred to the case of *Azamatullah Khan* v. *Ahmad Ali* (4) that I should hold that the subsequent payment of the cash into Court was a substantial compliance with the requirements of S. 17. In my opinion it is impossible to accept the contention of Mr. Panna Lal. The case of *Azmatullah Khan* v. *Ahmad Ali* (4) is clearly distinguishable and has no application to the facts of this case. In my opinion the furnishing of the security for the appearance of the judgment-debtor, that is all that the security in this case amounts to, before the Court, cannot be deemed to be a compliance with the requirements of S. 17, nor can it be said that the decree-holder had chosen his remedy by the arrest of the judgment-debtor, which was ensured if the security bond was filed for producing the judgment-debtor before the Court when called upon to do so. The result is that I allow the application and set aside the order of the learned Judge of the Court of Small Causes dated 25th January 1930.

G.P./R.K. *Revision allowed.*

A. I. R. 1931 Allahabad 104

SULAIMAN AND NIAMATULLAH, JJ.

(*Babu*) *Ram Saran Das* —Plaintiff—Appellant.

v.

Pearey Lal and *others*—Defendants—Respondents.

Second Appeal No. 919 of 1928, Decided on 24th October 1930, from decision of Sub-Judge, Bareilly, D/- 24th February 1928.

Civil P. C. S. 100—Question of fact—Question about existence of custom of pre-emption is mainly question of fact.

The question of the existence of custom is substantially a question of fact, and the finding would ordinarily be binding in second appeal. Of course, if the Court below has approached the question from wrong stand point or has thrown the burden of proof on the wrong party or has wrongly assumed a condition to be necessary, which is not required, the finding may be vitiated. Similarly if it has acted upon illegal evidence or acted upon evidence which is legally insufficient to show that the custom is general and of universal application, the finding may be interfered with. Or if in any other way a proposition of law is mixed up with the finding, the latter may become a mixed question of fact and law. Acts found to be done in pursuance of the alleged custom would be facts, but the conclusion whether the facts found fulfilled the requirements of the law may be a question of law. [P 105 C 1]

Where it is found that there is no universal custom of pre-emption established for the whole town, but that it exists in some mohallas and not in all, a mohalla should be taken as a unit. The evidence on the existence of the custom in the surrounding mohallas cannot be of great weight in such a case when it appears that in at least one of the adjoining mohallas it does not exist. Its existence in the particular mohalla in question ought to be specifically proved and when it is found that several houses in that mohalla were sold but there has never arisen even a single instance of a claim of pre-emption in that mohalla and when it is further found that the judgment of a civil Court in 1885 negatived the existence of such a custom, though a sale deed of 1855 contained a vague reference about its existence, the concurrent finding of the Courts below negativing the existence of such a custom could not be set aside in second appeal. [P 106 C 1]

K. N. Katju and *Damodar Das*—for Appellant.

G. S. Pathak—for Respondents.

Sulaiman, J. —This is a second appeal arising out of a suit for pre-emption by a Hindu pre-emptor of a house sold which is situated in mohalla Kauwa Tola in the city of Bareilly. In the plaint the plaintiff alleged that a custom of pre-emption prevailed in the entire city of Bareilly and especially in mohalla Azamnagar, whereof a number of "mohallas" including Kauwa Tola formed part. The existence of the custom of pre-emption was denied by the defendants. The Court of first instance framed the issue: "Is there any custom of pre-emption in the mohalla in suit," and found that no such custom was established. In the grounds of appeal before the District Judge the plaintiff urged that the finding of the lower Court that the custom of pre-emption did not exist in mohalla Kauwa Tola was erroneous. The learned Judge's judgment also shows that he applied his mind principally to the question whether the alleged custom of pre-emption obtaining in the said mohalla (Kauwa Tola) did not exist. He agreed with the first Court and held that it was not established.

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(4) A. I. R. 1925 All. 379=88 I. C. 581=47 All. 728.

The question of the existence of custom is substantially a question of fact, and the finding would ordinarily be binding on us in second appeal. Of course, if the Court below has approached the question from a wrong standpoint or has thrown the burden of proof on the wrong party or has wrongly assumed a condition to be necessary, which is not required, the finding may be vitiated. Similarly, if it has acted upon illegal evidence or acted upon evidence which is legally insufficient to show that the custom is general and of universal application, the finding may be interfered with. Or if in any other way a proposition of law is mixed up with the finding, the latter may become a mixed question of fact and law. Acts found to be done in pursuance of the alleged custom would be facts, but the conclusion whether the facts found fulfilled the requirements of the law may be a question of law. The learned advocate, in this case, urges that the learned Judge has approached the question from a wrong standpoint and has erred in law in throwing the burden on the plaintiff to prove the existence of the custom in the particular locality, viz. mohalla Kauwa Tola, and has ignored the evidence relating to the prevalence of such a custom in the surrounding 'mohallas.' If such were the case, the finding would naturally be vitiated and it would be our duty to examine the whole evidence afresh.

It is possible to interpret the judgment of the lower appellate Court as implying that the evidence of the existence of the custom in the surrounding "mohallas" should be altogether ignored and that the plaintiff is bound to show instances of pre-emption in that very mohallah. At the same time, it is possible that the learned Judge merely meant to hold that such evidence was not legally sufficient to establish the custom in the "mohalla" in question. In this state of doubt we think it desirable to briefly examine the important pieces of evidence that have been adduced by either party.

In favour of the plaintiff there is a judgment of the Agra High Court of 1866, in which there was a remark that the custom of pre-emption in the town of Bareilly was established. The judgment does not show that the question whether it applied to the whole town of Bareilly or not was directly in issue. There is a similar remark in the judgment of the District Judge of the year 1914; but that remark also is a general observation and there was no specific issue as to whether the custom prevailed in the whole town of Bareilly. There is also a similar remark in the judgment of the first Court in a suit which was finally decided by the High Court in 1921, which was partially endorsed by the District Judge; but the actual finding of the High Court did not turn on the existence of such a custom in the whole town of Bareilly. These judgments are, to some extent, in favour of the plaintiff, who also relies on a sale deed of 1855, in which there is a mention that the vendee, who was a resident of Azamnagar, known as Kauwa Tola, was the pre-emptor. The deed however does not show whether the right of pre-emption was based on the existence of any custom or any contract between the parties. The deed is therefore not of much importance.

As against these we have a judgment of the Subordinate Judge of Bareilly of the year 1885 in which the existence of the custom of pre-emption in mohalla Kauwa Tola itself was negatived. The judgment is in Urdu and is couched in a somewhat vague language. It is possible that the reasoning of the learned Subordinate Judge was not perfect, but there can be no doubt that in that suit the claim of pre-emption brought by a Hindu resident in mohalla Kauwa Tola on the strength of an alleged custom failed. We also find that in a judgment of 1927 the District Judge of Bareilly held that no such custom of pre-emption prevailed in mohalla Kucha Sita Ram situated in the town of Bareilly and adjoining Kauwa Tola. The judgments relied upon by the plaintiff with regard to other mohallas also show that attention was concentrated on the existence or non-existence of such a custom in those particular mohallas.

We must therefore accept the finding of both the Courts below that there is no universal custom established for the whole of Bareilly. It appears that the custom has been found to prevail in some mohallas but not in all. This being so, a mohalla is to be taken as a unit. As already pointed out, the frame of the issues, the grounds of appeal before the District Judge and the way in which the question was approached by him, go to show that stress was laid on behalf of the plaintiff on the existence of such a custom in mohalla Kauwa Tola. The evidence on the existence of custom in the surrounding mohallas cannot be of great weight when we find that at least in one of the adjoining mohallas, namely mohalla Kucha Sita Ram, it does not prevail.

If we confine our attention to the evidence which relates to mohalla Kauwa Tola itself, we find that on the one hand there is the vague recital in the sale deed of 1855, and on the other there is a judgment of the Subordinate Judge of 1885. The learned Munsif has also observed that several sale deeds were written in the mohalla but no instance of a claim of pre-emption has been shown.

We therefore, think that even if the finding of the lower appellate Court were not to be binding on us as a finding of fact, we should accept the concurrent conclusions of the two Courts. The appeal is accordingly dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 106

SULAIMAN AND BANERJI, JJ.

Muhammad Yunis Khan — Plaintiff—Appellant.

v.

Muhammad Saleh Khan — Defendant—Respondent.

First Appeal No. 125 of 1925, Decided on 25th July 1930, from decision of 2nd Addl. Sub-Judge, Aligarh, D/-12th December 1924.

Mahomedan Law — Pre-emption—Conditional exchange does not give rise to right of pre-emption.

Under the Mahomedan Law, so far as the right of pre-emption goes sales and exchanges are treated on the same level. Therefore even a conditional exchange with a reservation entitling either party to take back the property would not, just like a conditional sale, give rise to a right of pre-emption : 16 *All.* 344, *Ref.* [P 107 C 2]

Akhtar Husain Khan—for Appellant.
Iqbal Ahmad, *T. A. K. Sherwani* and *A. M. Khwaja*—for Respondent.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for pre-emption under the Mahomedan law. On 25th October 1922 the plaintiff's sister Mt. Rabia Begam executed a deed of exchange in favour of the defendant Haji Mohammad Saleh Khan in which shares in 12 villages were transferred to him in return for a bigger share in another village transferred by him to her. There was another deed of exchange dated 5th December 1922 between Haji Saleh Khan and Haji Yusuf Khan. Two suits for pre-emption were instituted by the plaintiff in respect of these two transactions. In these deeds of exchange there was a condition for the annulment of the transaction at the option of either party. The plaintiff alleged that he had made demands as required by the Mahomedan law, and that he was entitled to pre-empt half of these properties because he was a cosharer on the same footing as the transferees. He also alleged that the real consideration was Rs. 12,000 and not Rs. 20,000. The claims were resisted by the defendants on the ground that the deeds of exchange on account of the reservation clause were not pre-emptible under the Mahomedan law, it was further pleaded that the demands required by the Mahomedan law had not been performed under that law, and lastly it was alleged that the consideration entered in the deeds was genuine.

The learned Subordinate Judge has dismissed the claim holding that the conditional transfer was not pre-emptible, and has also held that the demands were not proved to have been duly performed.

With regard to the question of the performance of the demands, there is one point in favour of the plaintiff and that is that before even the deed of exchange was executed when he heard of the intention to exchange he had sent notice by means of a registered post-card, dated 6th September 1922 to his sister warning her not to transfer her share and informing her that in case it was transferred he would pre-empt the transfer. The plaintiff however did not go into the witness box, and relied on the evidence of his general attorney and two witnesses. The defendant went into the witness box and denied the performance of the second demand made to him. The plaintiff had attempted to show two second demands one made to the transferee and the other at the property. As we are convinced that the suit must fail on the question of law, it is unnecessary to consider the oral evidence at length.

The deeds of exchange contained the following covenants :

> "From this date the parties became the permanent owners in possession of their respective rights in the property exchanged on this condition that both the parties shall have powers to cancel the exchange at their will during their lifetime and to enter into possession of their respective properties, as they had been before the execution of the deed of exchange, whenever they feel any deviation, loss, inconvenience or difficulty in the arrangement which has been made for the facility of management of the property exclusively held by them, or find that the object for which this exchange and arrangement has been made is not fulfilled the parties shall abide by this condition. This condition should not be binding upon their heirs and representatives."

It is quite clear that the deeds of exchange reserve an option to both the parties to annul the transaction and get back the properties transferred in their lifetime. This therefore amounted to a conditional sale and not an out and out absolute sale which would completely extinguish the rights of the transferor. In Vol. 3, Ch. 38, p. 559 of Hamilton's Translation of the Hedaya, the rule of law is stated in the following words :

> "It cannot take place with respect to a property sold under a condition of option. If a man sell his house under a condition of option the privilege of shaffa cannot take place with respect to that house, the power reserved by the seller being an impediment to the extinction of his right of property : but when he relinquishes that power, the impediment ceases, and the privilege of shaffa takes place, provided the shaffi prefer his claim immediately. This is approved."

Under the Mahomedan law so far as the rights of pre-emption go sales and exchanges are treated on the same footing. It therefore follows that even a conditional exchange with a reservation entitling either party to take back the property would not give rise to a right of pre-emption.

As laid down in the Full Bench case of *Begam* v. *Muhammad Yaqub* (1) the Muhammadan law is to be applied in considering whether or not a right of pre-emption arises. The present claim being under the Mahomedan law, it is quite clear that under that law it was not a complete transfer extinguishing the rights of the parties and giving a right of pre-emption. We accordingly agree with the view taken by the Court below that no suit for pre-emption can be maintained.

The learned advocate for the appellant has argued that Haji Yusuf Khan has since died and the option has therefore come to an end. He has alleged that the plaintiff should therefore be given a decree as the transfer has already become absolute. We cannot accept this contention. On the date when the demands are alleged to have been made the claim was premature and no right of pre-emption had accrued to the plaintiff. If at a subsequent stage a right of pre-emption accrues there are to be fresh demands and a fresh claim for pre-emption. This follows from the last sentence in the passage quoted from the Hedaya.

In this view of the matter, we consider it unnecessary to go into the evidence regarding the true consideration. Both the appeals are dismissed with costs.

B.V./R.K. *Appeals dismissed.*

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(1) [1894] 16 All. 344 =(1894) A.W.N. 101 (F.B.).

* * A. I. R. 1931 Allahabad 108

SEN AND NIAMATULLAH, JJ.

Sewa Ram—Defendant—Appellant.

v.

Hoti Lal and *another* — Plaintiff and Defendant—Respondents.

Second Appeal No. 2308 of 1927, Decided on 5th June 1930, from decree of Addl. Dist. Judge, Aligarh, D/- 19th October 1927.

*** * Negotiable Instruments Act (26 of 1881), S. 78 — Suit by real creditor of pronote — Holder, his benamidar and debtor impleaded — Plaintiff cannot be allowed to fall back upon original consideration — But decree can be passed with due reservations against debtor.**

Where a promissory note or other negotiable instrument is provable by the holder thereof who can recover a debt due thereunder, no case can exist for recovery of the same debt independently of its terms. Consequently in a suit brought by the real creditor of the promissory note to which the holder, being his benamidar, and the debtor are parties, the plaintiff cannot be allowed to fall back upon the original consideration. Further to allow the real creditor to sue for the money advanced by him independently of the promissory note by proving the actual loan would expose the debtor to a double liability to the real creditor on foot of the original consideration and to the holder of the note in terms of the express promise contained therein. But in such a suit a decree can be passed against the debtor for what is due from him with a clear proviso that payment shall be made by the debtor to the holder or to his credit and that if it is made by deposit in Court or if money is recovered from him in execution of decree it shall be to the credit of the holder or may be paid to the plaintiff if he secures a discharge of the debtor by the holder of the pro-note. The plaintiff can also recover by suit against the holder if the decretal amount is deposited to the latter's credit: 21 *Mad.* 391 and 55 *Cal.* 551, *Rel. on*; 30 *Mad.* 88 and 44 *All.* 290, *Disc.*; 28 *Mad.* 205, *not Foll*; 46 *Cal.* 566 (*P. C.*) and 13 *A. L. J.* 695, *Ref.* [P 109 C 1,2; P 110 C 1]

Peary Lal Banerji—for Appellant.

Panna Lal and *Binod Behari Lal* — for Respondents.

Niamatullah, J. — This is a defendant 1's appeal from the decree passed by the learned Additional District Judge, reversing the decree passed by the Munsif of Kasganj in a suit brought by the plaintiff respondent for recovery of Rs. 1,000 on foot of a promissory-note, dated 14th April 1924.

The promissory-note in suit was executed by Sewa Ram, defendant 1 (the appellant) in favour of Panna Lal, defendant 2, on 14th April 1924 for a sum of Rs. 700 advanced thereunder at the rate of Rs. 1-4 per cent per mensem. Seth Hoti Lal, the plaintiff respondent sued on the promissory-note on the allegation that defendant 1 is his brother-in-law (wife's brother) to whom he advanced the loan in question. He took the promissory-note in the name of defendant 2 and retained it in his own possession. In other words, the plaintiff claims to be the real creditor under the promissory-note in suit, defendant 2 being his benamidar.

The suit was contested by defendant 1 who denied having borrowed any money from the plaintiff but admitted the execution of the promissory-note in suit under circumstances stated in his written statement, viz., that one Ganeshi Lal said to be the plaintiff's karinda agreed to secure for defendant 1 a loan of Rs. 700 from defendant 2 Panna Lal; that in anticipation of the loan he (defendant 1), executed the promissory-note and made it over to Ganeshi Lal, but that no money was subsequently lent and the transaction fell through. The suggestion is that the plaintiff got the promissory-note from Ganeshi Lal and preferred a groundless claim. It was also pleaded that the plaintiff is not competent to maintain a suit on foot of a promissory-note in favour of defendant 2 in view of S. 78, Negotiable Instruments Act.

Both the lower Courts have disbelieved the defendant's story as regards the circumstances under which he alleged to have executed the promissory-note in suit and have concurrently found that the plaintiff respondent actually advanced the loan, evidenced by the promissory-note taking it in the name of defendant 2 as his benamidar. The Court of first instance dismissed the suit on the ground that the plaintiff cannot sue on the promissory-note not being the holder thereof. The lower appellate Court took a contrary view and decreed the suit holding that the plaintiff can fall back upon the original consideration, though he may be incompetent to sue on foot of the promissory-note of which he is not the holder. The principal question which has been the subject of discussion in second appeal is whether under the circumstances already stated the plaintiff respondent is entitled to sue for recovery of principal and interest due under the promissory-note in suit.

The learned advocate for the appellant has argued that a claim arising under a promissory-note cannot be enforced independently of it and that a plaintiff is allowed to fall back upon the original loan transaction only if the promissory-note is inadmissible in evidence or is for any other reason unenforceable. We are of opinion that the contention has force. Where a promissory-note or other negotiable instrument is inadmissible in evidence or void, the promise contained therein cannot be established by evidence afforded thereby, and the Court has to accept the position that there was no undertaking reduced to writing which can be the foundation of an action. But where such promissory-note or negotiable instrument is provable by the holder thereof who can recover the debt due thereunder, no case can exist for recovery of the same debt independently of its terms. Apart from conflicting claims arising from a contrary view there is an inherent flaw in a claim collateral to the deed being permitted. A benami transaction of the kind we are concerned with closely analysed amounts to a transaction in which the executant of the promissory-note promises to pay to the person in whose favour it is executed in consideration of the money advanced by another. The promissory-note having been executed and delivered, the consideration for it is exhausted. All the three parties concerned in such a transaction stand committed to certain promises. The person actually advancing the money did so to induce the borrower to execute the promissory-note in favour of and to agree to pay the sum advanced with interest to the person mentioned in it. The holder of the promissory-note agrees to hand over the money when realized to the actual creditor.

The position of a benamidar has been described by their Lordships of the Privy Council as one having "no beneficial interest in the property or business that stands in his name" but representing

> "the real owner and so far as their relative legal position is concerned, being a mere trustee for him."

Under ordinary circumstances the beneficiary can maintain a suit for relief arising out of a transaction in which he is beneficially interested through a benamidar. The right of the benamidar to maintain an action has also been affirmed by their Lordships of the Privy Council in *Gur Narayan* v. *Sheolal Singh* (1) from which the above quotation has been made. If there is no rule of law which bars a suit by the beneficiary, there can be no objection to a decree being passed in his favour in a properly constituted suit to which the benamidar and the person liable are parties. In case of a benami promissory-note however, S. 78, Negotiable Instruments Act, imposes a certain amount of disability on the person claiming to be the real creditor who took it in the name of another person. It runs as follows:

> "Subject to the provisions of S. 82, Cl. (c), payment of the amount due on a promissory-note, bill of exchange or cheque, must, in order to discharge the maker or acceptor, be made to the holder of the instrument."

The case before us is free from any complication created by S. 82, Cl. (c), referred to in S. 78. We may therefore leave it out of account. The section makes it perfectly clear that the executant of the promissory-note is bound to make the payment of the amount due on the promissory-note to the holder of the instrument and that payment to anybody else will not discharge him. The word "holder" has been defined in S. 8 as a

> "person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto."

It follows that payment by the maker of the promissory-note to the real creditor will not effectively discharge him and his liability on foot of the promissory-note will continue in spite of it. To allow the real creditor to sue for the money advanced by him independently of the promissory-note by proving the actual loan would expose the debtor to a double liability, to the real creditor on foot of the original consideration and to the holder of the promissory-note in terms of the express promise contained therein. We are, therefore, clearly of opinion that the lower appellate Court has taken an erroneous view of the right of the plaintiff-respondent to succeed apart from the promissory-note in suit.

The next question is whether the plaintiff-respondent is entitled to sue on the promissory-note under which he is the real creditor, the holder thereof being his benamidar or trustee. It has been argued with reference to S. 78, Negotiable Instruments Act, that the only person who can sue is the holder of the promissory-note, in this case defendant 2. If the plaintiff has otherwise a right of suit, we find nothing in S. 78 which precludes him from maintaining a suit for enforcement of the liability incurred by defendant 1 under the promissory-note. All that the section provides is that the payment made to any person other than the holder shall not operate as a discharge. It does not in terms even refer to the right to sue. In a suit brought by the real creditor, to which the debtor and the holder of the promissory-note are parties a decree can be passed against the debtor for what is due from him with a clear proviso that payment shall be made by the debtor to the holder or to his credit and that if it is made by deposit in Court, or if money is recovered from him in execution of decree, it shall be to the credit of the holder or may be paid to the plaintiff if he secures a discharge of the debtor by the holder of the promissory-note. The plaintiff can also recover by suit against defendant 2 if the decretal amount is deposited to the latter's credit. A decree in these terms and payment made in pursuance thereof will satisfy all the requirements of S. 78. The holder of the promissory-note being a party will be bound by the result of the litigation, and there is no danger of the debtor being sued a second time; nor, if a payment is made by him in the manner directed by the decree, the discharge of his liability will be in any manner ineffective. Ordinarily there can be no difficulty in the real creditor obtaining proper endorsement of the promissory-note from the holder his benamidar, which will entitle him to sue. There may be cases in which the plaintiff may have to sue without such endorsement and, if the ends of justice so require, we see no reason why the Court should not pass a decree in favour of the plaintiff making sufficient provision for safeguarding the interest of all the other parties to the suit.

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(1) A. I. R. 1918 P. C. 140=49 I. C. 1=46 I. A. 1=46 Cal. 566 (P. C.).

The view stated above finds support from *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal & Co.* (2) in which a promissory-note sought to be enforced by a firm had been executed in favour of one of its partners. The suit was brought in the name of the firm as the plaintiff. Exactly similar contention based on S. 78, Negotiable Instruments Act, was put forward on behalf of the debtor but was negatived on two grounds : (1) that the holder of the promissory-note being one of the partners should be deemed to be the plaintiff and (2) that S. 78, Negotiable Instruments Act, did not preclude a third person suing the maker of the promissory-note and recovering money due thereunder if a discharge by the holder could be secured for the debtor.

In cases of benami promissory-notes the real creditor runs considerable risk in not forthwith obtaining an endorsement in his own favour, as cases are conceivable in which the holder may collude with the debtor and give him a discharge. In the case before us defendant 2 has not entered appearance and there is no suggestion that he has given a discharge to defendant 1, or that he opposes the claim of the plaintiff-respondent for the enforcement of the liability of defendant 1. As a mere lender of name he is apparently not concerned with the result of the suit. Unless on the authorities relied on by the appellant, to be presently noticed, the plaintiff-respondent is not entitled to maintain the suit at all we are of opinion that justice should be done by passing a decree against defendant 1 and safeguarding the interest of defendant 1 in the manner already mentioned.

One of the cases relied on by the learned advocate for the appellant in support of his contention that the plaintiff is not entitled to sue is *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (3), in which the holder of the promissory note sued the debtor for the recovery of what was due thereunder. The latter pleaded in defence that the plaintiff was a mere benamidar and not the real creditor and therefore not entitled to sue. The learned Judges held with reference to the terms of S. 78, Negotiable Instruments Act, that it was not open to the defendant to plead that the payee or endorsee was a benamidar. The case before us is converse of that case. The actual decision of it is wholly inapplicable to the circumstances before us. The learned Judges however proceeded to lay down that:

> "According to the law merchant which governed negotiable instruments in this country before the passing of the Negotiable Instru-

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(2) A. I. R. 1928 Cal. 143=105 I. C. 549=55 Cal. 551.

(3) [1907] 30 Mad. 88=16 M.L.J. 503=1 M.L.T. 377 (F.B.).

ments Act, no person could sue on a negotiable instrument unless he was named therein as payee or unless he had become entitled as endorsee or bearer and that Ss. 8 and 78, Negotiable Instruments Act have reproduced the law as it stood before the passing of the Act."

This dictum has come in for a good deal of criticism at the hands of the learned Judges of the Calcutta High Court in *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal & Co* (2), and we share the views of those learned Judges. We have to construe the language of the Negotiable Instruments Act as we find it and are not at liberty to import considerations borrowed from the law merchant in the absence of appropriate words in S. 78, Negotiable Instruments Act, justifying such considerations. That the holder of the promissory note can sue on it was the only question which the learned Judges of the Madras High Court had to decide and which has been correctly decided. Indeed the right of a benamidar generally to sue was always recognized and has been affirmed by their Lordships of the Privy Council in *Gur Narain* v. *Sheolal Singh* (1) already referred to. In an earlier case decided by the Madras High Court reported in *Gurumurti* v. *Sivayya* (4), the right of the real creditor to sue on a promissory note taken by him benami in the name of another person was affirmed, but we find no discussion of the point raised before us with reference to S. 78, Negotiable Instruments Act.

In *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (5), the promissory note in suit had been executed in favour of the mother of the minor plaintiff suing with his mother as next friend. The claim was barred by limitation if brought by the mother who was adult, but was within limitation if the promissory note be considered to be benami for the minor who sued and attempted to escape the bar of limitation in consequence of his minority. It was held that the suit was not maintainable and that it was only the payee of the note who could sue but that her claim was barred by limitation.

In *Dori Lal* v. *Sewak Ram* (6), a learned single Judge of this Court referred to the Madras case last noted apparently with approval. The case before him was one in revision from the decree passed by a subordinate Court dismissing the suit brought by a person alleged to be the real creditor under a promissory note executed benami in the name of a person since deceased whose heirs were parties. The learned Judge dismissed the revision, not being prepared

> "to hold that the learned Subordinate Judge acted with material irregularity in the exercise of his jurisdiction, in applying to the decision of the question of law raised by the pleadings before him a principle which has been specifically laid down by one at any rate of the High Courts in India, and not dissented from by the Court to which he is subordinate."

We do not think that this is at all of law which had been acted upon by the Court whose decree was under revision.

In a later case *Reoti Lal* v. *Manna Kunwar* (7), the facts were similar to those before us. The learned Judges constituting the Division Bench followed the Madras cases referred to by us in upholding the decree of the first Court by which the plaintiff's suit for money under a promissory note alleged to have been executed benami for him was dismissed. The learned Judges have not discussed the terms of S. 78 to ascertain how far it precludes a suit by the real creditor which was for recovery of money by the plaintiff. It was not argued before the learned Judges, at any rate they have not considered the question, whether a decree can be passed with due reservations in favour of the debtor and consistently with the terms of S. 78, Negotiable Instruments Act. We take it as deciding no more than that a plaintiff suing to recovery from the debtor is not entitled to a decree and consider that we are at liberty to hold that a decree in terms already indicated by us can be passed in a proper case.

We have not been referred to any other case decided by this or any other High Court other than the cases referred to by us. We think that the view taken by the Calcutta High Court in *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal & Co.* (2), is based on a correct view of S. 78, Negotiable Instruments Act. We have already given our own reasons for arriving at the same conclusion. To dismiss the plaintiff's suit on the technical ground that he is not entitled to recover from defendant 1 what is due under the promissory note in suit will inflict a hardship on the plaintiff for what seems to us to be an erroneous view of law taken by his legal adviser in instituting the suit on his behalf without obtaining the endorsement of defendant 2 in respect of the promissory note in suit. Defendant 1 on the other hand failed to establish the case set up by him as regards the manner in which he executed the promissory note in suit without receipt of any consideration therefor. Both the lower Courts have given an emphatic finding that his defence was false. Considering all the circumstances of the case, we allow the appeal so far as to modify the decree passed by the lower Court by adding the following proviso to it:

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(4) [1898] 21 Mad. 391.
(5) [1905] 28 Mad. 205=15 M.L.J. 249.
(6) [1915] 29 I.C. 988.
(7) A.I.R. 1922 All. 70=65 I.C. 785=44 All. 290.

(1) The decretal amount shall be paid to or to the credit of defendant 2; (2) it shall not be recoverable by the plaintiff except on obtaining a discharge from defendant 2 in respect of defendant 1's liability under the promissory note in suit; (3) if the decretal amount is deposited in Court by defendant 1 or is brought in execution of decree, it shall be to the credit of defendant 2.

In view of the peculiar circumstances of the case, we direct the parties to bear their own costs throughout.

P.N./R.K. *Decree modified.*

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SEN AND NIAMATULLAH, JJ.

Sabha Ram and *others* — Plaintiffs—Appellants.

v.

Kishan Singh — Defendant—Respondent.

Second Appeal No. 118 of 1928, Decided on 30th May 1930, from decree of Sub-Judge, Meerut, D/- 23rd November 1927.

Civil P. C. (1908), S. 60 (1), Proviso (c)—House, belonging to agriculturist joint family of father and minor sons, passing out by execution sale—Father not intervening when house was attached—Neither father nor his sons could challenge sale at later stage—Evidence Act (1872), S. 115.

Where house belonging to an agriculturist passes out of his hands by reason of an execution sale, there having been no intervention on his part at the time when the house was attached, he cannot challenge the validity of the sale at a later stage by a separate action. Nor can his minor sons, with whom he formed a joint family, challenge it, because the father must be deemed to have represented the entire family consisting of himself and his sons : 40 *All.* 680, *Rel. on.* [P 113 C 1]

Shiva Prasad Sinha – for Appellants.

S. M. Husain – for Respondent.

Sen, J.—This is an appeal by the plaintiffs and arises out of a suit for a declaration that a house and certain zemindari property were not attachable in execution of a decree held by Kishan, defendant 1 against Hari Ram, defendant 2, who is the father of the plaintiffs. On 6th August 1925, Kishan sued Hari Ram on a promissory note, dated 29th April 1923 and obtained a decree against him on 16th February 1926. In execution of this decree the properties in dispute were attached on 20th June 1926 and eventually sold to the decree-holder on 15th November 1926. The judgment-debtor did not intervene at any stage of the execution proceedings.

The present suit was instituted by the minor sons of the judgment-debtor on 29th November 1926. The Court of first instance decreed the claim with reference to the house but dismissed the claim with reference to the zemindari property. The lower appellate Court has reversed the decision of the trial Court with reference to the house with the result that the plaintiffs' claim stands dismissed in its entirety.

The Court of first instance definitely came to the conclusion that the house belonged to a joint family consisting of Hari Ram and his sons and that Hari Ram was an agriculturist and that his chief profession in life was agriculture. It gave the plaintiffs a decree on the ground that they had a share in the ancestral house and that this property was immune from attachment under S. 60, Cl. (1), proviso (c), Civil P. C. The lower appellate Court reversed the decision on the ground that it had not been proved satisfactorily that the main source of income of the plaintiffs was agriculture and that the property having passed out of the hands of the family by sale in execution of the decree against the father, the sons were not entitled to the protection of S. 60, Civil P. C.

The finding of the lower appellate Court that it has not been established that the main source of the income of the plaintiffs was agriculture may be open to criticism. The decree-holder had admitted before the trial Judge that Hari Ram was an agriculturist and that his chief profession in life was agriculture. The finding that the house was ancestral had not been impugned in appeal. While disagreeing with the lower appellate Court on the above points we are of opinion that we cannot displace the finding of law reached by the lower appellate Court that where a house belonging to an agriculturist passes out of his hands by reason of an execution sale, there having been no intervention on his part at the time when the house was attached, he cannot challenge the validity of the sale at a later stage by a separate action. The sons do not possess a higher right than the father, because the debt was binding upon them and they are bound by the consequences of the execution proceedings in which the father must be deemed to have represented the entire family consisting of himself and his sons. This appears to us to be the natural corollary of the decision in *Lala Ram* v. *Thakur Prasad* (1) by which we are bound. The result is that we affirm the decisions of the Courts below and dismiss this appeal with costs including in this Court' fees on the higher scale.

S.N./R.K. *Appeal dismissed.*

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(1) [1918] 40 All. 680=47 I. C. 947.

A. I. R. 1931 Allahabad 113

SEN AND NIAMATULLAH, JJ.

Ram Das Rae and *others*—Appellants.

v.

Brindaban Ram—Respondent.

Second Appeal No. 71 of 1928, Decided on 18th November 1930.

(a) Civil P. C. (1908), S. 100—Question of fact—Whether two transactions are connected and interdependant is question of fact—Evidence—Presumptions.

Whether or not two transactions are integral parts of the same transaction, connected and interdependent or whether they are disconnected and dissociated is in each case a question of fact which has to be ascertained from the evidence produced in the case and no question of legal presumption arises. [P 119 C 2]

The intervening period between the execution of the two documents may in some cases have a relevancy but there can be no irresistible presumption in favour of a mortgage from the mere fact that the two documents were executed on one and the same date: *A. I. R.* 1916 *P C.* 49, *Ref.* [P 118 C 1]

(b) Contract Act (1872), S. 2 (d) and (h), S. 58 (c)—Agreement to reconvey property is not nudam pactum and is capable of specific enforcement.

An agreement to reconvey the property cannot be ignored as nudam pactum and as such void of any legal effect. The reciprocity between the parties is evidence of consideration. An agreement of this description is not without consideration and is capable of being specifically enforced. [P 120 C 1]

(c) Transfer of Property Act (1882), S. 58 (c) — Requisites of conditional mortgage stated.

In order to bring a case within the definition of conditional mortgage there ought to be a stipulation that on default of the payment of the mortgage money on a certain date the sale shall become absolute. If the condition be there, it necessarily follows that primarily the consideration for the document is "mortgage money," an expression which connotes the existence of a debt as also of a security. [P 120 C 2]

It is not the form of the document but the intention of the parties which is the deciding factor, and it rather lies on the party who contends that a documents prima facie connoting an absolute sale is really a mortgage to prove his contention: [P 121 C 2]

Where there is a controversy as to whether the transaction is a sale or a mortgage by conditional sale, the matter has primarily to be determined upon a construction of the document or documents concerned.

An absolute sale-deed does not cease to be so merely because the vendor stipulates that he shall have a right to repurchase. If a deed of sale and a contract of repurchase be two separate and independent transactions and not two connected and interdependent parts of one and the same transaction they do not amount to a mortgage by conditional sale and do not satisfy the conditions of S. 58 (c): (*Case law discussed*). [P 123 C 1, 2]

U. S. Bajpai—for Appellants.

Jwala Prasad—for Respondent.

Sen, J.—This is an appeal by the plaintiffs and arises out of a suit for redemption of an alleged mortgage, dated 22nd August 1864. The case hinges upon the construction of two documents which were executed on the date last mentioned. By the first document Ex. A, Ram Prasad Rae and 26 others declared that they had absolutely sold certain property in patti Mathura Rae to Khushi Ram, Bhagirathi Ram, Kharag Ram and Ishri Ram for Rs. 2,758-5-3. On the same day, a second document was executed by Khushi Ram, Bhagirathi Ram, Kharag Ram and Ishri Ram whereby they declared that if the vendors paid off the entire amount due by them within 12 years from the date of the execution of the document, the said sale deed should be returned and the property sold be redeemed.

The present suit was instituted on 3rd March 1925, on the allegation that the two documents were integral parts of a single transaction and constituted a mortgage by conditional sale.

Advocate High Court

The suit was resisted inter alia on the ground that the transaction in question was not a mortgage by conditional sale, but was an out and out sale with an agreement to repurchase provided that the sale consideration was paid within 12 years of the execution of the document and that the purchase money not having been paid back within the stipulated period, the claim was time barred. The Court of first instance repelled the contentions of the defendants, held that the transaction amounted to a mortgage by conditional sale and decreed the plaintiffs' suit on payment of Rs. 1,588 whthin six months from the date of the decree. The suit was directed against 29 defendants of whom defendants 1 to 6 were the persons in actual possession of the property in controversy.

The lower appellate Court disagreed with the trial Court and held that the transaction was, as contended by the defendants an absolute sale with an option to repurchase within a certain period. It accordingly allowed the appeal and reversed the decision of the trial Court.

The main point argued in the appeal is that on a true construction of the document, the parties had intended to create a mortgage by way of conditional sale. Baibil-wafa form of mortgage is very common in northern India. It originated from a desire on the part of certain Mahomedans to evade the Musalman ecclesiastical law, which was opposed to the lending of money at interest and to the obtaining of security for the repayment of principal and interest. The Hindus, although they had no conscientious scruples about receiving and paying interest, also adopted this form of mortgage. As was pointed out by Edge, C, J. in *Ali Ahmad* v. *Rahmatullah* (1) the mortgage was:

"capable of being effected in different ways, as, for instance by a deed which purported to assign the property absolutely, but which contained a stipulation for a right of repurchase, or by two contemporaneous deeds, one of which purported to effect an absolute and unconditional sale, and the other of which was an agreement that the apparent vendor should have a right of repurchase, and that, as a rule, the common lump price mentioned in each of such deeds did not represent the actual price paid by the apparent vendee; but represented that price plus interest calculated frequently at a usurious rate, for the period during which it was agreed that the right of repurchase should subsist, an arrangement which could hardly be consistent with such a transaction, being one of an absolute sale and not one in the nature of a mortgage"

The doctrine of English law with respect to the equity of redemption after default of payment of the mortgage money appears to have been unknown to the ancient law of India. The said rule appears to have been introduced to certain parts of India by the combined effect of Begulation 1 of 1798 and Regulation 17 of 1806. In *Pattabhiramier* v. *Vencatarow Naicken* (2) their Lordships observed, p. 568:

"that this form of security has long been common in India is notorious. The fact is stated in the preamble to the Bengal Regulation 1 of 1798. That such contracts were recognized and enforced according to their letter by the ancient Hindu law appears from several passages in Colebrooke's Digest Vol. 1, pp. 183, 187, 188, and 193.. That these were equally recognised and enforced between Mahomedans is shown by Mr. Bailie in his introduction to his learned work on the Mahomedan Law of Sale. If the ancient law of the country has been modified by any later rule, having the force of law, that rule must be founded either on positive legislation or on established practice."

Again, at p. 569:

"That, in cases to which Regn. 17 of 1806 does not apply, the interest of a mortgagee under a deed of conditional sale becomes absolute according to the terms of the contract, by the mere failure of the mortgagor to redeem within the stipulated period, has recently been decided by a Full Bench of the High Court of Bengal in the case of *Sarifunnissa* v. *Sheikh Inayat Hossein* (3)."

Again at p. 571 their Lordships observed:

"What is known in the law of England, as 'the equity of redemption' depends on the doctrine established by Courts of equity, that the time stipulated in the mortgage-deed is not the essence of the contract. Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East India Company, their Lordships can find no such course of decision. In fact, the weight of authority seems to be the other way. It must not then be supposed that in allowing this appeal their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the law of the Forum, whereof such may prevail, or to affect any title founded thereon."

Much to the same effect their Lordships ruled in the case of *Thumbusawmy Moodelly* v. *Hossain Rowthen* (4). Their Lordships observed (p. 16) that

"the essential characteristic of a mortgage by conditional sale was that, on the breach of the

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[1892] 14 All. 195=(1892) A. W. N. 42.

(2) [1870] 13 M. I. A. 560=15 W. R. 35=2 Suth. 410=2 Sar. 623 (P. C.).

(3) [1863] 5 W. R. 88=B. L. R. Sup. Vol. 415.

(4) [1876] 1 Mad. 1=2 I. A. 241=3 Sar. 531 (P.C.).

condition, the contract executed itself, and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them."

This state of things created mischief and resulted, in many cases, grave injustice. The result was that in certain parts of the country the legislature had to intervene:

> "In Bengal, where the possible mischief that might result from leaving mortgages by conditional sale to take effect according to their tenor early became apparent, the legislature proceeded on sound principles to apply a remedy. By Regn. 1 of 1798 it gave the mortgagor means of avoiding any dispute as to tender and of keeping alive his right of redemption by a payment into Court. By Regn. 17 of 1806 it made provision for redemption and judicial foreclosure by the procedure still in use."

The documents in dispute which have given rise to the present suit having been executed in 1864, the provisions of the Transfer of Property Act (Act 4 of 1882) are not applicable. As was observed by the Privy Council in the leading case, the T. P. Act, S. 58, defines a mortgage by conditional sale stating the already existing law and practice regarding it. The present case has to be decided independently of the provisions contained in that section. The two regulations of 1798 and 1806, already referred to, had been extended to the Province of Agra.

It is important and interesting to note that the plaintiffs' predecessors-in-title had made a mortgage by conditional sale in favour of the defendant's predecessors under an instrument dated 26th November 1858. The mortgagees instituted foreclosure proceedings under Regulation 17 of 1806. The mortgagors had a year's time to redeem. The year of grace was to expire on 3rd September 1864. Before this time had expired, the two documents dated 22nd August 1864 were executed. There can be no doubt that one of these documents is, according to its tenor, an out and out sale-deed. It provides as follows:

> "Formerly, we the executants had executed a mortgage by conditional sale on 26th November 1858 in respect of patti Mathura Rai purchased by us out of the entire 16 annas of taluka Firozpur, pargana Kopachit, the ancestral zamindari property owned and possessed by us for Rs. 1,692-4-0 in favour of Khushi Ram, Sheoraj Ram, Dipa Ram, ancestor of Kharag Ram and Chhatar Ram, ancestor of Ishri Ram. On the basis of it, an order for foreclosure has been passed in the Miscellaneous Department in favour of the creditors-mortgagees by conditional sale. We approched the said mortgagees and after making an account of the consideration money entered in the said document took upon overselves the liability for payment of Rs. 2,758-5-3, out of which Rs. 2,288-0-3 are due to Khushi Ram and Sheoraj Ram, heir of Bhagirathi Ram, and Rs. 470-5-0 to Kharag Ram and Chhatar Ram, ancestor of Ishri Ram, as per detail given below, and in lieu of it, we have executed an absolute sale-deed in respect of the entire ancestral property purchased by us and owned and possessed by us, together with high and low lands, water and forest produce, fruit and timber trees, artizan's cess, fish, groves, ponds, sair items and all the appurtenances, to Khushi Ram, Bhagirathi Ram, brother and heir of Sheoraj Ram, deceased, Kharag Singh, son of Duniya Ram deceased, Ishri Ram, brother and heir of Chhatar Ram deceased, residents of Firozpur, pargana Kopachit and have put the vendees in possession of the property sold like overselves. The vendees, the said creditors are now at liberty to get their names entered in the revenue papers on the basis of this document in place of those of us and pay the Government revenue and enjoy the profits thereof. They should either keep the *sir* lands cultivated by us in their possession or may let it out to whomsoever they like. We and our heirs neither have nor shall have any objection to this, and if we do so, it will be invalid. We have therefore executed this document by way of an absolute sale-deed, in order that it may be of use when needed."

This is an absolute transfer of the plenary rights belonging to the executants without any reservation whatsoever. These recitals are followed by a detail of mortgage money due by the vendors to the vendees which need not be reproduced. The agreement to reconvey was not executed by all the vendees. It was presented for registration by Khushi Ram in whose favour Bhagirathi Ram, Kharag Ram and Ishri Ram had executed a power of attorney. The document is not entirely free from ambiguity. It provides as follows:

> "(1) If the executants of this sale-deed, out of the income of the collections made by them in the village, after deducting the Government revenue, road cess, subscription, tax, other village expenses such as patwaris' rate, village expenses, pay of karindas and the interest on the amount of consideration of the sale-deed, pay any amount to us, the vendees, the said amount shall be credited towards the principal. (2) If they pay off the entire amount due by them on account of the principal within twelve years from the date of the execution of this document, i. e. up to 1281 F, the said sale-deed shall be returned and the property sold shall be redeemed. (3) If any of the executants of the sale-deed pays off, within the fixed time, the entire amount of consideration of his share, he will be entitled to get his share redeemed. (4) The 5 bighas of land and the two plots of land on which stands the house of us, Khushi Ram and Bhagirathi Ram, which have been sold by these very vendors, this day under another sale-deed, ... can, in no way be redeemed (*kisi tarah faq ul rahan nahin*

> *ho sakta*) and shall be the property of us, Khushi Ram and Bhagirathi Ram for good. (5) If the vendors fail to pay the amount of the aforesaid sale deed within 12 years, the absolute sale deed shall, as heretofore, be upheld and maintained. It shall not be returned, nor can the property be redeemed."

If we refer to some of the surrounding circumstances, either attending or following the transaction in dispute the facts which stand out in clear relief are: (1) effect was given to the sale deed as such. (2) Mutation followed. The names of the vendees were substituted in the proprietary column in place of the vendors. (3) In the partition proceedings in the revenue Court, the plaintiffs or their predecessors-in-title neither repudiated the title of the defendants as absolute owners nor set up their own title. (4) Settlements followed settlements. Plaintiffs or their predecessors-in-title did not intervene for the correction of the records. Before the institution of the present suit, they do not appear to have put forward the contention that the names of the vendees had been wrongly entered in the proprietary columns of the revenue khewats and that the entries should be correct. (5) In 1868, Kharag Ram and Ishri Ram, two of the vendees, repudiated the agreement dated 22nd August 1864 and claimed to have become the absolute owners of the mortgaged property by force of the foreclosure decree on foot of the mortgage, dated 26th November 1858. Their claim was decreed. (6) The successors in interest of the vendees have been dealing with the property as absolute owners, and indeed one of them, Brindaban Ram, executed a perpetual lease of a portion of the property in dispute on 31st May 1921. (7) In certain partition proceedings of the year 1885, some of the successors in interest of the vendors do not appear to have claimed to be the owners of the zamindari property but appear to have put forward a claim to the timber and fruits of a certain grove. The respondents strongly relied upon the aforesaid circumstances as indicating that the transaction entered into between the parties was one of absolute sale and not of mortgage.

The plaintiffs, on the other hand, rely upon the fact that the ancestors of some of them had instituted a suit for redemption in the Court of the Munsif for possession of the property on the allegation that the mortgage debt had been satisfied out of the usufruct. This was suit No. 126 of 1880. The Court held that the transaction amounted to a mortgage, but it dismissed the suit on the ground that the mortgage debt had not been discharged. This judgment is only a piece of evidence and is not conclusive.

The point, which calls for determination in this case, has come up before the Judicial Committee and the Courts in a variety of cases. We shall mention some of the typical cases.

In *Situl Pershad* v. *Luchmi Pershad* (5), one Chuk Narain Singh executed a patta on 15th January 1864 in favour of his brother Ram Charan in which he purported to grant in mukarrari on perpetual tenure his two annas share in 52 villages at an annual rental of Rs. 497. On the same date the lessee executed an ikrarnama in favour of the lessor and it was stipulated between the contracting parties that when Babu Chuk Narain Singh or his heirs paid off the nazrana money of Rs. 30,000 without interest from their own pockets, without taking money from any other person to Babu Ram Charan Singh or his heirs, then Babu Ram Charan Singh or his heirs would return the patta (perpetual lease) and Babu Chuk Narain should have no claim in respect of the mesne profits for the period of the mukarraridar's possession. Their Lordships held that, looking at the surrounding circumstances, among other things, at the value of the property, which appears to have been fairly ascertained, and at the relations of the parties, the transaction was, in fact, what it purported to be, and that there was no sufficient ground for holding it to be what it did not purport to be, namely a mortgage.

In *Bhagwan Sahai* v. *Bhagwan Din* (6) two documents were executed on 20th February 1835, a date long before the passing of the Transfer of Property Act. Under the first document, Alam Singh and others declared that they had absolutely sold the entire property to Ganga Din for Rs. 4,000. The second document was executed by Ganga Din, the vendee, who stipulated that

> "as a matter of favour, mercy, kindness and indulgence that if the vendor would within a period of ten years from the date of the deed

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(5) [1884] 10 Cal. 30=10 I.A. 129=4 Sar. 470 (P.C.).

(6) [1890] 12 All. 387=17 I.A. 98=5 Sar. 551 (P.C.).

pay in a lump sum and without interest the whole amount specified above, I shall accept the same and cancel this valid sale . . . . In case the whole of the principal is not paid according to the terms of this document the vendor shall not be able to cancel the sale by payment of the principal."

Their Lordships founded their decision upon the rule laid down by Lord Chancellor Cranworth in the case of *Alderson* v. *White* (7), and came to the conclusion that the case was not illustration of a relation between the mortgagor and the mortgagee but was one of an absolute sale with a right to repurchase within a period of ten years. The passage in the judgment of the Lord Chancellor would bear quotation:

"These deeds taken together do not on the face of them constitute a mortgage and the only question is whether, assuming the transaction to be a legal one, it has been shown to be in truth such as in the view of a Court of equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by common sense, that prima facie an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor's stipulation that he shall have a right to repurchase . . . . . In every such case, the question is: What upon a fair construction is the meaning of the instrument? . . . . I think that the Court after the lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be and I see but little evidence to that effect here."

The principal English cases bearing upon the point are on similar lines. These have been collected in *Rochefoucauld* v. *Boustead* (8), and need not be noticed in detail.

In *Bal Kishan Das* v. *Legge* (9), Legge purported to sell his estate to his former creditors, namely Balkishan Das and another, for Rs. 1,50,000. Part of the sale consideration was paid by wiping off a previous mortgage debt in favour of the vendees, dated 8th April 1872. The balance was retained by the vendees for financing expenses of conducting certain factories. The vendees executed a second document in favour of the vendor, whereby they agreed to resell the property to him, if he paid a sum of Rs. 1,65,000 on 1st March 1876. It was further stipulated that if the estimate of the expenses on the indigo factories should be altered from year to year by the concurrence of the parties, the vendor should be liable to pay, along with the sum specified above, whatever sum may be found due at this time. The High Court held that the transaction amounted to a mortgage by conditional sale. The judgment is reported in *Bal Kishan Das* v. *Legge* (10). The Privy Council affirmed the decision except in one particular. It was held by the Privy Council that the case had to be decided on a consideration of the documents themselves with only such extrinsic evidence of circumstances as might be required to show the relation of the written language to existing facts—oral evidence for the purpose of ascertaining the intention of the parties to the deeds being inadmissible under S. 92, Evidence Act, and that there were contained in the deeds indications that the parties intended to effect a mortgage by conditional sale. The ratio for the decision has been explained in *Jhanda Singh* v. *Wahiduddin* (11):

"The real ground of the decision appears to have been this that the real effect of the deeds was to consolidate the debt due on the factory account with the principal sum mentioned in the first deed and thus to give the bankers a security on the taluk for the debt due on the factory accounts. This, as Lord Davey delivering the judgment of the Board said, gives the transaction the character of a mortgage so far as the factory accounts are concerned. And if it is to some extent a mortgage, it may well be held to be so entirely."

Jhanda Singh v. *Wahiduddin* (11) was an appeal to the Privy Council from a Full Bench decision of this Court reported in *I. L. R.* 33 *All.* 585. A document purporting to be an out and out sale deed was executed on a certain date, and seven days later, a second document was executed by the vendee, whereby he covenanted to reconvey the property if the vendors paid back the purchase money after the lapse of nine or ten years from the date of that sale deed. The two deeds were separately stamped and were registered on different dates. On a first appeal being preferred to the High Court, there was a difference of opinion between Stanley, C. J., and Banerji, J , the former holding that the transaction was one of sale with an agreement to repurchase and did not amount to a mortgage by conditional sale. On an appeal being preferred under a section of the Letters Patent, the case eventually came up before a Bench of three Judges. The learned Judges upheld the decision of Stanley, C. J., and came to the conclusion that the transaction did not amount to a mortgage. We are not prepared to endorse the following proposition enunciated by Richards, J.:

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(7) [1858] 2 De. G. & J. 97=6 W.R. 242=4 Jur. (n.s.) 125.

(8) [1897] 1 Ch. 196=66 L.J.Ch. 74=45 W.R. 272=75 L.T. 502.

(9) [1900] 22 All. 149=27 I.A. 58=7 Sar. 601 (P.C.).

(10) [1897] 19 All. 434=(1897) A. W. N. 109

(11) A. I. R. 1916 P. C. 49=36 I. C. 38 = 43 I. A. 284=38 All. 570 (P.C.).

> "There can, in my opinion, be no doubt that if the two deeds were of even date an almost irresistible presumption would arise in favour of the transaction being a mortgage."

The intention is to be inferred from the terms of the document and from the surrounding circumstances. The intervening period between the execution of the two documents may in some cases have a relevancy but there can be no irresistible presumption in favour of a mortgage from the mere fact that the two documents were executed on one and the same date. Indeed Lord Atkinson observes:

> "If no such agreement was made before the deed of sale was executed and the latter deed was an after-thought, only suggesting itself after the sale deed had been executed and delivered, it would not suffice. The execution of the deed of sale and of the contract of repurchase would then form two separate and independent transactions, not two connected and interdependent parts of one and the same transaction."

Their Lordships came to the conclusion that the transaction was an out and out sale and not a mortgage by conditional sale. In *Narasingerji Gyanagerji* v. *Parthasaradhi* (12) two instruments were executed by the Raja of Kalahasti on 4th August 1908. Under one of these documents, the Raja agreed to convey by a private sale certain villages belonging to him for rupees six lacs to the appellant and the villages were conveyed to him subject to certain conditions. The second document was an agreement for a reconveyance of the villages to the Raja and provided that "the vendor agrees to sell and the purchaser to purchase the villages mentioned in the conveyance for rupees six lacs the said sum to be paid by the purchaser to the vendor on 31st August 1913 or 31st August 1914 and not earlier."

An important fact noticed in the case was that the price named which was an amount immediately required to prevent a Court sale had been settled without bargaining; it was absurdly low, less even than what the property would have realized upon a public sale. Their Lordships, without reference to the oral evidence other than such as was held admissible in *Bal Kishan Das's* case considered the nature of the transaction having regard to the documents in controversy and the surrounding circumstances. They came to the conclusion that the transaction was a mortgage by conditional sale.

In *Ghulam Nabi Khan* v. *Niazannissa* (13), an instrument purporting to be an out and out sale in favour of the respondent was executed on 12th August 1894. On the same day, a second document was executed between the parties which provided that if the purchase money were paid within five years, the transferee would reconvey the property to the vendor. Reliance was placed upon S. 58, T. P. Act. Their Lordships held that the sale deed represented and was intended to be an out and out sale. Following *Bhagwan Sahai* v. *Bhagwan Din* (6) they held that a stipulation for repurchase would not of itself convert a case of sale into one of mortgage and that to make a mortgage there must be a debt as held in *Vasdeo* v. *Bhau* (14).

In *Balbhaddhr Rai* v. *Brijraj Rai* (15 there was a single document which purported to be a sale but it contained a clause to the effect that if within six years from the date of the transaction, the amount secured was paid back the sale would become void. It was held by Richards, C. J. and Banerji, J., that the document exactly fulfilled the requirements of the definition of a mortgage by conditional sale given in S. 59, Cl. (c), T. P. Act. The document in question was dated 23rd March 1871. Reference was made to the observation of the Privy Council in *Bal Kishan's* case :

> " It may be assumed that the framers of it (the Transfer of Property Act) in this section intend to state the existing law and practice of India."

In *Mahomed Hamiduddin* v. *Faqir Chand* (16) two documents were executed on 21st July 1883, one of which was a sale deed in favour of Lala Faqir Chand and Lala Baldeo Sahai for Rs. 6,125 and the other was an agreement in favour of the vendors. The vendees stipulated that the vendors could, on payment of

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(12) A. I. R. 1924 P. C. 226 = 82 I. C. 993= 51 I. A. 305=47 Mad. 729 (P.C.).

(13) [1911] 33 All. 337=9 I. C. 140.

(14) [1897] 21 Bom. 528.

(15) [1911] 10 I. C. 630.

(16) [1920] 42 All. 437=58 I.C. 717.

Rs. 6,125 within five years from the date of the execution of the agreement get back the property. A suit for redemption was instituted by the heir of one of the vendors on 12th September 1916. It was held that having regard to the terms of the instruments, the transaction amounted to a mortgage by conditional sale. It was further held that the terms, that the parties were at the time of the demand for reconveyance to go through the accounts of the realization of rents by the vendees, and the vendors were to get ten annas per cent per month interest on the consideration money, and a price for reconveyance was to be determined after casting of accounts, showed clearly that the relation of creditor and debtor existed between the parties; and that the two documents taken together showed that the transaction which the parties entered into was a baibul-wafa or a mortgage by conditional sale.

In *Mohindra Man Singh* v. *Maharaj Singh* (17) plaintiff had executed an out and out sale deed on 30th January 1918 in favour of a third party whereby he transferred all his interests in mahal Girwar Singh of village Salehdi. The document contained a provision that if the vendor within six years in the month of Jeth paid the amount of sale consideration, namely Rs. 3,000, and also the arrears of rent which might then be due against the tenants, the vendee should reconvey the vended property to him but otherwise the property should not be reconveyed. In the body of the document the consideration for the deed of transfer was described as mortgage money. A number of facts were taken into consideration to justify the conclusion that the transaction amounted to a mortgage by conditional sale. But reliance was chiefly placed upon the definition of such mortgage as given in the Transfer of Property Act. This appears to have been a very special case and does not lay down any general rule of law.

In *Jagannath* v. *Gauri Shanker* (18) there was a single instrument executed on 15th April 1879, in favour of Gauri Shanker for Rs. 504-4-0. The document purported to be a sale deed which contained an agreement that if and when the executant handed over half the price namely, a sum of Rs. 252-2-0, to Gauri Shankar he would return that portion of the property to the executant. It was held that the transaction amounted to a mortgage by conditional sale. We are not prepared to endorse the following proposition in its unrestricted form:

> "In all cases where there is a sale and there is an agreement to retransfer the property, the two transactions must be treated as part and parcel of one and the same transaction."

We are of opinion that whether or not the two transactions are integral parts of the same transaction connected and interdependent or whether they are disconnected and dissociated is in each case a question of fact which has to be ascertained from the evidence produced in the case. No question of legal presumption is involved in the case as is abundantly clear from the pronouncement of the Privy Council in *Jhanda Singh's* case which we have already adverted to (*I. L. R.* 38 *Allahabad* 570 at p. 575).

In *Lalta Pershad* v. *Jagdish Narain* (19) three documents were executed in the 24th July 1920. One of these documents, upon its face value, was an out and out sale deed. The second was an agreement to reconvey provided that the purchase money was repaid on the expiration of three years with interest or without interest in the event of the buyer having received interest in full in the shape of rent. The third deed was a lease by the buyer to the seller of the property, dealt with in the first two deeds. There was no evidence to show what was the intrinsic value of the property at the date of the execution of the documents. It was held that the three documents formed part of one and the same transaction and amounted to a mortgage by conditional sale. Kanhaiya Lal, J., was particularly impressed by the fact that there was a stipulation about charging interest on the purchase money:

> "There could hardly have been any question about charging interest on the purchase money, if the transaction had been an out and out sale, much less for allowing the vendors to remain in possession of the house, subject to the payment of that interest half-yearly in the shape of rent or for requiring them to execute all repairs and be responsible for its value, if it fell into ruins, or by reason of any unforeseen accident or any other cause."

Ashworth, J., relied upon the language of S. 58 (c), T. P. Act:

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(17) A. I. R. 1923 All. 48=70 I. C. 132=45 All. 72.

(18) A. I. R. 1926 All. 670=96 I. C. 780.

(19) A. I. R. 1927 All. 137=98 I. C. 961=48 All. 787.

"In India, unless we can find that the promise to resell was in consideration of the sale, that promise will be deemed to be without consideration and unenforceable. There is a strong presumption that parties to a document intend their covenants to be enforceable . . . Accordingly I hold that since the passing of the Transfer of Property Act, the test to be applied in such cases is merely whether the parties, from the language of the deed, are to be deemed to have intended that the covenant to resell should form a part along with the purchase money of the consideration for the execution of the ostensible sale. The language of the deed will be irrelevant for any other purpose."

With great respect, we find it difficult to follow this reasoning. An agreement to reconvey the property cannot be ignored as nudum pactum and as such void of any legal effect. The reciprocity between the parties is evidence of consideration. An agreement of this description is not without consideration and is capable of being specifically enforced.

In *Bishambhar Nath* v. *Muhammad Ubedullah Khan* (20), there was a single document which, on the face of it, was a sale deed but contained a provision that if the purchase money and any arrears of rent, which happened to remain due at the time of repayment were repaid to the vendee on the last date of Jeth, 16 years after the purchase, the vendors would be entitled to get back the property. No right of repurchase was reserved to the vendors except upon the fulfilment of the condition that the payment was to be made on a particular date. It was held that the transaction was a sale with a condition of repurchase and not a mortgage by conditional sale.

It was not suggested in this case that the price paid under the deed was in any way inadequate to the value of the property at the time when the sale was executed. The case is not dissimilar to that of *Jagannath* v. *Gauri Shanker* (18) and *Mohindra Man Singh* v. *Maharaj Singh* (17). It was contended that the terms of the instrument satisfied the requirements of S. 58 (c), T. P Act. This contention was overruled with the following observations :

"A reference to S. 58 (c) is sufficient to show that this is a misreading of the law. A mortgage by conditional sale is there defined as a mortgage in which the mortgagor ostensibly sells the property on condition that on default of payment of the mortgage money on a certain date, the sale shall become absolute, or on condition that on such payment, (i. e , payment of the mortgage money) being made, the sale shall become void, or on condition that on such payment (again referring back to the payment of the mortgage money) being made, the buyer shall transfer the property to the seller . . . ."

"The repetition of the terms "payment of the mortgage money" or "such payment" in each clause of the definition makes it clear that before a document can be a mortgage by conditional sale it must first be a mortgage, i. e., the property must be transferred as security for a debt The definitions of a mortgage in Cl. (a) of the section and the subsequent clauses are merely particular cases of this definition. The neglect of this obvious fact has, in some cases, led to serious confusion."

Reference is then made to a Full Bench decision of the Madras High Court in *Muthuvelu Mudaliar* v. *Vythilinga Mudaliar* (21).

We are not quite sure that a correct interpretation has not been put upon S. 58 (c). The argument set out above is on one of substance ; but this aspect of the case has not been considered in *Lalta Pershad* v. *Jagdish Narain* (19), *Jagannath* v. *Gauri Shankar* (18), *Mohindra Man Singh* v. *Maharaj Singh* (17) and *Ramcharan Lal* v. *Dharam Singh* (22). In order to bring a case within the definition, there ought to be a stipulation that on default of the payment of the mortgage money on a certain date the sale shall become absolute. If the condition be there, it necessarily follows that primarily the consideration for the document is "mortgage money," an expression which connotes the existence of a debt as also of a security.

Ram Charan Lal v. *Dharam Singh* (22) was decided by Lindsay and Sulaiman, JJ., on the same lines as the cases of *Mahindra Man Singh* v. *Maharaj Singh* (17) and *Jagannath* v. *Gauri Shanker* (18). The decision in *Kirpal Singh* v. *Sheoambar Singh* (23) and *Mathura Kurmi* v. *Jagdeo Singh* (24) are also on the same lines and founded upon much the same reasoning.

In *Modhu Sudan Das* v. *Rhidoy Moni Baistabi* (25) the plaintiff had executed a sale deed in favour of the defendant of a certain plot of land on 27th January 1886, and on the same date the defendant had executed an agreement promising to reconvey the land to the plaintiff if the amount of the purchase money, together with interest at 12 per cent per annum, was paid within the period of three years. It was held that the transaction was one of sale and not of mortgage and that the stipulation as to the payment of interest did not conclusively indicate that the transaction was not an absolute sale, but amounted to a mortgage. Certain criteria enumerated by the trial Court were approved :

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(20) A. I. R. 1923 All. 586=77 I. C.572=45 All. 581.

(21) 1919] 42 Mad. 407=50 I. C. 205.

(22) A. I. R. 1924 All. 444=79 I. C. 626=46 All. 173.

(23) A. I. R. 1930 All. 283=126 I. C. 366.

(24) A. I. R. 1927 All. 321=104 I. C. 504=49 All. 405.

(25) [1902] 6 C. W. N. 192.

(1) That the price paid was a fair and proper price for the land. (2) That the defendant was let into immediate possession. (3) That the defendant received the entire profits for her own benefit (4) That the cost of preparing the deed was borne by the defendant. (5) That there was no provision in the deed giving the defendant power to recover the sum named as the price for the repurchase and (6) That the period stipulated for a repayment was a short one viz , three years.

In *Kinuran Mondol* v. *Nitye Chand Sirdar* (26) two documents were executed by the parties on the same day, under the first of which the property was declared to have been sold for Rs. 375 which was alleged to be the proper value of the property. The purchasers were to be entitled to all the rights of the vendors and to possess and enjoy the property with their heirs, sons and grandsons, etc. The second deed provided that if the sum of Rs. 375, together with costs, was paid to the vendee within 7 years, the vendee should return the holding to the vendor. It was held by Maclean, C. J. and Holmwood, J. that the two documents together did not constitute a mortgage. It was held inter alia that "a certain date of payment" was an essential element of a mortgage by conditional sale within the meaning of sub-S. (c), S. 58, T. P. Act. We doubt the correctness of this proposition in the form in which it has been enunciated.

In *Abdul Gaffur* v. *Sheikh Jamal* (27) the question in controversy was the interpretation of a kobala dated 30th June 1876 the terms of which are set out at p. 1053. The plaintiffs contended that the document was a mortgage by conditional sale. The case was initially heard by Digamber Chatterji, J., who held that the transaction amounted to a mortgage by conditional sale and not an out and out sale. Stress was laid upon the fact that the consideration was not adequate and also upon the fact that

> "one of the tests applied by Mahometan lawyers for determining whether the document is a kobala, or a baibil-wafa is that a short term indicates a kobala and a long term a security."

This judgment was upheld in appeal under the Letters Patent. In *Mahomed Muzaffar Ali* v. *Asraf Ali* (28) there were three contemporaneous documents, namely a kobala, a kabuliyat and an ikrarnama. It was contended that the cumulative effect of these documents was to create a mortgage by conditional sale. This contention was accepted in view of the facts that the money advanced was considerably lower than the true value of the property and that the plaintiff had remained in possession of the property although under a lease.

In *Ganesh Mudaliar* v. *Ganansikhamani Mudaliar* (29), the property in dispute was conveyed for its full value on 14th July 1902. Part of the consideration wae applied in discharge of a pre-existing mortgage in favour of the vendee. On the same date, the vendee agreed to reconvey the proprety to the vendor on payment of the consideration recited in the sale deed within eight years. It was held that the transaction did not amount to a mortgage by conditional sale because there were no indications either in the documents or in the surrounding circumstances to show that there were to be a relation of debtor and creditor between the parties or that the property was to be held as security for the debt.

> "That there is no presumption in favour of a mortgage by conditional sale is clearly laid down in the Full Bench case in *Muthuvelu Mudaliar* v. *Vythilinga Mudaliar* (21). It is not the form of the document but the intention of the parties which is the deciding factor, and it rather lies on the party who contends that a document prima facie connoting an absolute sale is really a mortgage to prove his contention."

In *Bapu* v. *Bhavani* (30) there was a single instrument, dated 30th June 1886, which recited that the property which was already held in mortgage by the so called vendees was sold in consideration of Rs. 2,500 and that the vendees were entitled to enjoy the property for ten years in any manner they liked. If a the expiration of that term, the vendors paid Rs. 2,500 they were entitled to get back the property. The suit was instituted in 1893 for redemption. It was held that the transaction amounted to a mortgage:

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(26) [1907] 6 C. L. J. 208=11 C. W. N. 400.

(27) [1913] 21 I. C. 90.

(28) [1914] 25 I. C. 93.

(29) A. I. R. 1925 Mad. 37=84 I. C. 505.

(30) [1898] 22 Bom. 245.

> "The transaction is in the body of the instrument styled a sale but that though a circum. stance to be taken into consideration is not conclusive. The test is whether after its execution there continued to be a debt from the so-called vendors to the vendee or whether the pre-existing debt became extinguished on the execution of the instrument."

It is to be remarked that the vendees in their account books had entered the Rs. 2,500 as a debt due from the so-called vendors.

In *Maruti* v. *Balaji* (31) two documents were executed on 27th April 1885. The first document purported to be a sale deed for Rs. 450. Under the second document the defendant agreed to relinquish his claim at the end of ten years on the debt being paid off. The exact terms of this instrument are set out in the judgment of Sir Lawrence Jenkins at p. 1061. The material portion of the agreement may be reproduced:

> "It is agreed between us in this matter that in the event of your repaying the money without interest after the season and at the end of a year any time after five and within ten years, I should accept it and return the land to you. I therefore execute this deed of agreement that if you three according to the said agreement repay me the loan without interest the said Rs. 450 in one sum after five years from this year and within ten years from this date I shall sell you the said land according to the boundaries described above. After ten years there will remain no connexion between us under this agreement."

It was held by Jenkins, C. J., that Rs. 108 out of the sale consideration represented interest and not rent:

> "But it is a self evident proposition that there could not have been interest from the first unless there was a debt therefore the finding that the Rs. 108 was insterest involves the conclusion that the Rs. 450 on which it was interest was a debt" . . . . . . The fact that it was a debt excludes the idea that the transaction was at its inception an out and out sale so that there is no alternative but to treat it as a mortgage."

Ranade, J. held that where the apparent purchaser treats the consideration money as a continuing debt or where the deed gives him a right to recover the money with interest or where the sum paid falls far short of the value of the property there are indications which determine the transaction to be a mortgage though it may be described as a sale.

In *Madhavrao Keshavarao* v. *Sahebrao Ganpatrao* (32) there were two documents of even date, namely 7th November 1922. The first document purported to be an out and out sale of the land in dispute for Rs. 300. Under second document the vendee agreed that if the defendant vendors repaid Rs 300 in five years he would resell the land to them. Three years later the defendants took possession of the land as tenants of the plaintiffs and continued to pay them Rs. 18 annually as rent. In 1910 the plaintiffs who were the ostensible vendees brought a suit for ejectment. The defendants pleaded that the land was held by the plaintiffs as mortgagees and that the defendants were entitled to redeem. This contention was upheld. The Court took into consideration the fact that the name of the vendor (defendant 1) continued to be recorded in the revenue papers presumably in the proprietary column and that there was evidence to show that Rs. 300 was a wholly inadequate price for the land.

In *Kastur Chand Lakhmaji* v. *Jakhia Padia Patil* (33) three documents were contemporaneously executed. The first was a sale deed for Rs. 2500. The bulk of the sale consideration consisted of old bond debts. Under the second document the defendant vendees agreed to reconvey the lands to the plaintiffs, if they fulfilled certain conditions. These conditions are set out in detail at p. 81 of the report. The third document was a rent note. There are two terms in the agreement to reconvey which arrest our attention:

> "(1) The right which you have obtained from us in virtue of this writing of purchasing the above property is given by us to yourself alone.
> (2) With respect to the above property if we are obliged by any means to spend any sum upon it or if you hereafter borrow money from us we shall receive all these amounts with interest first and then only we shall pass to you a sale deed of the above property."

The Court came to the conclusion that the transaction amounted to a mortgage by conditional sale. Although the mere agreement to reconvey did not necessarily signify that the transaction was a mortgage, the factors which had to be taken into account were firstly, the notorious reluctance of Indian peasants to sell their lands and secondly, the terms of the document that the repayment of Rs. 2,500 and the repayment of any fresh advances were to be on the one and the same footing showing thereby that the relation of debtor and creditor was continued and lastly that the assessment due to Government on the land continued to be paid by the plaintiffs as well after as before this transaction of ostensible sale.

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(31) [1900] 2 Bom. L. R. 1058.

(32) [1915] 39 Bom. 119=26 I.C. 751.

(33) [1916] 40 Bom. 74=31 I. C. 388.

In *Ganpat Rao Appaji* v. *Bapu Tukaram* (34) it was held by Macleod, C. J., and Crump, J., that on general principles it would be extremely undesirable after the document had stood more than 50 years to allow evidence to be led to show that the document was not what it appeared on the face of it. It was further held:

> "that where a document itself is a perfectly plain, straightforward document no extrinsic evidence is required to show in what manner the language of the document is related to existing facts."

The trend of authorities indubitably leads to the following conclusions as settled propositions of law :

(1) Where there is a controversy as to whether the transaction is a sale or a mortgage by conditional sale, the matter has primarily to be determined upon a construction of the document or documents concerned.

(2) Oral evidence as to the intention of the parties to the deeds is not admissible except within the limits imposed by S. 92, Evidence Act.

(3) Evidence aliunde or intrinsic evidence of circumstances as might be required to show the relation of the written language to the existing facts may be admissible.

(4) Where the document itself is free from ambiguity and is a perfectly plain and straightforward document, the necessity of any extrinsic evidence to explain the relation of the written language to existing facts does not and cannot arise.

(5) Where a document is ostensibly a sale deed and has held its ground as such for a long course of years the onus of establishing that the transaction is not what it purports to be lies upon the party who disputes its nature and character.

(6) An absolute sale-deed does not cease to be so merely because the vendor stipulates that he shall have a right to repurchase. If a deed of sale and a contract of repurchase be two separate and independent transactions and not two connected and interdependent parts of one and the same transaction they do not amount to a mortgage by conditional sale and do not satisfy the conditions of S. 58 (c), T. P. Act.

(7) It is permissible to appeal to some of the surrounding circumstances for determining the real nature of the transaction. If the ostensible vendee out of courtesy and kindness agrees to convey the property this will be an important circumstance to indicate that the transaction was a sale and not a mortgage. In order to constitute a mortgage, there must be a debt and there must be a security. A stipulation to pay interest on the amount of the purchase money may be an indication of the fact that the transaction is a mortgage. If the entire transaction shows an accountability on the part of the ostensible vendee this would warrant an inference in favour of a mortgage. It may also be an important factor as to whether the sale consideration represents the actual value of the property. These and other cognate tests may be reasonably applied for determining the question in issue between the parties.

We have already noticed that the first document Ex. A is an out and out sale deed. The agreement Ex. 2 is an extremely obscure and ambiguous document. We are of opinion that the words "wapsi" and "infiqaq" used in this instrument are convertible terms and we are not inclined to attach much significance to the use of the word "infiqaq" in Cls. 2 and 3 of the agreement. If the transaction was intended to be a mortgage we do not understand why the mortgagees are to be allowed to remain in possession of five bighas of land and two other plots of land on which were located the houses of Khusi Ram and Bhagirathi Ram, in spite of the redemption of the mortgage.

The plaintiffs' predecessors-in-title had executed a mortgage by conditional sale of the property in dispute on 26th November 1858 in favour of the defendants. What could have been the object of executing two documents instead of one with a view to create a mortgage by conditional sale over the same property in favour of the same mortgagees or their successors in interest? We have already seen that the plaintiffs or their predecessors-in-title except once in the year 1880, never repudiated the title of the defendants as the absolute owners of this property. The vendees and their successors were recorded in the revenue papers as full owners. The plaintiff or at any rate, some of them took a perpetual lease of a portion of the vended property from the defendants. In view of the clear tenor of the two documents and of the surrounding circumstances we are clearly of opinion that the transaction in question was one of absolute sale and not of mortgage. We therefore dismiss this appeal with costs including in this Court fees on the higher scale.

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(34) [1920] 44 Bom. 710=58 I. C. 574.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 124

DALAL, J.

Kannu Lal – Decree-holder — Appellant.

v.

Bhagwan Das and *another*—Judgment-debtors—Respondents.

Execution First Appeal No. 52 of 1930, Decided on 19th November 1930, from decision of Sub-Judge, Badaun, D/- 19th October 1929.

(a) Civil P. C., O. 34, R. 5—Decree for costs cannot be executed separately as personal one.

Ordinarily costs must be included in the amount due on the mortgage and the property must be sold for the total amount and the decree for costs cannot be executed separately as a personal decree against the mortgagor. [P 125 C 1]

(b) Civil P. C. (1908), O. 34, R. 5—Presumption as regards to costs in mortgage suit stated.

Unless there is in the judgment a specific direction that the costs should be recovered from the mortgagor personally the presumption must be that the decree directed costs to be added to the mortgage amount : 20 *All.* 523 ; *Rel.on.* 40 *All.* 109; *A.I.R.* 1926 *All.* 343; 41 *All.* 483 and *A. I. R.* 1929 *All.* 287, *Ref.* [P 125 C 2]

K. Varma — for Appellant.

N P. Asthana and *Baijnath Sahai* — for Respondents.

Judgment.—The trial Court had to interpret a decree of this Court. The mortgagor has appealed here from a decree for sale and the decree of this Court was :

> " the decree of the Additional Subordinate Judge of Budaun be confirmed and that this appeal be and here by is dismissed, and it is further ordered that the appellants aforesaid do pay to respondent 1 aforesaid the sum of Rs. 578-5-0 the amount of costs incurred by the latter in this Court, and it is further ordered that the costs incurred in the lower Court be paid with interest thereon as awarded by the said Court."

The decree-holder put into execution as a simple money decree against the mortgagor a decree for a sum of Rs. 578-5-0 the costs of this Court. The trial Court held that this Court had not granted a personal decree but that the amount should be included in the total amount for which the property was to be sold under O. 34, R. 5, Civil P. C., in a final decree for sale and that only on the property not being found sufficient for the payment of the amount and when a simple decree if one is permitted, is obtained under R. 6, that a personal liability of the mortgagor arises. Mr. Kamala Kant Varma was very persuasive as he generally is in inducing this Court to hold that the opinion of the trial Court was in conflict with the rulings of this Court. He placed all the rulings before the Court starting with the Full Bench ruling in the case of *Maqbul Fatima* v. *Lalta Prasad* (1). The other rulings placed by him before the Court were *Dambar Singh* v. *Kalyan Singh* (2), *Amina Bibi* v. *Rama Shankar Misra* (3), *Wahid Ali* v. *Durga Shankar*, *A. I. R.* 1926 *All.* 343 and *Khairunnissa Bibi* v. *Oudh Commercial Bank, Ltd.* The true principles of interpreting such a decree are declared in the Full Bench ruling. I do not think that that ruling can be distinguished from the present case on the alleged ground that it did not deal with the High Court decree but with a decree of the trial Court. When a decree of the High Court exists there cannot be a separate decree of the trial Court. It is true that at p. 526 of the report there does appear a sentence :

> " As regards the costs of the appellate Court, there is no controversy in this appeal."

The meaning possibly conveyed by these words was that it was admitted by the parties that costs of this Court would form part of the mortgage money and it was only with respect to the costs of the Court of first instance that it was contended by the decree-holder respondent in that case that he was entitled to recover that amount of costs from the person of the mortgagor. The learned Judges decided that the contention of the decree-holder could not prevail. In that case also the portion of the decree which their Lordships had to interpret was :

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(1) [1898] 20 All. 523=(1898) A.W.N. 157 (F.B.).

(2) [1917] 40 All. 109=43 I.C. 557.

(3) [1919] 41 All. 473=50 I.C. 730.

(4) A.I.R. 1929 All. 287=51 All. 640=119 I.C. 510.

"It is further ordered that the defendant aforesaid do pay to the plaintiff aforesaid the sum of Rs. 876-8-0, the amount of costs incurred by them in this Court."

It was contended in that case on behalf of the respondent that this direction in the decree was independent of the rest of the decree and it was urged that under this clause the mortgagee-plaintiffs were entitled to recover the costs from the defendants personally. Their Lordships said that they were unable to accede to that contention. In their opinion this clause in the decree relied upon by the decree-holder was only a formal compliance with the provisions of the Code of Civil Procedure and was not directed for the recovery of costs personally from the debtor. They went further and said that even if there were any ambiguity in the decree it would be the duty of the Court to construe the decree in the light of the terms of the Transfer of Property Act which was then the rule. There cannot be the slightest doubt that ordinarily costs must be included in the amount due on the mortgage and the property must be sold for the total amount and the decree for costs cannot be executed separately as a personal decree against the mortgagor. R. 4, O. 34, lays down how a preliminary decree in a suit for sale is to be prepared. That decree directs the payment out of the property not only of the sum due to the plaintiff in a suit for sale at the time of the passing of the decree but also subsequent interest and subsequent costs. Again the same purpose is repeated in R. 5 when the final decree has to be prepared. In this decree all subsequent costs mentioned in R. 10 are to be included in the total amount recoverable from the property. R. 10 lays down :

"In finally adjusting the amount to be paid to a mortgagee in case of a sale . . . . . . the Court shall . . . . add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for sale up to the time of actual payment."

It cannot be denied that costs in an appeal are costs incurred by the mortgagee up to the time of actual payment. The same principle as regards interpreting a decree in accordance with the terms of the Code of Civil Procedure were enunciated in the ruling in 40 *Allahabad* referred to above. It was held there that in construing a decree similar to the one now before me it was open to the Court to consider, first, the nature of the suit, secondly, the judgment of the High Court upon which the decree was founded and the general practice of the Court.

Their Lordships held that considering these matters the intention of the Court which passed the decree which they had to interpret was that there should be the ordinary mortgage decree awarding the costs incurred in the suit and up to the time of the final decree to be realized by sale of the mortgaged property. Mr. Kamala Kant picked out one sentence at p. 115 out of the judgment and desired to draw the conclusion that their Lordships were of opinion that when costs were to be included in the mortgage money the High Court should so state. In fact that sentence was used when their Lordships pointed out that the form of the decree prescribed in this Court was not correct in preparing a decree for sale. Unfortunately those observations do not appear to have been brought to the notice of the office of this Court and the same form is still continued. The words used by their Lordships were :

"While we decide in favour of the appellants, we think it right to say that the form used by the High Court is not strictly correct as applied to mortgage suits. O. 40, R. 35, prescribes what a decree of the appellate Court shall contain, and it would seem that it is more accurate that in mortgage suits where it is the intention of the Court that the costs should be recoverable out of the property and not personally against the party, the decree of the High Court should so state. It perhaps may also be considered whether in mortgage suits in which the High Court is making a decree for sale the High Court's decree instead of merely being a dismissal or affirmation of the decree of the lower Court, should not be in the form prescribed by O. 34 directing the property to be sold and stating the amount which is to be recovered from the property including costs."

Their Lordships found fault with the existing form of the decree and did not desire that when the High Court dismissed an appeal from a mortgagor against a decree for sale, they should specifically state that the costs were to be included in the mortgage amount. In the 1926 case reported in the *All India Reporter* Sulaiman, J., recapitulated all the case-law on the subject and came to the conclusion that unless there was in the judgment a specific direction that the costs should be recovered from the mortgagor personally the presumption must be that the decree directed costs to be added to the mortgage amount. In the 1929 case also a Bench of two Judges appears to have held the same view. The learned Judges gave it as their opinion that the costs may either form part of the mortgage money or may be ordered to be recovered from the person of the mortgagor, but in that case they were not called upon to interpret any particular decree of the High Court. The only ruling which may in some way be considered to lay down principles in conflict with the general tenor of rulings in this Court is that of *Amina Bibi* v. *Rama Shankar Misra* (3) quoted above. One of the learned Judges, Walsh, J., appears to have brought the general principles of equity as understood in England to bear on the facts of the case, and he was of opinion that principally the mortgagor shall be made personally liable to pay the costs of appeal. In his judgment there was no discussion of the rules laid down in O. 34. Piggott, J., the other learned Judge, interpreted the decree merely in the particular case before him and admitted that as a rule costs of appeal would be included in the general mortgage costs. For this reason Sulaiman, J., was justified in distinguishing this ruling by saying :

"that the learned Judges had to consider the particular decree which was before them and their interpretation of it was that the appellant had been made liable to pay the costs personally."

Possibly these observations would not apply to the judgment of the learned Judge, Mr Walsh, but they certainly applied to the observations of the other learned Judge. In the judgment of the High Court, in the case before me, the only order is : "The appeal is dismissed with costs." There is no specific order that the costs would be recoverable from the person of the respondent, and not according to law.

I agree with the opinion of the trial Court and dismiss this appeal with costs.

The attention of the Registrar shall again be drawn to the form of the decree of this Court in a suit for sale.

Permission to file an appeal by Letters Patent is granted.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 126

SULAIMAN AND YOUNG, JJ.

Lachhmi Narain—Appellants.

v.

Shambhu Nath—Respondents.

First Appeal No. 238 of 1926, Decided on 17th November 1930.

(a) Tort—Defamation—Words complained of when defamatory, test laid down—Court's duty enunciated.

In considering the question whether the words complained of are defamatory or in other words whether they are capable of a defamatory meaning, the test is whether under the circumstances in which the writing is published, reasonable men to whom the publication is made would be likely to understand it in a libellous sense. What the Court has to consider is what might be conveyed by the words complained of to a reasonable, fair-minded man and not what might be inferred from it by a man of a morbid or suspicious mind. It is unreasonable that where there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document : *apital and Counties Bank* v. *Henty & Sons*, (1882) 7 *A. C.* 741 ; *Keogh* v. *Incorporated Dental Hospital of Ireland*, (1910) 2 *Ir. R.* 163, *Foll.* [P 127 C 1]

(b) Tort — Defamation — Justification proved — Bearing libellous meaning is immaterial.

Where justification is pleaded and proved in an action for damages for libel, it would not matter if the words complained of do in fact bear a libellous meaning. [P 127 C 2]

(c) Civil P. C., S. 35—High Court would not interfere unless question of principle is involved.

The question of costs is a matter quite in the discretion of the Judge and where no question of principle is involved, the High Court would refuse to interfere. [P 128 C 1]

P. L. Banerji, *Saila Nath Mukerji*, *N. C. Vaish* and *Karlai Narain Agarwala*—for Appellants.

K. N. Katju, *M. N. Kaul* and *M. L Chaturvedi*—for Respondents.

Judgment.—This is an appeal from the Court of the Second Additional Subordinate Judge of Cawnpore. It was connected with first appeals from Orders. Nos. 62 of 1930 and 41 of 1930. We have heard these latter appeals and have dismissed them with costs. Those first appeals from order were in matters arising out of arbitration proceedings in connexion with alleged breaches of contract. This appeal arises out of a libel action. The plaintiffs alleged that they had been libelled. The defendants, who were importers of piece-goods sold by auction the goods which were the subject-matter of the contract between the plaintiffs and the defendants because the plaintiffs failed to take delivery. The plaintiffs complain of the terms of the notice published by the auctioneers, which read as follows :

> "Under instructions from Messrs. Jainy Brothers, the undersigned will sell by public auction the following goods near the shop of Messrs. Umrao Lal on account and risk of Messrs. Shankar Lal Lachhmi Narain, Generalganj, Cawnpore, who in spite of repeated demands and notice have failed to pay for and take delivery of the goods they had purchased."

The plaintiffs alleged that that notice is libellous upon them and that they suffered damage as merchants because of it. The defendants-respondents pleaded first that the words were not capable of a libellous meaning, and although the 2nd plea in the written statement is not clear, nor drawn up with art, we are satisfied that it amounts to plea of justification. The lower Court dismissed the suit with costs, and the plaintiffs appeal.

It was agreed by counsel on both sides on 25th February 1930 that the issue as to whether the plaintiffs were liable or not on the contract, must be taken for the purposes of this appeal as finally decided by the arbitrators if the award stands good. By our judgments in the first appeals from order we have upheld the award and therefore for the purposes of this judgment we must take it that the plaintiffs have broken their contract with the defendants.

The first point we have to consider is whether the words complained of are in fact defamatory. In other words, whether they are capable of a defamatory meaning. In the words of Lord Selborne in *Capital and Counties Bank* v. *Henty & Sons* (1), the test is :

> "whether, under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense,"

or in the words of Lord O'Brien in *Keogh* v. *Incorporated Dental Hospital of Ireland* (2), we must :

> "consider what might be conveyed by the notice to a reasonable, fairminded man and not what might be inferred from it by a man of a morbid or suspicious mind."

We must also take notice of the words of Brett, L. J., in the *Capital and Counties Bank* case that

> "it is unreasonable that where there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document."

It is strenuously pressed by the appellants that the words " have failed to pay for and take delivery of the goods they have purchased " impute insolvency, or that the plaintiffs were bad payers. It is true that the words are capable of bearing that meaning, but we must take all the circumstances into account. This was a commercial transaction between importers from England and buyers in this country. In such commercial transactions there are many reasons which would justify the buyers in this country failing to pay for and take delivery of goods which they had ordered, all of them consistent with a perfectly sound commercial morality on the part of the buyers and by no means necessarily pointing to inability or unwillingness to pay. In this particular case a dispute arose over the question as to whether or not the shipping documents ought to be delivered to the buyers before they paid for the goods. The notice itself was in common form. A large number of such notices are continually being published when buyers fail to take delivery of goods they have purchased, and under the contract form of the Delhi Piece goods Association, the sellers then proceed to sell the goods against the buyers by public auction. Although the matter is not without difficulty, we are on the whole satisfied that the words did not, under the circumstances, bear a libellous meaning, and we rely in particular on the words of Brett, L. J., quoted above.

In view of our opinion upon the second point raised by the defence, that of justification, it would not of course matter if the words complained of did in fact bear a libellous meaning There can be no doubt that the words used in the notice, and which the plaintiffs complain of, are true in substance and in fact. We have decided against the plaintiffs-appellants in the former appeals, and in view of that decision it cannot now be argued that the plaintiffs had not broken their contract and had not,

> "in spite of repeated demands and notice, failed to pay for and take delivery of the goods they had purchased."

The only point which we had to consider was whether or not the plea of justification had been taken in the written statement of the defendants. Para. 21, the defendants allege, raises the plea of justification. It is to be noted that in this province legal practitioners have very little practice in pleading in cases arising out of tort, and if we were to judge such pleadings in the same strict manner as in England, injustice might well be done to the litigating public. In this case it is nowhere said in clear terms that the words complained of were true in substance and in fact. But in para 21, Cls. (a), (b), (c), (d), (e), (f), (g) and (h), we are satisfied that in effect the plea is raised with the necessary particulars.

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(1) [1882] 7 A. C 741=47 L. T. 662=47 J. P. 214=52 L. J. Q. B. 232=31 W. R. 157.

(2) [1910] 2 Ir. R. 166.

A cross-objection has been taken with regard to costs awarded in the lower Court. This is a matter in the discretion of the Judge and there is no question of principle involved. We do not feel that we ought to interfere. The appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 128

BANERJI, J.

Nabidad Khan—Applicant.

v.

Abdul Rahman—Opposite Party.

Civil Revn. No. 99 of 1930, Decided on 4th July 1930.

Contract Act, S. 23—Agreement, object of which is withdrawal of criminal prosecution against third party is void.

Where the defendant was in no way interested in the original liability of the plaintiff's debtor and undertook that liability and executed a bond in plaintiff's favour to avoid the threatened criminal prosecution of the original debtor by the plaintiff :

Held : that the plaintiff could not enforce the bond against the defendant : *Henry Williams* v. *James Bayley*, (1866) 1 *House of Lords* 200, *Rel. on.* ; *A. I. R.* 1927 *All.* 318, *Dist* ; *A.I.R.* 1930 *P. C.* 100, *Ref.* [P 128 C 2]

B. Malik—for Applicant.

Sahah Zamir Alam—for Opposite Party.

Judgment.—This is a plaintiff's application in revision against the judgment and decree of the Judge of the Small Cause Court at Benares dismissing his suit against the opposite party. The plaintiff claims Rs. 83-14-0 due on a bond of 29th June 1927, executed by the opposite party in favour of the plaintiff. The bond recites payment of cash as consideration. The real facts are that not a penny was paid by the plaintiff to the defendant. What happened was as follows : One Mohammad Baksh alias Mahngo who is the defendant's brother's son-in-law took some gold to make some ornaments for the plaintiff. Mohammad Baksh prepared the ornaments but they were not satisfactory and he took back the ornaments to prepare others. The gold of which the plaintiff was the owner thus remained with Mohammad Baksh until he was traced by the plaintiff to have come to attend a wedding at the defendant's house. The plaintiff then instituted a criminal complaint against Mohammad Baksh and obtained a warrant for his apprehension. It is also proved that the complaint was sent to the police for investigation. It appears what the plaintiff intended to do was to arrest Mohammad Baksh at the house of the defendant while the wedding party was there. It appears that the defendant executed the bond and undertook the liability of Mohammad Baksh and the plaintiff got his complaint dismissed.

The defendant pleaded that there was no consideration for the contract and that the bond was executed under undue influence. It is difficult to say that there was no consideration for the bond and it is difficult to bring the case as one in which the contract was entered into by undue influence bearing in mind the definition of "undue influence" as defined by the Contract Act. That however does not dispose of the case. The plaintiff's difficulty is S. 23, Contract Act. I am of opinion that the plaintiff's suit must fail as the object and consideration of the agreement was the withdrawal of the prosecution. The defendant was not interested in any way with the original liability of Mohammad Baksh and although that point was not pleaded in the Court below, the evidence of the plaintiff taken with the circumstances of the case to my mind makes it clear that the case comes within the purview of *Henry Williams* v. *James Beyley* (1). Mr. Malik has referred me to the case of *Onkar Mal* v. *Ashiq Ali* (2) and similar cases. All these are cases where the agreement had been entered into by the party who was personally liable or who was personally interested in the matter. In the present case the defendant must be considered to be a third party : see also *A. I. R.* 1930 *P. C* 100. I am therefore of opinion that this revision must fail and I dismiss it with costs.

K.N./R.K. *Revision dismissed.*

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(1) [1866] 1 House of Lords 200.

(2) A. I. R. 1927 All. 318 =100 I. C. 499 = 49 All. 540.

A. I. R. 1931 Allahabad 129 (1)

MUKERJI AND BENNET, JJ.

Rati Singh and *another* — Defendants —Appellants.

v.

Kunwar Damodar Lal — Plaintiff — Respondent.

Letters Patent Appeal No. 159 of 1929, Decided on 17th April 1930, against judgment of Ashworth, J., D/- 27th February 1929.

Landlord and Tenant — Abadi — Right to build on ahata occupied by chhappar.

Where site forms part of the ahata or yard of the house and formerly there was a chhappar on the site, and the chhappar has not been there for a statutory period, it is not open to the tenant to build a house on the site of the chhappar: 18 *A. L. J.* 781, *Dist.* [P 129 C 1]

M. L. Agarwala—for Appellants.

Mushtaq Ahmad—for Respondent.

Bennet, J.—This is a Letters Patent appeal by two defendants against a judgment of a learned single Judge of this Court granting the plaintiff zamindar an injunction to prevent the defendants from building on a certain plot of land in the village site and to remove any buildings made by them. The facts as found by the lower appellate Court are that there was formerly on the site of the building in question a chhappar, that is a thatched structure, and that previously to that the site contained an open space. The lower appellate Court considered that the rule governing this suit was as follows:

> "The site of house B in this case forms part of an ahata which must be considered to be a part of the abadi. The zamindar has no reason to complain if a house is built by the occupiers of the ahata on a portion of it."

In other words the lower appellate Court considers that if land in an abadi adjoins a house and is considered to be the ahata or yard of that house then the tenant residing in the house has a right to make a building on that ground. The learned counsel for the appellants refers to *Ghorey* v. *Shib Lal* (1) as authority for this proposition, but that ruling merely says that a tenant is entitled to build a pucca house on the site of a kuchcha house. In the present case the finding of fact is that formerly there was only a chhappar, and that that chhappar had not been there for the statutory period of twelve years. We consider that a tenant is not entitled to build a house on the site of a chhappar. The chhappar in question was burnt down and no question is before us of the right to retain the chhappar. In any case the chhappar had not been there for the statutory period. Accordingly we consider the judgment of the learned single Judge is correct and we dismiss this Letters Patent appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 129 (2)

BANERJI AND KING, JJ.

Behari Lal Ram Charan —Decree-holder—Applicant.

v.

Badri Pershad — Judgment-debtor — Opposite Party.

Execution First Appeal No. 250 of 1929, Decided on 3rd November 1930, from decision of Sub-Judge, Cawnpore, D/- 28th May 1929.

Civil P. C., S. 47—Order merely deciding mode of execution is not appealable as decree.

Where the order under appeal does not conclusively determine any question at issue between the parties relating to the execution of the decree, but merely decides the mode in which the execution should proceed such an order is not appealable as a "decree." [P 131 C 2]

The order of the executing Court that the decree-holder must first proceed to realize the balance of his decretal money from defendants 1 to 3 and if he is unable to realize his money from them, then alone he can proceed against defendants 4 and 5, amounts to an order staying execution against defendants 4 and 5 until certain conditions have been fulfilled, and is not appealable : *A. I. R.* 1924 *All.* 808 ; *A. I. R.* 1929 *All.* 85 and *A. I. R.* 1927 *All.* 208, *Ref.* [P 130 C 2]

K. N. Katju and *Benod Behari Lal*—for Applicant.

P. L. Banerji and *S. N. Seth*—for Opposite Party.

King, J.—The appellant is a decree-holder who obtained a decree for money on 8th August 1928 against five judgment-debtors. The judgment-debtors were divided into two parties, Nos. 1 to 3 forming one party and Nos. 4 and 5 the other party. Before the passing of this decree there had been a partition between the five defendants, and it was decided in the partition suit that defendants 1 to 3 would be liable for the debt due to the appellant. For that reason the Court, although passing the decree against the five defendants, made an order that the plaintiff (who is now the appellant before us) should at first try to realize the amount from defendants 1 to 3, and defendants 4 and 5 should help him in realizing the amount from them ; but in case he fails to realize all the amount from defendants 1 to 3, and defendants 4 and 5 fail to help him in realizing the amount from defendants 1 to 3, then the plaintiff will be entitled to realize the amount, or any balance due to him from defendants 4 and 5.

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(1) [1919] 18 A. L. J. 781=58 I. C. 410=2 U. P. L. R. 266.

In the partition suit defendants 4 and 5 were given a decree for a sum of money against defendants 1 to 3 and defendants 4 and 5 proceeded to execute their decree and attached the whole immovable property of defendants 1 to 3. Defendants 1 to 3 sold their property privately for Rs. 25,000 and plaintiff-appellant applied for rateable distribution. The execution Court alloted Rs. 12,000 to the plaintiff-appellant, the balance being allotted to defendants 4 and 5 and to other creditors,

On 19th January 1929, the appellant applied to the execution Court Cawnpore, for a transfer certificate to proceed against the money which had been deposited in favour of defendants 4 and 5 in the Court at Fatehpur. Badri Prasad, defendant 4, had already sold his share in the decree and the application was for the attachment of the share of Dwarka Prasad, defendant 5 only.

Notices were served upon defendants 4 and 5, but they failed to appear and the proceedings were taken against them ex parte. An order of transfer was made and the appellant's decree was sent to Fatehpur for execution.

On 6th April 1929, Badri Prasad, defendant 4, applied to the Court at Cawnpore to set aside the order of transfer, on the ground that the appellant was bound under the terms of the decree to execute his decree against defendants 1 to 3, if possible, and was not entitled to proceed against the property of defendants 4 and 5, unless and until he had entirely exhausted his remedies against defendants 1 to 3. An affidavit was filed by defendants 4 and 5 showing that defendants 1 to 3 still had moveable property in their possession. The Court below, acting under S. 151, Civil P. C., cancelled the order of transfer. This order cancelling the transfer is the order which is now under appeal before us. The order laid down that the decree-holder must first proceed to realize the balance of his decretal money from the defendants 1 to 3 and, if he is unable to realize his money from them, then alone he can proceed against defendants 4 and 5.

A preliminary objection has been taken that no appeal lies. It is contended for the appellant that the order which forms the subject-matter of this appeal, is an order passed by the execution Court under S. 47, Civil P.C., and it determines a question arising between the parties to the suit, in which the decree was passed, and the question relates to the execution of the decree. Therefore, under S. 2 (2), the order is appealable as a decree. It must be conceded that, if the words "the determination of any question within S. 47" are construed in their widest sense then the determination by the execution Court of any question arising between the parties to the suit and relating to the execution of the decree, would amount to the determination of a question within S. 47 and would be appealable as a decree. On this interpretation the order in question would be appealable as a decree.

It is contended by the learned advocate for the respondents that it is not every order under S. 47 which is appealable. An order to be appealable must be an order which finally or conclusively determines a question at issue between the parties relating to the execution of a decree. The order now under appeal does not conclusively determine the question whether the decree-holder is entitled to execute his decree against defendants 4 and 5, but merely lays down the mode in which the decree shall be executed, viz. that recourse must be had to the property in the hands of defendants 1 to 3 in the first instance and, if the decree-holder is unable to realize his decree money from such property, then he is entitled to proceed against the property of defendants 4 and .5. The order amounts to a temporary stay of execution against defendants 4 and 5. As there is no conclusive determination regarding the decree holder's right to proceed against defendants 4 and 5 the order does not amount to a decree and is not appealable as a decree, In our opinion, there is much force in this contention. We think that the word "determination" in S. 2 (2) must be read in the sense of a conclusive determination. In other words, the determination must have the characteristics of a "decree" as defined in the first sentence of S. 2 (2). We cannot believe that it was the intention of the legislature that evey order of every description (including interlocutary orders) passed by an execution Court, determining any question at issue between the parties in relation to execution of a decree, should be appealable as a decree. The learned counsel for the appellant asks us to put this wide interpretation upon the language of the statute, but we consider it must of necessity be construed in a more restricted sense, and the context in which the words "the determination of any question within S. 47" occur justifies us in restricting their meaning.

Several rulings of this Court can be cited in support of our view. If we are to accept the appellant's contention, it would follow that every order passed by the execution Court relating to the execution of a decree, as for instance, an order staying execution, would be appealable. It has however been expressly held in two cases decided by Division Benches of this Court that orders staying execution or rejecting stay of execution are not appealable. We refer to the rulings in *Husain Bhai* v. *Belto Shah* (1) and *Mangat Rai* v. *Babu Ram*, *A. I. R.* 1929 *All.* 85. We may also refer to the ruling in *Alimuddin* v. *Govind Prasad*, *A. I. R.* 1927 *All.* 208, in which it was held that no appeal lies against an order fixing the estimated value of the property sought to be sold in proceedings under O. 21, R. 66. These rulings all take the view that it is not every determination of a question within S. 47 which is appealable as a decree. In two rulings it was expressly held that orders staying execution are not appealable as decrees. Those rulings are specially in point as the order now in question amounts to an order staying execution against defendants 4 and 5 until certain conditions have been fulfilled.

We have been referred to rulings of other High Courts in which a very wide meaning has been given to "the determination of any question within S. 47" and some authority is to be found for the appellant's contention, but we do not find any case decided by this Court which is of any material assistance to the appellant. We prefer to follow the rulings of this Court which we have cited above.

In our view the order under appeal did not conclusively determine any question at issue between the parties relating to the execution of the decree, but merely decided the mode in which the execution should proceed. In our opinion, such an order is not appealable as a "decree."

It has been urged that, if the order is not appealable, we should treat the appeal as an application in revision, but in the circumstances of this case, we see no reason to treat the appeal like a revision.

We accordingly dismiss the appeal. Parties will bear their own costs.

K.N./R.K. *Appeal dismissed.*

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(1) A. I. R. 1924 All. 808=46 All. 733=83 I. C. 1035.

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* A. I. R. 1931 Allahabad 131

SULAIMAN AND YOUNG, JJ.

Ajodhia Prasad—Plaintiff—Appellant.

v.

Data Ram and *others* — Defendants—Respondents.

First Appeal No. 176 of 1927, Decided on 27th November 1930, from decision of Sub-Judge, Shahjahanpur, D/- 31st January 1927.

* (a) **Hindu Law—Debts—Son's liability—Grandfather, manager of joint family alive—Father contracting personal debt — Sons are not liable.**

The interest of the minor grandsons is not liable for the personal debt of the father when their grandfather is alive and is the manager of the estate and represents them to the outside world : *A. I. R.* 1924 *P. C.* 50, *Foll.*; *A. I. R.* 1917 *P.C.* 61, *Ref.* [P 133 C 1,2]

(b) **Hindu Law—Joint family— Execution of decree against father — Only father's interest held to have passed at auction sale.**

M's share in the joint family property was attached in execution of a decree against him in respect of his personal debts. His three sons objected to the attachment, whereupon the decree-holder stated to the Court that he had attached only the right, title and interest of *M* and that the objectors (*M's* sons) had no concern with it. Accordingly the Court ordered that the rights and interest of the judgment-debtor without specification of shares should be sold and that the objections be allowed to that extent. The rights and interest of *M* were thereafter sold and purchased by decree-holder's son.

Held : that in view of the above facts decree-holder's son could not claim to have purchased at auction sale the entire interest of *M* and his three sons in the joint family property on the ground that the entire estate was liable for father's debts, as only the right and interest of *M* was put up for sale and purchased by the auction-purchaser. [P 133 C 2]

P. L. Banerji and *Hazari Lal Kapoor* —for Appellant.

S. N. Chaube—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for a declaration as to the extent of the share which the plaintiff has acquired by purchase. The plaintiff is the son of Kanhai Lal, who held a simple money decree, No. 371 of 1923, against Mathura Prasad, who is a member of a joint Hindu family. The joint family consists of Data Ram whom we shall call the grandfather, Data Ram's son Mathura Prasad whom we shall call the father, and Mathura Prasad's three minor sons whom we shall call the grandsons. The debt was a personal debt of the father Mathura Prasad. The decree-holder attached a half share in the joint family property and objections appear to have been raised by Data Ram which were disallowed presumably because his half-share had not been sought to be attached. Fresh objections were filed on behalf of the minor grandsons. On 13th October 1923 the decree-holder applied to the Court stating that he had attached only the right and interest of Mathura Prasad and that the objectors, namely, the minor grandsons, had no concern with it. The vakil for the minor objectors stated that if the Court ordered that only the rights and interest of Mathura Prasad would be sold he would not lead any evidence.

On 5th January 1924 the Court ordered that the rights and interest of the judgment-debtor without specification of shares should be sold and that the objections be allowed to that extent. Obviously this referred to the half-share which had been attached and sought to be put up for sale. On 20th March 1925 the rights and interest of Mathura Prasad in this half-share were sold and purchased by Ajodhia Prasad, the son of the decree-holder. The name of the grandfather Data Ram alone stood recorded in the revenue papers and the auction-purchaser therefore felt a considerable difficulty in applying either for the mutation of names in his favour or applying for partition in the revenue Court. He has accordingly instituted the present suit for a declaration as to the extent of his right in the property purchased by him. The minor defendants pleaded that in the execution proceedings the decree-holder expressly confined his attachment and sale to the rights and interest of the father Mathura Prasad and exempted the interests of the minor objectors and that therefore their interests had not passed. They also pleaded that the plaintiff was not entitled to sell more than one-eighth share in the entire estate, which alone would fall to the lot of Mathura Prasad at a complete partition of the family property.

The learned Subordinate Judge has held that the plaintiff has purchased only the share of Mathura Prasad which amounted to one-eighth in the joint family property. He has decreed the claim to that extent and dismissed the rest of it.

After the passing of the decree the plaintiff applied to the Court for review of judgment on the strength of a judgment inter partes dated 13th July 1925 stating that they had not come to know of its existence before the suit was decided. The learned Judge did not expressly reject this judgment but thought that inasmuch as the previous suit had been dismissed on the ground that as framed it was not maintainable it would not operate as res judicata.

The plaintiff has appealed to this Court and all these points are again urged before us.

The previous suit was brought by the minor sons for partition of the family property alleging that the decree No. 371 of 1923 against Mathura Prasad was not binding against them inasmuch as the debt had been incurred without any family necessity. The defence was that the debt was binding on the sons because it was not tainted with immorality and further that the plaintiffs could not maintain the suit for partition of a part of the family property. The learned Subordinate Judge decided both these issues against the plaintiffs holding that the debt not having been contracted for an immoral purpose the whole estate was liable for the debt in execution of the decree, and that the suit as brought was not maintainable. For these reasons he held that the plaintiffs were not entitled to any relief and he dismissed the suit. If it were necessary to rely upon this judgment we might have been inclined to hold that the view of the Court below that the judgment did not operate as res judicata was not correct. We may refer to the case of *Mid-*

napur Zamindary Co. Ld. v. *Naresh Narayan Roy* (1). The point as to the liability of the whole estate for the debt was directly raised and decided and was one of the grounds for the dismissal of the suit. It is immaterial to consider which finding was absolutely necessary or came first in strict logical sequence.

We however think that before admitting this judgment the Court had to be satisfied that it could not be discovered with due diligence. The suit had been brought against Kanhai Lal, the father of the present plaintiff, and was decided while the execution proceedings were pending. It is difficult to believe that Ajodhia Prasad was not aware of that litigation, but even if he were not aware of it, he could with due diligence have discovered its existence. There is therefore no good reason for admitting this judgment as a fresh evidence under O. 47, R. 1, Civil P. C.

Furthermore even if that judgment were admitted, it would only operate as res judicata on the question of the liability of the whole of the half-share for the debt due from Mathura Prasad. Even if the whole of the half-share was liable, the question remains how much of it was actually put up for sale. On the facts stated above the decree-holder in order to meet the objection of the minor grandsons stated that he had only put up for sale the rights and interest of Mathura Prasad with which the objector had no concern. Thus it was only the rights and interest of Mathura Prasad which were put up for sale and purchased by the present plaintiff. In view of the express statement we cannot hold that the entire interests of Mathura Prasad and his three sons were sold at auction. The form of the sale certificate drawn up is ambiguous or perhaps misleading. The Court had not decided that the whole of the half-share should necessarily be sold. What it had ordered was that the rights and interest of Mathura Prasad in the half share should be sold.

We also think that there is no authority in support of the appellant's contention that the interest of the minors in the joint family property should be held liable to be sold in execution of a decree against their father, when their grandfather is alive and is the head of the joint family. This fact is admitted in para. 3 of the plaint. No case has been cited before us which would support this contention. After the pronouncement of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (2), it became extremely doubtful whether there was any pious obligation on the sons to pay their father's debt during his lifetime. In the leading case of *Raja Brij Narain Rai* v. *Mangala Prasad Rai* (3), their Lordships have summarized the propositions which follow as a result of the existing authorities. The first two propositions are stated in the following words :

> "The managing coparcener o a joint undivided estate cannot alienate or burden the estate qua the manager except for purposes of necessity ; and (2) If he is the father and the reversioners are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt."

It is quite clear that the liability of the whole estate to be taken in execution proceeding upon a decree for payment of the father's debt is stated to be in the case when the managing coparcener happens to be the father of the other coparceners who are his sons. Their Lordships did not state the proposition in its wide scope that, even if the debtor is the father though not the manager, the liability of the estate remains. A mere coparcener in a joint family does not represent the whole family in its transactions with the outside world unless he is the manager. In the present case Data Ram, the grandfather, has a joint interest in the property and so have the grandsons. It cannot be said that the joint undivided property in which Data Ram has an interest in any case is liable for the debt of Mathura Prasad, who is a mere coparcener. On principle it seems to follow that in the absence of any express authority to the contrary the interest of the minor grandsons should not be held liable for the personal debt of the father when their grandfather is alive and is the manager of the estate and represents them to the outside world. At the time of the partition the sons may have a right to demand separation of their shares also, and if the shares of all the members of the family are separated Mathura Prasad's share would only be one-eighth of the entire estate. We therefore think that the decree passed by the Court below was correct. The appeal is dismissed without any order as to costs as no one appears for the respondents.

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(1) A.I.R. 1924 P.C. 144=80 I.C. 827=51 I.A. 293=51 Cal. 631 (P.C.).

(2) A.I.R. 1917 P.C. 61=39 I.C. 280=44 I.A. 126=39 All. 437 (P.C.).

(3) A.I.R. 1924 P.C. 50=77 I.C. 689=51 I.A. 129=46 All. 95 (P.C.).

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 134

SULAIMAN AND YOUNG, JJ.

B. Bandhu Singh Judgment-debtor—Applicant.

v.

K. T. Bank, Ltd., Gorakhpur—Decree-holder—Opposite Party.

Execution First Appeal No. 422 of 1929, Decided on 20th November 1930, from decision of Sub-Judge, Gorakhpur, D/- 14th August 1929.

(a) Civil P. C. (1908), S. 48—Fresh application—Meaning explained.

Where a decree-holder applies after the expiration of 12 years from the date of the decree for the attachment and sale of property not mentioned in any of the previous applications for execution, the application is a fresh application within S. 48 and cannot be entertained. Mere fact that the execution proceedings started by the previous application are still pending and have not been struck off would not be sufficient to save limitation : *A. I. R.* 1928 *Lah.* 808 ; *A. I. R.* 1928 *Cal.* 241 and 34 *I. C.* 27, *Rel. on.* [P 134 C 2]

(b) Civil P. C. (1908), S. 48 (2) (a)—Fraud—Mere fact that execution proceedings are prolonged by judgment-debtor raising objection does not amount to fraud or force—Fraud must be of nature which decree-holder is not able to discover and which helps judgment-debtor in gaining time.

The mere fact that there has been prolongation of the execution proceedings due in part to the objections raised by the judgment-debtor from time to time, would not in itself amount to fraud or force within S. 48 (2) (a). The raising of an objection however frivolous would not ordinarily amount to practising fraud on the decree-holder, for it can be easily met and disposed of by the Court. Fraud must be of a nature which the decree-holder is not able to discover at the time and which helps the judgment-debtor in deceiving him in gaining time. [P 134 C 2]

Haribans Sahai—for Applicant.

Sulaiman, J.—This is a judgment-debtor's appeal arising out of an execution proceeding. Notice was served on the respondent, but no one appears on his behalf. A simple money decree was obtained on 9th March 1916 and it was put in execution. Proceedings continued off and on for a considerably long time, and on 21st November 1925 an application for review was granted and the execution proceedings were restored and declared to start from the stage at which they had arrived on 23rd May 1925.

Twelve years from the date of the decree expired on 9th March 1928 On 8th May 1928 the decree-holder filed an application for the attachment and sale of shares in two new villages which had never been mentioned in any of the previous applications. So far as the attachment of these villages was concerned, the application was undoubtedly a fresh one.

The learned Subordinate Judge has conceded that in the case of *Ram Ratan* v. *Datar Kuar*, *A I. R.* 1928 *Lah.* 808 and *Khairat Ali* v. *Wahed Ali*, *A. I. R.* 1928 *Cal.* 241 and *Krishna Dayal Gir* v. *Mt. Sakina Bibi* (1), it has been laid down that an application for the sale of a new property cannot be acted upon by the execution Court when it has been made after 12 years have elapsed from the date of the decree ; but he has held that in view of the frivolous objections taken by the judgment-debtor from time to time there was fraud or force within the meaning of S. 48, Civil P. C., which extends the period. He has relied on the case of *Lalta Prasad* v. *Suraj Kumar* (2) in support of his view.

It seems to us that the decree-holder is now seeking to attach fresh property and his application for the attachment of this new property is a fresh application within the meaning of S. 48, Civil P. C., and having been made more than 12 years after the date of the decree, cannot be entertained. The mere fact that the execution proceedings are still pending and have not been struck off would not be sufficient to save limitation.

It also seems to us that the mere fact that there has been a prolongation of the execution proceedings due in part to the objections raised by the judgment-debtor from time to time, would not itself amount to fraud or force within sub-S. (2), sub-Cl. (a) of that section. The raising of an objection, however frivolous, would not ordinarily amount to practising fraud on the decree-holder, for it can be easily met and disposed of by the Court. Fraud must be of a nature which the decree-holder is not able to discover at the time and which helps the judgment-debtor in deceiving him and gaining time. We do not think that this can be said in this case. The result therefore is that the appeal is allowed, the order of the Court below is set aside and the application for the attachment and sale of the shares in the two new villages dismissed with costs in both Courts, including fees in this Court on the higher scale.

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(1) [1916] 34 I. C. 27.

(2) A. I. R. 1922 All. 145=65 I. C. 877=44 All. 319.

P.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 135

DALAL, J.

Secy. of State and *another*—Defendants—Appellants.

v.

Rup Ram-Audh Behari Lal and *another*—Plaintiffs—Respondents.

Civil Revns. Nos. 104 and 105 of 1930, Decided on 14th November 1930, from order of Small Cause Court, Budaun, D/- 23rd November 1929.

Railways Act (9 of 1890)—Risk note form A—Suit for loss caused to consignment of goods—All bales consigned under risk note A delivered—Shortage due to some goods slipping out of bales—Loss must be shown to be due to misconduct of railway administration for holding company responsible.

A suit was brought for damages for loss caused to a consignment of goods. There were five bales of cloth consigned and all the five bales were delivered. The shortage was due to some goods slipping out of some of the bales. The consignment was delivered to the company under risk-note form A which is to be used when the consignments are already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit.

Held: that the company under the protection granted to it under risk-note A would not be responsible except upon proof that the loss was due to misconduct on the part of the railway administration or servants: *A. I. R.* 1929 *All.* 124, *Rel. on.*; *A. I. R.* 1923 *All.* 605 and *A.I.R.* 1924 *All.* 7, *Expl.* and *Dist.* [P 135 C 2]

U. S. Bajpai—for Appellants.

Harnandan Prasad—for Respondents.

Judgment. — The Court of Small Causes decreed the plaintiffs' suit for damages for loss caused to a consignment of goods sent from Delhi to Budaun. There were five bales of cloth consigned and it is admitted that all the five bales were delivered. The shortage was due to some goods slipping out of some of the bales. The consignment was delivered to the company under risk-note form A which is to be used when the consignments are already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. The learned Judge of the Court of Small Causes, on the authority of two rulings of this Court, held that it was first necessary for the railway company to prove loss before the plaintiffs can be called upon to prove that such loss arose from misconduct on the part of the railway administration or servants. The cases cited are *E. I. Ry. Co.* v. *Makhan Lal* (1) and *E. I. Ry. Co.* v. *Kishan Lal Tirkhamal*, *A. I. R.* 1924 *All.* 7. In both those cases it will be noticed that there was short delivery of bags or bales.

In one case the delivery was short by one cask of oil and in the other by two bags. In the second case the learned Judge (Daniels, J.) has explained the foundation for these two judgments. According to him the plaintiffs were suing in those cases for something which was outside the protection afforded by the note, namely breach of the contract to deliver. In neither case the numbers of bags and casks were specifically delivered and the question did not arise of something missing from a particular bale or a particular cask. The railway company had undertaken to deliver a certain number of casks or bags in good, bad or indifferent condition, and having failed to do so as regards the number they would principally be liable to explain the shortgage. The present is not such a case. The number of bales was correctly delivered. What was missing was something out of the bales. The bale after something was missing would be the condition of that bale at the time of delivery and the railway company, under the protection granted to it under risk-note A, would not be responsible for that condition except upon proof that the loss was due to misconduct on the part of the railway administration or servants. This view was taken by a learned Judge of this Court in *Bansi Ram* v. *B. N. W. Ry. Co.*, *A. I. R.* 1929 *All.* 124. The Judge of the trial Court has quoted this ruling but does not appear to have taken the trouble of reading the whole of it. The learned Judge there has specifically considered the question of an article or two slipping out of a bale or a bag by reason of imperfect or unsuitable packing. In the present case the law has not been correctly interpreted by the trial Court. The company was not liable to pay damages. The decree of the trial Court is set aside and the plaintiffs' suit dismissed with costs in both the Courts.

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(1) A. I. R. 1923 All. 605=74 I. C. 814=45 All. 575.

P.N./R.K. *Decree set aside.*

A. I. R. 1931 Allahabad 136 (1)

SULAIMAN AND YOUNG, JJ.

Chandi Prasad Misir—Defendant—Appellant.

v.

Balaji Misir and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 769 of 1929, Decided on 21st November 1930. against decision of 2nd Additional Dist. Judge, Gorakhpur, D/- 15th February 1929.

Hindu Law—Manager—Not only manager but also minor member impleaded in his individual capacity—No attempt made to get guardian appointed for minor—Decree obtained is not binding on him—Civil P. C., O. 32, R. 3.

The principle that the manager of a joint family represents the whole family does not apply to a case where a minor member is impleaded as such, but no attempt is made to get a guardian appointed for him. If the plaintiff does not choose to sue the manager alone, but also impleads the minor member in his individual capacity it is his duty to get proper guardian appointed for him. If this procedure has not been followed the decree obtained in the suit cannot bind the minor. [P 136 C 2]

Harnandan Prasad—for Appellant.

Shiva Prasad Sinha—for Respondents.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for a declaration that a pre-emption decree obtained by the respondents is not binding on the plaintiff because he was a minor at the time when the decree was passed. One of the pleas raised in defence was that in the previous suit the plaintiff's uncle Maharaj Pat who was the karta of the joint family had been impleaded and was in a position to take all the possible pleas which could have been raised by the plaintiff because their interests were identical. The Courts below have held that the decree is not binding on the minor although Maharaj Pat had been impleaded in the previous suit.

It is contended before us that when the manager of a joint Hindu family was sued, and it was not necessary to describe him as such, the decree was binding upon the whole family even though a minor member was not represented by a duly appointed guardian and that the plaintiff could not get the declaration without showing that he had been prejudiced by the omission to appoint a guardian for him. We think the principle underlying the case in which it has been held that the manager of a joint Hindu family represents the whole family does not apply to a case where a minor member is impleaded as such but no attempt is made to get a guardian appointed for him. If the plaintiff does not choose to sue the manager alone but also impleads the minor member in his individual capacity it is his duty to get a proper guardian appointed for him. If this procedure has not been followed the decree cannot bind him. We therefore think that the Court below was right. The appeal is dismissed with costs including in this Court fees on the higher scale.

P.N./R.K. *Appeal dismissed.*

✲ A. I. R. 1931 Allahabad 136 (2)

SULAIMAN AND YOUNG, JJ.

Shankar Lal Lachhmi Narain—Plaintiff—Appellant.

v.

Jainey Brothers — Defendants — Respondents.

First Appeal No. 41 of 1930, Decided on 17th November 1930, from order of Dist. Judge, Cawnpore, D/- 16th January 1930.

✲ **(a) Arbitration Act (1899), S. 4 (b)—Written agreement—Meaning explained.**

The terms of a written agreement may be collected from a series of documents, and a "written agreement" does not mean that each party has to sign a document containing the terms. The plain acceptance of a document containing all the terms is sufficient. All that is required by S. 4 (b) is that both parties accept a written document as containing the agreed terms: it might be in the form of a signed document by both parties containing all the terms, or a signed document by one party containing the terms and a plain acceptance either signed or orally accepted by the other party, or, in the third case, an unsigned document containing the terms of the submission to arbitration agreed to orally by both parties. A written contract does not mean a contract which is proved by documentary evidence, but one in which the terms are expressed in writing in the act of making it: 42 *All.* 525, *Doubted.* [P 138 C 1, 2]

(b) Arbitration—Delhi Piece goods Association rules—Power to appoint umpire.

Under the arbitration rules of the Delhi Piece goods Association, which governed the the contract for sale and purchase of piece goods between the parties, where there is a rupture between the arbitrators appointed by the parties, either party to the arbitration becomes then and there entitled to apply to the

Delhi Piece goods Association to appoint an umpire: *A. I. R.* 1922 *All.* 219, *Appr.* [P 139 C 1]

P. L. Banerji and *I. B. Banerji*—for Appellant.

K. N. Katju and *M. N. Kalu*—for Respondents.

Young, J.—This is a first appeal from an order of the learned District Judge of Cawnpore, by which he dismissed an application to set aside an arbitration award. The facts are these: Messrs. Jainey Brothers, the defendant-respondents, are importers of Manchester Piece goods carrying on business in Cawnpore. Messrs. Shankar Lal-Lachhmi Narain, the plaintiffs-appellants, are dealers in such piece goods. The importers belong to an association called the Delhi Piece goods Association. That association has drawn up a form of indent contract which dealers must sign before they can deal with the importer-members of the association.

On 9th December 1923 Messrs. Shankar Lal-Lachhmi Narain, being desirious of buying certain cotton trouserings from Messrs. Jainey Brothers, signed the indent contract of the association, specifying two cases of cotton trousering at 1s. 10d. That indent contract contains a submission to arbitration in accordance with the Arbitration Act. It also provides in Cl. 15 that

> "no claim nor dispute of any sort whatever can be recognized, if not made by us in writing within 60 days from due date of payment."

On 10th December 1923 Messrs. Jainey Brothers wrote a letter referring to the above indent contract and said:

> "We are glad to inform you that your above indent at the limit of 1s. 10d. per yard has been accepted by us. Copy of your indent is sent herewith as usual."

This letter did not in terms include any of the provisions as set out in the indent contract executed by Messrs. Shankar Lal-Lachhmi Narain, except as above quoted. Disputes arose between the parties, and eventually Messrs, Jainey Brothers issued a notice to Messrs. Shankar Lal-Lachhmi Narain that the matter should be referred to arbitration in accordance with Cl. 16 of the indent contract, and they appointed an arbitrator to represent them. Messrs. Shankar Lal-Lachhmi Narain also appointed an arbitrator, though under protest. The arbitration then proceeded. On no less than 13 occasions the proceedings had to be adjourned on account of the absence of Messrs. Shankar Lal-Lachhmi Narain and their arbitrator. The arbitration proceedings started on 20th December 1924 and the last meeting of the arbitrators took place on 2nd January 1927. On 2nd January 1927 Shankar Lal-Lachhmi Narain wanted a further adjournment, but Mr. Gur Prasad, the arbitrator for Messrs. Jainey brothers, being of opinion that Messrs. Shankar Lal-Lachhmi Narain were endeavouring unduly to delay the arbitration, refused to adjourn and Mr. Janki Nath, the purchasers' arbitrator, then left. There and then Mr. Gur Prasad proceeded to an award, and on the same day, under Cl 16 of the contract he applied to the Delhi Piece goods Association to appoint an umpire. The Delhi Piece goods Association appointed an umpire who eventually sat, and as neither Mr. Janki Nath nor Messrs. Shankar Lal-Lachhmi Narain appeared before him, proceeded to draw up his award ex parte. This award supported the award of Mr. Gur Prasad in favour of Messrs. Jainey Brothers.

Of the grounds of objection set out in the memorandum of appeal the appellants, Messrs. Shankar Lal-Lachhmi Narain have argued four only. They submit: (1) that the letter of 10th December 1923, from Messrs. Jainey Brothers, did not amount in law to an acceptance in writing of the submission to arbitration set out in the contract indent. They say that there was therefore no submission in writing within the meaning of S. 4 (b), Arbitration Act of 1899. (2) That there was no claim or dispute made by Messrs. Jainey Brothers within 60 days from the due date of payment in accordance with Cl. 15 of the contract. (3) That the appointment of the umpire was not valid, inasmuch as Messrs. Jainey Brothers' arbitrator did not give the arbitrator of Messrs. Shankar Lal-Lachhmi Narain an opportunity to agree as to the nomination of an umpire, and that therefore there had been no "disagreement as to the umpire" in accordance with Cl. 16 of the contract and R. 5 of the Survey and Arbitration Rules of the Delhi Piece goods Association, which were endorsed on the back of the contract. (4) That Shankar Lal who signed the indent contract was not authorized by Messrs. Shankar Lal-

Lachhmi Narain, a partnership, to sign the arbitration clause.

As regards the first point, we are clearly of opinion that the objection is misconceived. S. 4 (b), Arbitration Act, enacts that a "submission" means a written agreement to submit present or future agreements, to arbitration. There must therefore be an agreement in writing between the parties. It was urged by the appellants that a "written agreement" means that each party must sign the document which contains the submission to arbitration, and that as the letter of 10th December 1923 did not refer in specific terms to the clause relating to arbitration, in law this could not amount to an agreement in writing. It is clear on the authorities both in England and in India that the terms of a written agreement may be collected from a series of documents, and a "written agreement" does not mean that each party has to sign a document containing the terms. The plain acceptance of a document containing all the terms is sufficient. We are satisfied that the letter of 10th December 1923 alludes to the indent contract and accepts it in its entirety. Further, we are of opinion that a written agreement does not in the Arbitration Act mean that the signatures of the parties is a necessary ingredient. We are aware of the case of *Sukhamal Bansidhar* v. *Babu Lal Kedia & Co.* (1), which decided that S. 4 (b) required a submission signed by both parties or their agents; but we think that, in so far as that case decided that signatures were necessary, we doubt if it was correctly decided. The Act merely specifies a written agreement, and we see no reason to read into the plain words of the Act that the execution of a submission to arbitration is necessary. All that is required is that both parties accept a written document as containing the agreed terms: it might be in the form of a signed document by both parties containing all the terms, or a signed document by one party containing the terms and a plain acceptance either signed or orally accepted by the other party or in the third case, an unsigned document containing the terms of the submission to arbitration agreed to orally by both parties. A written contract does not mean a contract which is proved by documentary evidence, but one in which the terms are expressed in writing in the act of making it. The obvious example of a perfectly valid written contract unsigned by either party is a steamship or railway company's ticket containing the printed terms and conditions of the contract. This ticket is not merely evidence of the contract, but is an operative contractual instrument and subject to rules of law which govern written as opposed to oral contracts. We think some confusion has been imported into the Indian decisions on this point through the analogy of English law in cases where submissions to arbitration may in certain instances be contained in contracts which are subject to the operation of S. 4 of the Statute of Frauds or S. 4, Sale of Goods Act, both of which statutes enact that in order to make the contracts enforceable they must be signed by the party to be charged or their duly authorized agent. Neither of these statutes apply to India, and we see no reason to read into S. 4 (b), Arbitration Act, anything more than what is there expressed. Even in England the doctrine that the signatures of the parties or their agents are necessary to a submission to arbitration has been doubted: see *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Association* (2). There is certainly a conflict of authority as to whether signatures are necessary in cases which do not fall within statutes which expressly require such signatures.

With regard to the second objection that no claim was made by Messrs. Jainey Brothers within 60 days, we are satisfied that in f ct a claim was made or a dispute arose between the parties within 60 days from the due date of payment. Messrs. Jainey Brothers' letter of 19th September 1924 to Messrs. Shankar Lal-Lachhmi Narain, in our views, established this. In any event, the word "us" in Cl. 15 of the contract refers clearly only to Messrs. Shankar Lal-Lachhmi Narain and not to Jainey Brothers. Nowhere else in the contract can it be said that "us" refers to both the parties. When Messrs. Jainey Brothers are indicated the proper word "you" is used.

As regards the third objection, the wording of Cl. 16 is as follows:

"When the arbitrators or the surveyors disagree and do not appoint an umpire the Delhi

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(1) [1920] 42 All. 525=59 I. C. 75.

(2) [1915] 1 Ch. 881=84 L.J. Ch. 688=59 S.J. 478=113 L. T. 159.

Piecegoods Association, if applied to by either party to the dispute, shall appoint an umpire."

It is clear in this case that the arbitrators had disagreed and had not appointed an umpire. If the matter rested there, there would be no difficulty in repelling the objection of the appellants; but the contract undoubtedly includes the Survey and Arbitration Rules of the Dehli Piecegoods Association endorsed upon the back of the contract and referred to in Cl. 16. Rule 5 is as follows:

"Should the two surveyors chosen by buyers and sellers be unable to agree as to the nomination of an umpire, the buyers or sellers may apply to the committee of the association within 15 days from the final date of survey to nominate an umpire."

It is contended that the sellers were in this case never given an opportunity to agree to the nomination of an umpire and therefore it could not be said that the arbitrators were unable to agree, and that therefore the appointment of the umpire was invalid and the award therefore bad. It is to be noted that these rules nowhere mention arbitrators. They refer solely to surveyors whose duties are different from those of arbitrators. But the rules are headed "Survey and Arbitration Rules of the Delhi Piecegoods Association," and we are inclined to think therefore that, although the rules are loosely worded, they are meant to apply to arbitration proceedings. A similar point was taken in the case of *Shushil Chandra Das* v. *Sukhamal Bansidhar* (3). The facts in that case are identical with the facts of the one under consideration. The High Court in that case came to the conclusion that

"the arbitrators had differed in such conclusive fashion as to put beyond doubt that they were not going to deliver a joint award, and the refusal of Mr. Roberts to adjourn the arbitration proceedings were equivalent, under the circumstances, to a refusal to meet Mr. Khosla again: and the arbitrators had separated without nominating an umpire."

We see no reason to disagree with the decision in that case. There was a final rupture between the arbitrators on 2nd January 1927 and we hold that Messrs. Jainey Brothers were then and there entitled to apply to the Delhi Piecegoods Association to appoint an umpire, and that this objection to his award is not sound.

With regard to the objection that Shankar Lal was not authorized to sign the arbitration clause, the learned District Judge in his judgment sets out convincing evidence that Shankar Lal must have been authorized to enter into a submission of arbitration on behalf of his firm, and we see no reason to differ from his finding that he was so authorized and that it was the usual practice of the appellant firm to enter into similar agreements containing such a submission. The appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 139

MUKERJI AND BENNET, JJ.

Kesho Ram—Defendant—Appellant.

v.

Chunni Singh and *another*—Plaintiff—Respondents.

Letters Patent Appeal No. 195 of 1929, Decided on 4th June 1930, from judgment of Dalal, J., D/- 16th July 1929.

Civil P. C., O. 21, R. 63 — Purchaser in execution of his own decree subject to mortgage lien declared by Court without acquiescing in order can question validity of mortgage within one year of the order.

A person who purchases property in execution of his own decree, apparently subject to a mortgage lien as declared by the Court without however acquiescing in the order made in favour of the mortgagee is entitled to question the validity and bona fides of the mortgage within a year of the order in the claim case: 2 *C. L. J.* 599, *Foll.*; 28 *All.* 418; *A. I. R.* 1921 *All.* 79 and 47 *Cal.* 446, *Ref.* [P 140 C 1]

Shabd Saran—for Appellant.

Panna Lal—for Respondents.

Bennet, J.—This is a Letters Patent appeal by the defendant Kesho Ram against a judgment of a learned single Judge of this Court upholding the decree of the lower appellate Court awarding possession of certain property to the plaintiff on certain conditions. The plaintiff had a simple money decree for Rs. 1,100 against Behari Singh dated 17th September 1925, and he applied on the same date for attachment of the property in execution. On 3rd October 1925 his judgment-debtor Behari Singh executed a usufructuary mortgage of this property to defendant 1 Kesho Ram, the appellant before us. This mortgage purported to be for Rs. 1,000. On 19th December 1925 Kesho Ram made an objection to the execution of the decree of the plaintiff, claiming that the property had been mortgaged to him. On 16th January 1926, the objection was allowed in a proceeding from which the plaintiff was absent, and it was held by the execution Court that the property should be sold subject to the mortgage in favour of Kesho Ram. The sale took place four days later on 20th January 1926, and it has been taken by the lower appellate Court that that sale was made subject to the rights of Kesho Ram as mortgagee. The plaintiff decree-holder purchased the property himself subject to this mortgage of Kesho Ram. On 26th October 1926, the plaintiff brought the present suit contesting the validity of the mortgage by his judgment-debtor in favour of Kesho Ram.

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(3) A. I. R. 1922 All. 219=67 I. C. 487=44 All. 472.

It has been argued by counsel for the appellant Kesho Ram that the suit of the plaintiff would not come under O. 21, R. 63, and that the plaintiff is precluded from bringing the present suit in the civil Court. The ground on which the plaintiff is precluded is not particularly clear, because there is no principle of the law of estoppel by which the plaintiff could be estopped. The purchase at the auction-sale by the plaintiff did not in any way prejudice the rights of the appellant as mortgagee. The case for the appellant has however been argued on the strength of obiter dicta in certain rulings of this Court. We may note at once that there is a definite ruling on the point in favour of the plaintiff *Shah Ziyauddin Abdul Hossein* v. *Kailash Chander* (1).

In that case it was laid down that a person who purchases property in execution of his own decree apparently subject to a mortgage lien as declared by the Court under S. 282, Civil P. C., without however acquiescing in the order made under S. 282, in favour of the mortgagee, is entitled to question the validity and bona fides of the mortgage within a year of the order in the claim case. It is true that in that case it was pleaded by way of defence, whereas in the present case a suit has been brought by the plaintiff, but we consider that there is no distinction in the circumstances. Now the cases relied on by the learned counsel for the appellant are firstly *Inayat Singh* v. *Izzatunnissa Begum* (2). That was a Full Bench case in which it was held by a majority of two Judges to one that where there was a notification in the sale proclamation that there were two prior mortgages on the property sold, the decree-holder purchased at the auction-purchase only the equity of redemption of the mortgaged property and not the whole of the proprietary rights therein. This ruling however did not deal with the case of a decree-holder who claimed to bring a suit to contest the order in the execution department.

The next case is *Shib Kumar Singh* v. *Sheo Parsad Singh* (3). In that case also there was a notification in the sale proclamation of the existence of a mortgage. The mortgagee subsequently brought a suit for sale, and it was held that the auction-purchaser was not debarred from proving that the mortgage was fictitious and without consideration. The Court proceeded to draw distinction between the notification of a mortgage in a sale proclamation and an order by an execution Court under S. 282, Civil P. C. of 1882, that the mortgage deed in fact existed. The Court held that in the case of an order under S. 282 the Court, after being satisfied of the existence of the mortgage, sells only the judgment-debtor's right of redemption, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage. Again the ruling did not consider the case of a a decree-holder auction-purchaser who desired to bring a suit contesting the validity of the order in the execution department. We may note that the language quoted from p. 420 of this ruling, *Shib Kumar Singh* v. *Sheo Prasad Singh* (3), is not in accordance with what is laid down in O. 21, R. 62, and the previous S. 282, Civil P. C. of 1882, as the rule states that the Court may order that the attachment should continue subject to the mortgage. This shows that the Court continues the attachment of the property subject to the mortgage, and what is sold by subsequent sale is the property itself subject to the mortgage and not merely the right of redemption.

In *Agha Sultan Khan* v. *Mohabbat Khan* (4) there was again a case of a notification in a sale proclamation and it was held that that would not preclude the purchaser from subsequently questioning the validity of the incumbrance, and it was further held that the provisions in the Civil Procedure Code of 1908 did not differ from the previous law on the subject in the former Code. There was no reference in this ruling to the possibility of a case contemplated by O. 21, R. 63, so the ruling is not an authority on that point.

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(1) [1905] 2 C.L.J. 599.

(2) [1904] 27 All. 97=(1904) A. W. N. 174.

(3) [1906] 28 All. 418=(1906) A. W. N. 68.

(4) A. I. R. 1921 All. 79=63 I. C. 395=43 All. 489.

Reference was further made to *Kalidas Chaudhri* v. *Parsanna Kumar Das* (5). In that case, as far as we are able to ascertain, the property was sold on 22nd August 1914, and the suit which was brought to contest, among other things, the validity of a mortgage, is a suit referred to as original decree No. 93 of 1917. Presumably therefore the suit was brought at a period of more than one year after the auction sale and the order on the application which were both on the same date, and accordingly the question could not have been raised in that case as to the right of an unsuccessful party to bring a suit under O. 21, R. 63 contesting the validity of an order in execution.

The rulings therefore produced before us can be summarized as follows: One ruling of the Calcutta High Court reported in *Shah Ziauddin Abdul Hossein* v. *Kailash Chunder* (1) deals with the precise facts before us, and that ruling is against the appellant. The other rulings merely contain obiter dicta on which the appellant seeks to rely, but in these rulings the rights of an unsuccessful party to a proceeding in execution to bring a suit contemplated by O. 21, R. 63, has not been considered. The weight of authority therefore is in favour of the plaintiff-respondent. Accordingly we consider that the judgment of the learned single Judge of this Court is correct, and we dismiss this Letters Patent appeal with costs.

G.P./R.K. *Appeal dismissed.*

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(5) [1920] 47 Cal. 446=55 I. C. 189.

A. I. R. 1931 Allahabad 141

KENDALL, J.

Emperor—Applicant.

v.

Salig Ram—Accused—Opposite Party.

Criminal Ref. No. 255 of 1930, Decided on 28th May 1930.

Criminal P. C., S 195 (c)—Village Panchayat acting in civil cases is subordinate to District Judge—Report of offence by panchayat to Collector and complaint by him is without jurisdiction—Criminal P. C., S. 476.

A village Panchayat acting in a civil case having come to the conclusion that a person made a false statement and used a forged document in a case before it sent a report to the Collector for his orders and the Collector apparently acting as a District Magistrate made a complaint.

Held: that the principal civil Court of the district was the District Judge, and the complaint of the Collector or the District Magistrate was without jurisdiction. [P 142 C 1]

Judgment.—The circumstances from which this reference arises have been stated very fully by the learned District Judge in his order. A village panchayat having come to the conclusion that Salig Ram had made a false statement and used a forged document in a case before it, sent a report to the Collector for his orders and the Collector apparently acting as a District Magistrate made a complaint in the Court of the Sub-divisional Magistrate under Ss. 467 and 471, I. P. C. with the result that Salig Ram was committed for trial to the Court of Session. As the Judge has pointed out, the panchayat is not subordinate to the Collector if it is a civil Court. As a civil Court it could have made complaint itself which it did not do, for under Cl. (c) S. 195, Criminal P. C., the Court to which it is subordinate could have made such complaint. That Court as the Judge points out, is the principal civil Court of the district namely the District Judge, and the complaint of the Collector or the District Magistrate was therefore, without jurisdiction.

The learned Assistant Government Advocate who has considered the matter with great care has argued that the Panchayat is not a civil Court as contemplated in Cl. (3), S. 195, Criminal P. C., but as a Court in the wider sense as referred to in Cls. (b) and (c), sub-S. (1), S. 195, that the distinction is a real one as shown in the case of *Bilas Singh* v. *Emperor* (1), and that a panchayat is a Court has been held in a recent decision namely *Makhna Das* v. *Secy. of State* (2). In the earlier decision referred to above it has been found that there are other tribunals which may properly be called Courts outside civil, revenue and criminal Courts. It may be argued therefore that a panchayat is a Court in this wider sense and that as a panchayat is undoubtedly subordinate to the Collector in many respects, as shown in Ss. 70 and 71, United Provinces Village Panchayat Act of 1920, it may reasonably be held that the Collector is the

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(1) A. I. R. 1925 All. 737=47 All. 934.

(2) A. I. R. 1927 All. 752=100 I. C. 598.

Court to which this Court, the panchayat is subordinate within the meaning of Cl. (c), sub-S. (1), S. 195, Criminal P. C.

The argument is ingenious but it may be doubted whether the Collector for the purposes of Ss. 70 and 71 of the Act, is "Court" rather than an administrative officer. In any case when once it is admitted that a panchayat is a Court there is no reason to regard it as other than a civil Court when it is exercising jurisdiction over civil matters and as a criminal Court when it deals with offences against the criminal law. It may not always be a civil Court, but in the matter from which the present reference arises it was undoubtedly acting as a civil Court and in such cases in my opinion the District Judge is perfectly correct in saying that it must be deemed to be subordinate to the principal Court having original civil jurisdiction in the district namely the District Judge himself. This is clearly provided in sub-S. (3), S 195, Criminal P. C. The result is that I accept the reference and direct that the commitment be quashed and the surety or sureties of the accused be discharged.

M.N./R.K. *Commitment quashed.*

✲ A. I. R. 1931 Allahabad 142 (1)

NIAMATULLAH, J.

Ram Sakal Singh and *another*—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. 774 of 1930, Decided on 25th November 1930, made by Sess. Judge, Benares.

✲ **Penal Code, S. 378—Judgment-debtor's nephews cutting and removing crops attached only by beat of drum—Possession does not pass to Court—Removal with consent of judgment-debtor—Theft is not committed—Civil P. C., O. 21, R. 44.**

Where attachment of moveable crops is made merely by beat of drum and the procedure prescribed by O. 21, R. 44, Civil P. C., is not followed, the produce cannot be deemed to have passed from the possession of the judgment-debtor into the possession of the Court. If, therefore the judgment-debtor's nephews cut and remove on behalf of and with the consent of the judgment-debtor such crops, they cannot be held guilty of theft. [P 142 C 2]

Order.—This is a reference made by the learned Sessions Judge of Benares under S. 438, Criminal P. C., recommending that the conviction of the applicants of an offence of theft and sentences of fine passed on them by a Magistrate of the First Class in that district be set aside. The applicants for revision, Lalta Singh and Ram Sakal Singh, are nephews of one Jagardeo whose growing crop was attached in execution of a civil Court decree at the instance of Mahabir, the decree-holder who is also the landholder and cut and removed the crops said to have been so attached.

The attachment was made by beat of drum and it is not disputed that the procedure prescribed by O. 21, R. 44, Criminal P. C., was not followed. That rule provides that in case of growing crops attachment shall be made

> "by affixing a copy of the warrant of attachment on the land on which such crop has grown"

and another copy on the outer door or some conspicuous part of the house in which the judgment-debtor ordinarily resides;

> "and the produce shall thereupon be deemed to have passed into the possession of the Court."

The crops will otherwise remain in the possession of the judgment-debtor. Unlike cases of other kinds of moveable property, in which attachment is made by actual seizure, custodia legis in the case of growing crops is symbolical and is effected only by affixation of warrants of attachment provided for by the rule without which the crops do not pass into the possession of the Court.

It is of the essence of theft as defined in S. 378, I. P. C., that the accused should move the property from the possession of another. If he does so when it has not passed out of his own possession, he cannot be held to be guilty of theft.

In this case the accused cut and removed the crops on behalf of and with the consent of his uncle Jagardeo and cannot be held guilty of theft.

The reference is accepted and the conviction of the applicants is set aside. The fine if paid shall be refunded.

K.N./R.K. *Reference accepted.*

A. I. R. 1931 Allahabad 142 (2)

BANERJI AND KING, JJ.

Kashi Nath and *another* — Opposite Parties — Appellants.

v.

Official Receiver—Applicant — Respondent.

First Appeal No. 64 of 1929, Decided on 10th July 1930, from order of Dist. Judge, Benares, D/- 10th Dec. 1928.

Provincial Insolvency Act (5 of 1920), S. 54 (1)—Onus of proving intention of preference lies on Official Receiver.

The onus of proving that the transfer by the debtor was made with the intention of preferring one creditor to others lies on Official Receiver : 29 *I. C.* 128 and 43 *Cal.* 640, *Ref.* [P 144 C 2]

K. Verma —for Appellants.

Gadadhar Prasad —for Respondent.

Banerji, J.—This is an appeal by one Kashi Nath and another against an order of the District Judge of Benares exercising insolvency jurisdiction.

The order passed by the learned District Judge is as follows :

"It is ordered that the mortgage deed dated 28th November 1927, executed by the insolvent be declared to be void and fraudulent and be cancelled. The said mortgage deed be cancelled except for Rs. 933."

Then follows an order as to costs.

The Official Receiver of Benares presented an application on 18th June 1928, purporting to be under S. 54, Prov. Insol. Act. The application in para. 4 stated that as the insolvent had executed a mortgage deed within three months of the date of adjudication it was void as against the receiver.

Paragraph 5 of the application stated that the transfer was made in preference to some of the creditors of the insolvent and therefore the necessity of the application for setting aside the simple mortgage deed dated 28th November 1927, and declaring it as void.

The facts are that one Jittu Sahu executed a simple mortgage for Rs. 2,700 in favour of the appellants before us hypothecating a house, and the consideration for the mortgage was paid as follows :

Rupees 50 were paid in cash to Jittu Sahu ; Rs. 983, which was due to the mortgagee and was the subject of suit No. 2477 of 1927, in the Court of Small Causes at Benares ; Rs. 734 left with the mortgagee for payment to two creditors of Jittu, namely, Munni Lal Rupees 425-4-0 and Jai Narain and Sheo Narain Rs. 308-12-0.

There was a previous mortgage in favour of Bala Prasad of 13th March 1923, and a sum of Rs. 933 was paid out of the sum of Rs. 2,700.

Jittu Sahu finding, he was unable to pay the debts due by him, on 24th February 1928 presented an application to be declared an insolvent, and on 4th May 1928 he was adjudged an insolvent by an order of that date and the Official Receiver was directed to take charge of his property.

We have set out above the application out of which this appeal has arisen.

The defence of the appellants was that S. 54, Insolvency Act, did not apply to the suit and that only a portion of the mortgage money of the mortgage deed sought to be cancelled was paid to the defendants. The rest of the mortgage money was left with the mortgagee for payment to the creditors and the creditors had been duly paid. It was also stated that at the time of the execution of the mortgage in favour of the defendants the insolvent had stated that he was paying off all the debts due by him as mentioned in the mortgage deed and that the defendants, namely, the appellants, had no knowledge of any other debts and they had acted in good faith in getting the mortgage executed and for full consideration.

Issues were framed by the learned District Judge and his finding were that the consideration entered in the mortgage deed was duly paid and that the mortgage deed was executed for valuable consideration.

The learned Judge says as follows :

"For a transfer by the insolvent is to be set aside merely on the ground that he had made the transfer with the view of giving preference to one creditor over the other creditors and it is immaterial whether the transferee acted in good faith or not."

In the final part of his order he finds that the mortgage deed was executed by the insolvent within three months of the presentation of the insolvency petition with the object of giving preference to certain of his creditors over others and he therefore declared the mortgage deed to be fraudulent and void as against the Official Receiver. The learned Judge then goes on to say :

"The portion of the mortgage money (paid to the prior mortgagee) was paid by the opposite party to a prior mortgagee who was obviously a secured creditor, and is covered by Cl. (2), S. 4."

and he held that the opposite party, namely the appellants before us, would be deemed to be secured creditors as regards this amount. He then goes on to say :

"With this exception the mortgage deed dated 28th November 1927 is hereby annulled."

The first question that we have to decide is whether the order passed by the learned District Judge annulling a document as void, and holding it to be a good document in part, is a good order under S. 54, Insolvency Act. We are of opinion that Cl. (2), S. 54, Insolvency Act, has no application to the facts of this case.

It is admitted by the learned counsel for the respondent, the Official Receiver, that this form of decree is incorrect, and we are asked to pass a decree declaring the whole of the document to be null and void as a fraudulent transfer by the insolvent in favour of the appellants.

It appears to us that the application filed by the Official Receiver is an inartistic document and does not show what were the grounds on which the Official Receiver asked for the document of 28th November 1927 to be declared void as against the receiver. S. 54 (1) lays down four conditions which a receiver has to prove before an order should be passed by the Court annulling a document. They are :

(1) That the debtor must, at the date of the transaction, be unable to pay from his own money his debts as they fall due.

(2) The transaction must be in favour of a creditor.

(3) That the debtor must have acted with the view of giving such creditor a preference over his other creditors ;

(4) The debtor must be adjudged an insolvent on the insolvency petition presented within three months after the date of the transaction sought to be impeached

In this case the second and fourth conditions are proved and admitted. There is no proof in this case that the debtor at the date of the transaction was unable to pay from his own money his debts as they fell due. In the view we are taking of the transaction which we will state presently we do not think it is necessary to send the case back to the Court below for a finding on the point. It seems that the point escaped the attention of the Court, the Official Receiver and the counsel appearing for the appellants in the Court below. The law on the subject is perfectly clear and there is no ambiguity in S. 54, Insolvency Act, about what an Official Receiver has got to prove to get a document annulled by the Court. A number of cases were cited by Mr. Kamla Kant Verma, but in our opinion it is unnecessary to refer to all the cases cited by him. The law has been clearly set out in the case of *Bhagwan Das and Co.* v. *Chuttan Lal* (1) at p. 431 (of 43 *All.*). It appears to us that there has been no doubt as to what a receiver has to prove to get a document annulled either in England or in this country. The law in England under the Bankruptcy Act is the same as the law in India and the law has been unaltered from the year 1869 down to the present day. We therefore think that no useful purpose would be served by repeating what has been repeatedly stated to be the points which a receiver has to prove under S. 54. If any reference was necessary we would refer to the case of *Nripendra Nath Sahu* v. *Ashutosh Ghosh* (2), and *Nripendra Nath Sahu* v. *Ashutosh Ghosh* (3).

The real point that has to be decided in this case is whether the transfer made to the appellants by the insolvent was "with the view of giving" the appellants a preference over the other creditors.

The onus of proving that the transfer was with the view, namely with the intention of preferring one creditor to others lies on the Official Receiver. In this case, we may mention that the Official Receiver led no reliable evidence at all. He called one witness, Anrudh Tewari, servant of one Narotam Das, who has been, in our opinion, rightly disbelieved by the learned District Judge.

It is urged by the learned counsel for the appellants that the transfer by the insolvent although it had the effect of giving a preference to the appellants was not made with the intention of giving preference to his clients. The evidence which was relied on by the learned counsel for the appellants was that the document itself and the statement therein show that pressure was being brought by some of the creditors for payment to them, and hence the mortgage. The learned counsel for the respondent has argued that the document in question could not be looked at on the ground that it was not admissible in evidence under the Evidence Act. We are of opinion that under S. 21, Evidence Act, this document was admissible in evidence. The Court has to decide what was the intention on the date of the transfer and in our opinion the document by which the purpose of seeing what was the prima facie intention of the insolvent. It may be that facts may be proved to show that the statements in that document were incorrect or false, but in this case there is no evidence to suggest that the statements of the insolvent in the document in question were false or incorrect. Moreover, it is proved that although the initiative about the mortgage deed came from the insolvent there was a suit pending, namely Suit No. 2477 of 1927, by which the appellants had claimed Rs. 983 as against the insolvent. We are unable to hold that there was no pressure on the insolvent when he entered into the transaction that is in question and that although the document had the effect of giving a preference to the appellants that was not the object or intention of the insolvent.

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(1) A. I. R. 1921 All. 41 = 62 I. C. 732 = 43 All. 427.

(2) [1915] 29 I. C. 128.

(3) [1916] 43 Cal. 640=33 I. C. 548.

The result is that we allow the appeal, set aside the order and decree of the District Judge and dismiss the application of the Official Receiver dated 18th June 1928. The appellants will have their costs of both Courts from the estate of the insolvent.

R.M./R.K. *Appeal allowed.*

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DALAL AND BENNET, JJ.

Kashi Ram and *others* — Decree-holders — Appellants.

v.

Mt. Hasmat Banoo — Judgment-debtor — Respondent.

Execution Second Appeal No. 862 of 1929 Decided on 9th December 1930, from decision of Dist. Judge, Bareilly, D/- 23rd March 1929.

Civil P. C. (1908), S. 47—Application for setting aside sale on ground of omission to notify under O. 21, Rr. 22 and 66, though falling under S. 47 is governed by Limitation Act (1908), Art. 166.

Though an application by a judgment-debtor for setting aside sale on the ground that he was not notified either under O. 21, R. 22 of the application for execution nor under O. 21, R 66 of the date of the preparation of the sale proclamation, falls under S. 47, still it is governed by Art. 166: 56 *Cal.* 975; *A. I. R.* 1925 *Cal.* 351; *A. I. R* 1924 *Mad.* 137 and *A. I. R.* 1927 *Mad.* 394, *Rel. on.* *A.I.R.* 1924 *Mad.* 431. (*F. B.*) and *A I. R.* 1926 *Cal.* 60, *Expl.* and *Dist.* [P 145 C 2, P 146 C 1]

G. S. Pathak—for Appellants.

Dalal, J.—This is an appeal in the execution department from a decree of the District Judge of Bareilly passed in appeal. Mt. Hashmat Banoo is the judgment-debtor, and the decree passed against her was for the recovery of money out of the assets of her deceased husband Anwar Husain. For the purposes of this appeal we need only mention the application for execution of 26th June 1927. In pursuance of this application certain properties were put to auction and were purchased by the decree-holder himself on 20th October 1927. The decree was thereby satisfied on 15th March 1928. Mt. Hashmat Banoo applied to the executing Court for the setting aside of the sale on the ground that she had no notice thereof. Presumbly what was meant was that she was not notified either under O. 21, R. 22 of the application for execution nor under O. 21, R. 66 of the date of the preparation of the sale proclamation. Possibly the two subordinate Courts have taken an indulgent view of the facts of case in holding that service on her was not sufficient. She is a pardanashin lady and in the nature of things service cannot be made on her personally. She was reported to be inside a house, and the summons was affixed on the gate. However it may be, the finding of fact is final that there was no proper service of notice.

The trial Court was not very definite, so we looked into the matter, and in both cases the service was made in the same manner as would be possible for service on a pardanashin lady. The first Court set aside the sale, but made a provision that the decree-holder may apply for execution again by sale of the property provided he proved that the transfers in favour of the lady were collusive and did not in reality pass the property to the lady. On appeal the learned District Judge kept the sale in suspense and did not set it aside. He directed the decree-holder to apply for an inquiry as to whom the property belonged. He explained that if the finding was that the property belonged to the lady the sale would automatically be rendered void, and if it was proved that the property did not belong to the lady the sale need not be interfered with. Such an order would lead to considerable confusion. The sale remaining in suspense the decree-holder may take no action whatever and enjoy the benefit of sale. Such an order cannot be upheld. The question before us is whether the sale should be set aside or not.

The respondent was not represented here. But Mr. Pathak, cn behalf of the appellants has put fairly before us the case law on the subject. The matter for inquiry is whether the application of Mt. Hashmat Banoo was or was not barred by the period of limitation prescribed by Art. 166, Lim. Act. The subordinate Courts have not noticed the addition to Col. 1 of that article made by Act No. 1 of 1927 which came into operation on 1st January 1928 prior to the appliction of Mt. Hashmat Banoo to have the sale set aside. Col. 1 of the article now reads as below:

> "Under the same Code (Civil Procedure Code) to set aside a sale in execution of a decree including any such application by a judgment-debtor."

the period prescribed is 30 days from the date of the sale.

The present application was made long after that period. The argument of the trial Court was that the application was one under S. 47, Civil P. C. and the period of limitation applying thereto was one of three years. There was a certain amount of conflict of opinion between the Calcutta and Madras High Courts as to whether Art. 166, Lim. Act, applied to an application by a judgment-debtor under S. 47 or not. The addition to this article has now set the controversy at rest, so it appears that what the legislature desired by the enactment of this article was an application thereof to the provisions of S. 47 also. In *Satish Chandra* v. *Nishi Chandra Dutta* (1) it was held by a Bench of two Judges that an application under S. 47, Civil P. C. for setting aside the sale of a property on the ground that it did not belong to the original judgment-debtor is governed by Art. 166, Lim. Act and not Art. 181. The view has been consistently adopted by that Court and was reaffirmed in *Haripada Haldar* v. *Baroda Prasad Roy* (2). A Full Bench of the Madras High Court would appear, without close examination to have held a different view in *Rajagopala Ayyar* v. *Ramanuja Charirar* (3). In that case however the sale in execution was held to be a nullity and for that reason the Judges were of opinion that the period of limitation for an application was one of three years. Only a few months previously a Bench of two Judges had held in *Paramasiva Thevar* v. *Pulukaruppa Thevar* (4), that an application by a judgment-debtor to set aside a sale held in execution on the ground that the proclamation of sale was not published in the village in which the property was situated fell under Art. 166 and not under Art. 181, Lim. Act. The same view was taken by another Bench of two Judges of the Madras High Court subsequently in *Muthu Kumaraswami Pillai* v. *Muthuswami Thevan* (5). In that case the properties of some one other than the judgment-debtor were sold in execution of a decree more than 30 days after the sale. The decree-holder purchaser found out his mistake and applied for further execution by setting aside the sale. It was held that Art. 166, Lim. Act, applied and that the sale could not be set aside when the application was made more than 30 days after the sale. Mr. Pathak has also drawn our attention to the Calcutta case of *Manmatha Nath Ghose* v. *Lachmi Devi* (6). In that case however specific fraud was proved in so far that the decree-holder by certain means prevented notice of the sale reaching a pardanashin lady. In the present case there is no allegation that service was not made on Mt. Hashmat Banoo by reason of any action of the decree-holder. We are of opinion that the limitation applicable to this application was one of 30 days. The application of Mt. Hashmat Banoo was therefore barred by time. We set aside the decrees of the subordinate Courts and dismiss the application for the setting aside of the sale. Parties will bear their own costs throughout.

P.N./R.K. *Decree set aside.*

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(1) [1919] 46 Cal. 975=54 I. C. 431.

(2) A. I. R. 1925 Cal. 351=82 I. C. 322=51 Cal. 1014.

(3) A. I. R. 1924 Mad. 431=80 I. C. 92=47 Mad. 288 (F. B).

(4) A. I. R. 1924 Mad. 137=77 I. C. 631=47 Mad. 525.

(5) A. I. R. 1927 Mad. 394=100 I. C. 522=50 Mad. 639.

(6) A. I. R. 1928 Cal. 60=105 I. C. 65=55 Cal. 96.

A. I. R. 1931 Allahabad 147

SEN, J.

on difference between

MUKERJI AND BENNET, JJ.

Abdul Qayum Khan—Appellant.

v.

City Board, Mussoorie—Respondent.

Misc. Ref. No. 381 of 1930, Decided on 19th December 1930, made by Supdt., Dehra Dun, on 22nd May 1930.

(a) U. P. Municipalities Act (1916), S. 298—Scheme of Act with regard to granting of licenses for building explained.

The whole scheme of the Act discloses the fact that the power of the Municipal Board to grant or withhold sanction to a building is confined to the questions of sanitation and to some extent uniformity of buildings where they abut a road.—(*Bennet, J.*, contra.) [P 148 C 2]

(b) U.P. Municipalities Act (1916), Ss. 184 and 321—Municipal Board is not authorized to encroach on private rights except for public benefit—Decision of Board cannot be final when arrived at without hearing evidence—Board should not disallow erection of building because it would look hideous.

The Municipal Board is not given any authority to encroach on the rights of the inhabitants except for the purpose of the benefit to the public in general. The decisions of the Board or the appellate authority (Collector or the Commissioner as the case may be) is no doubt final under S. 321; it is impossible to believe that a decision on a question of private rights could have been given finality where the decision is arrived at without hearing evidence or where the decision is arrived at by a body of men not especially trained in law respecting private rights. It is not open either to the Board or to the appellate authority to disallow a proposal to erect a building on the ground that it is hideous in its appearance and would therefore injuriously affect the value of a neighbour's property. In such matters the parties should be left to seek their own remedy in civil Court.—*Bennet, J.* (contra.) [P 148 C 2, P 149 C 1, 2]

(c) U. P. Municipalities Act (1916), Ss. 319 and 298—High Court has no power to question District Magistrate's decision.

It is not open to the High Court to question the District Magistrate's decision that bye-law No. 23 framed by the Municipal Board under S. 298 of the Act has been properly disregarded or departed from. [P 149 C 2]

(d) U. P. Municipalities Act (1916), S. 318—For relaxing bye-law 23 of the Municipal Board, District Magistrate in appeal can take into consideration the three heads, viz. sanitation, prevention of disease and overcrowding of houses.

Bennet, J.—For relaxing bye-law 23 framed by the Municipal Board anything which would come under the three heads, viz., sanitation, prevention of disease and overcrowding of houses, is a matter which should be considered by the District Magistrate in an appeal. But it is open to the appellant to show that the relaxation of the bye-law would adversely affect his premises in regard to any of the three heads and if he succeeds in showing this, then it will be for the District Magistrate to consider whether under those circumstances the bye-law should be relaxed or not. The very basis of the bye-law involves a question of private rights. [P 150 C 1, 2]

(e) U. P. Municipalities Act (1916), Ss. 318 and 298—Bye-law, No. 23 framed by Hill Municipality — Terms "overcrowding" and "sanitation" in the bye-law, explained.

Bennet, J.—The bye-law being framed by a Hill Municipality, the term "overcrowding" as used in it, cannot mean overcrowding in the sense in which it is used in densely populated cities. The term "overcrowding" means that houses should be at such distance from each other that one house is not injuriously affected by another house. "Sanitation" is also a wide term. It is a mistake to consider sanitation as equivalent to a drainage system. Sanitation means the science of health, and hence the health of the inhabitants is a question that may be considered under the terms "sanitation." There is no limitation that these bye-laws to be framed by a municipality under S. 298 must only deal with buildings which abut on a road. The bye-laws on other matters such as sanitation can as well be framed. If there are such bye-laws, they regulate the discretion of the Board and the District Magistrate on questions as to how and when the rules under the bye-laws should be relaxed; otherwise their discretion is not limited. [P 150 C 2, P 151 C 1]

(f) U. P. Municipalities Act (1916), S. 321—Decision of Municipal Board though, not consisting of experts, is conclusive.

Bennet, J.—The Municipalities Act is an Act for Local Self-government. The principle of Local Self-government is that the inhabitants and not experts should decide their own local affairs. Hence the decisions of the Municipal Board and the appellate authority, though the Board is composed of members without legal training and not of experts, are conclusive as directed under S. 321. [P 151 C 2]

(g) U. P. Municipalities Act (1916), S. 298—Bye-law No. 23 framed by Municipal Board under S. 298 can be relaxed by full Board on recording special reasons.

Sen, J.—It is within the competency of the Full Board during the season to relax the rigour of any rule under bye-law No. 23 framed by the Board under S. 298 of the Act, in any particular case for special reasons to be recorded in writing. [P 152 C 2]

Mukerji, J.—This is a reference by the learned District Magistrate of Dehra Dun under the following circumstances: In Mussoorie, which is within the jurisdiction of the learned Magistrate, a gentleman described as the Raja Sahib of Amawan, put in an application before the Municipal Board for permission to make certain additions and alterations to a house which he had purchased. This house was known as Cecil Hotel and apparently was used as an hotel before the purchase. Adjacent to the building purchased by the Raja of Amawan, is a house known as Ivy Cottage, which is owned by one Sardar Abdul Qayum Khan, a political detenue. That building has been obtained on lease by one Sardar Bhagat Singh and is being used as an hotel and has been called "The Grand Indian Hotel." The Raja Sahib of Amawan, among other alterations, constructed a bathroom at the north-west corner of his house. The estate owned by the Raja Sahib of Amawan, it appears, is on a much higher level than the estate Ivy Cottage. The Raja Sahib of Amawan, to obtain further room for his building, has constructed the bathroom on certain girders and it now hangs out in the air supported on girders. The result is that to some extent the added building (the bathroom) hangs over the Ivy Cottage estate. The Municipal Board of Dehra Dun having granted sanction to the construction, the political officer, who looks after the interest of the political detenue Sardar Abdul Qayum Khan, took up the matter and lodged an appeal on behalf of the Sardar before the Magistrate. The objections that were taken to the grant of the sanction were threefold. The first objection was that the Raja Sahib of Amawan had been permitted by the City Board to make a construction on the land of the appellant. The second point was that the proposed bathrooms, if constructed would injuriously and materially affect the appellant's buildings. The third point was that the grant of sanction was opposed to law and equity and contrary to principles of sanitation.

So far as the first point was concerned, the learned Magistrate held that, if any land of the appellant had been encroached upon, that was a matter for the civil Court to decide.

On the question of sanitation the learned Magistrate considered the arguments from different points of view. It appears that one of the bye-laws framed by the Municipal Board of Mussoorie was bye-law No. 23 and was meant to be a bye-law framed under S. 298, list 2, sub-list (i) Cl. (j). The idea therefore in framing the bye-law was the avoidance of overcrowding in houses and inhabited sites. The bye-law lays down that no building shall be erected or re-erected outside bazar areas in such a manner that any portion of it would be less than 50 yards from any other building, etc. It is a fact that the bathroom complained of (we are concerned only with one particular bathroom, although the Raja built several) was less than 50 yards from one of the buildings on the estate, Ivy Cottage. The learned Magistrate considered how far the question of sanitation was affected by the construction of the bathroom. He is of opinion that the Municipal Board could depart from the bye-law, but for good reasons. He held that there was sufficient justification for the Board to depart from the bye-law and to give the Raja permission to construct the bathroom. The learned Magistrate held that the sanitation of the locality was not affected by the existence of the bathroom and, as a matter of fact, the sanitation was likely to improve by the introduction of a sanitary bathroom in place of an old kind of service bathroom. The learned Magistrate says in para. 3 of his order of reference, referring to the breach of R. 23, that he accepts the explanation of the Municipal Board that the sanction had been given by the Full Board. Then he says, that it was pointed out to him that the building did not constitute a new building, but was merely an addition and alteration to an existing building, and this argument was also accepted by the Magistrate. Then he considered the question of sanitation and concluded by saying :

> "I see therefore no reason for taking any exception to the Board's order sanctioning infringement of the distance rule on the ground that the proposed additions and alterations will improve the sanitation of the locality."

Now a rule which is meant to avoid overcrowding must be treated as a rule designed for the betterment of sanitation and to avoid want of it. The whole scheme of the Municipalities Act discloses the fact that the power of the Municipal Board to grant or withhold sanction to a building is confined to the questions of sanitation, and to some extent, uniformity of buildings where they abut on a road. The points on which bye-laws may be framed are enumerated under S. 298, and they show this design. I need not dilate on the point. A cursory perusal of the list will show that the Municipal Board is not given to it any authority to encroach on the private rights of the inhabitant except for the purpose of benefit to the public in general. For this reason, all other questions of private rights have been left to be determined by the Courts: see S. 184, Municipalities Act. The decisions of the Municipal Board or of the appellate authority (Collector or the Commissioner as the case may be) is final under S. 321 of the Code. It is impossible to believe that a decision on a question of private rights could have been given finality where the decision is arrived at without hearing evidence or where the decision is arrived at by a body of men not specially trained in law respecting private rights.

The learned Magistrate therefore found himself unable to decide that he should interfere with the sanction granted by the Full Board to the Raja of Amawan, on the simple ground that the bathroom " detracted from the value and amenities of the appellant's property." Now, what the learned Magistrate meant by detracting from the value and amenities of the appellant's property is explained by himself at another place in his judgment. He found that the bath room was exceptionally prominent and unsightly : vide para. 4 of the judgment. As I have said, there were three bathrooms. With two of these the Magistrate had no quarrel, and the third one, he found jutted right out above a portion of the appellant's " Ivy Cottage " estate. Then he says :

> "What does appear to concern me however is that in my opinion no sane man can possibly doubt that the existence of this hideous new bathroom right above the entrance door and over his annexe of Ivy Cottage must injuriously affect the value of appellant's property."

Being unable to decide whether the ground on which the existence of the bathroom is objected is one of the grounds on which the Municipal Board and therefore the appellate authority might lawfully interfere with the construction, the learned Magistrate has made this reference.

I am clearly of opinion that having regard to the general scheme of the Municipal Act, and the finality of the orders passed by the Municipal Board and its appellate authority, it is not open to either of them to disallow a proposal to erect a building on the ground that it is hideous in its appearance and would therefore injuriously affect the value of a neighbour's property. In such matters the parties should be left to seek their own remedy in Court and the Municipal Board or its appellate authority should not take upon itself the duty of disallowing a construction on the ground that it " detracted from the value and amenities of a neighbour's property."

I would answer the reference accordingly. I may mention before leaving the subject, that in my opinion it is not open to the High Court to question the District Magistrate's decision that bye-law No. 23 has been properly disregarded or departed from.

Bennet, J.—This is a reference by the District Magistrate of Dehra Dun under S. 319 (1), Municipalities Act, U. P. Act 2 of 1916, for a direction as to whether he should consider certain matters in hearing an appeal under S. 318 from an order of the City Board of Mussoorie. S. 298, Municipalities Act, prescribes in List 2, Further bye-laws for a Hill Municipality, heading I—Sanitation and Prevention of Disease that bye-laws may be made for " (j) preventing overcrowding in houses and inhabited sites." U. P. Gazette of 4th May 1918, p. 419, shows that under this section the Municipal Board of Mussoorie made the following bye-law :

> Under S. 298, List 2, heading 1, Cl. (j) 23. No building shall be erected or reerected outside bazar areas in such a manner that any portion of it would be less than
>
> (a) fifty yards from any other building and
>
> (b) fifteen yards from the boundary of the estate on which it is to be erected; provided that
>
> (1) nothing in this bye-law shall apply to bona fide repairs or minor additions and alterations to an existing building and (2) nothing in Cl. (a) shall apply to a building intended as an outhouse as regards its distance from any building which it is intended to serve or from any other outhouse.
>
> *Note* (1).—An outhouse is a building detached from the main building and used as kitchen godown, stables, servants' quarters or for a like purpose.
>
> (2) The distance shall be estimated in a bee line from the nearest point of the existing building or boundary to the nearest point of the proposed building.

This is the rule as it was published and confirmed by the Commissioner. The District Magistrate states :

> " Relaxation of these rules can however be allowed by the Full Board during the season for special reasons to be recorded."

We have not been shown in the Gazette the authority for this statement, and the Magistrate ought to verify it.

Assuming that it is correct, the question is: What is the nature of the special reasons which should be considered by the Board or the Magistrate in allowing relaxation of the rule? The answer to this question is found in a consideration of the purpose of the rule. The purpose of the rule is shown by the words used in the section which authorizes the Board to make the rule. Those words are quoted above and are "sanitation and prevention of disease, preventing overcrowding in houses and inhabited sites." Anything therefore which would come under these three heads, sanitation, prevention of disease, overcrowding, is a matter which should be considered by the District Magistrate in this appeal.

The exact matter referred has not been definitely expressed as an issue by the District Magistrate. The appellant is the owner of premises formerly known as Ivy Cottage. The respondent is the City Board of Mussoorie. The appeal is against an order of the Board of 11th March 1930 sanctioning the application of the Raja of Amawan to add certain latrines to the upper storey of his premises which adjoin Ivy Cottage. As to distance the Magistrate finds that

> "a plumb line dropped from the furthest corner of this new bathroom would just about reach the eaves of Ivy Cottage on the Raja's side, and the distance from the apex of the projecting triangle AA on the Raja's ground level to the ridge of Ivy Cottage roof is 19 feet, while it is also 19 feet from the apex to the eaves of Ivy Cottage on the Raja's side."

Bye-law 23 is therefore clearly infringed as it lays down that the distance should be 50 yards, that is, 150 feet; whereas the distance here is only 19 feet; and the bathroom is on the boundary instead of being 15 yards from it. The owner of Ivy Cottage made an appeal stating his objections as follows:

> "3. That the proposed bathrooms, etc., if constructed will, in any case, injuriously and materially affect the appellant's building.
>
> 4. That the aforesaid grant of sanction is opposed to law and equity and contrary to principles of sanitation."

In para. 3 of his referring order the Magistrate appears to deal with para. 4 of the grounds of appeal and it was argued for the respondent Raja of Amawan that the system of flushed latrines with a waste pipe was a more sanitary system than the system of sweepers and the Magistrate accepted that argument.

In para. 4 of his referring order the Magistrate considered ground 3 of appeal, and apparently what he desires to know is whether this is a ground which he is entitled to consider. No doubt S. 184, Municipalities Act, provides that a sanction by a Board shall not prevent any person claiming his rights in a civil Court if his property is damaged by the building sanctioned. But S. 318 lays down that "any person aggrieved" by any order such as the present may appeal to the District Magistrate. The rule is framed for the purposes of sanitation, prevention of disease, and prevention of overcrowding in houses and inhabited sites. It is open to the appellant to show that relaxation of the rule would adversely affect his premises in regard to any of these three matters, and if he succeeds in showing this then it will be for the District Magistrate to consider whether under those circumstances the rule should be relaxed or not. For example the Magistrate mentions that instead of making the bathrooms project by adding them to the existing building, the Raja could have installed the flushing system in his existing bathrooms. It is open to the Magistrate to consider whether these projections tend to overcrowding in houses and inhabited sites, and whether sanction should be refused on that ground.

In regard to the argument that the objection of the appellant should not be heard because it is based on interference with his private rights, I would point out that the very basis of the bye-law in question involves a question of private interest. The bye-law says that the re-erected building shall not be fifty yards from any other building. It is natural that the person to object would be the owner of the other building. It is also natural that he should object on the grounds that his building was "injuriously and materially affected." For it is his building which is in question. His is the building within the fifty yards limit, and not other buildings in the neighbourhood generally. The question of whether the bye-law should or should not be relaxed must be considered from the point of view of his building and how it will be affected, for it is the only building which will be affected by the relaxation of the bye-law. Overcrowding is a very general term. The bye-law in laying down a limit of fifty yards could not mean overcrowding in the sense in which it is used in a densely populated city. The bye-law is one which may be framed by Hill Municipalities only. It appears to me to mean that houses should be at such distances from each other that one house is not injuriously affected by another house. "Sanitation" is also a wide term. It is a mistake to consider sanitation as equivalent to drainage systems. The confusion is possibly due to the fact that shopkeepers who sell and erect water closets euphemistically describe themselves as sanitary engineers, whereas not long ago they were more simply known as plumbers. "Sanitation" is derived from the Latin word sanitas which means health, and "sanitation,' means the science of health. The question therefore is not merely whether in the abstract one system of latrines is better than another system. The matter is wider, and I think that the health of the inhabitants of Ivy Cottage is a question which may be considered. As to the question of the additions being hideous and unsightly, S. 180, Municipalities Act, gives the Board an absolute discretion to refuse to sanction any work subject to the provisions of any bye-law.

"Subject to the provisions of any bye-law, the Board may either refuse to sanction any work." Bye-laws may be made under S. 298, List I, A (f), prescribing "the type or description of buildings" which may be erected, and under A (h) (i) prescribing the "method of construction" for erection, re-erection or alteration of buildings. There is no limitation that these bye-laws must only deal with buildings which abut on a road. If there are any bye-laws in this Municipality on the point those bye-laws would regulate the discretion of the Board and of the District Magistrate. If there are no bye-laws on the point discretion is not limited. In my opinion therefore this point is also one which may be considered by the District Magistrate in this appeal. Then there is the argument that a Municipal Board is not competent to decide the question of whether the bye-law should not be relaxed because the house of objector is adversely affected. In the present case the erection was of latrines, and systems of latrines have been considered, and the argument is that a Board can only consider such matters as systems of latrines from the point of view of the neighbourhood generally. But the bye-law in question does not refer to latrines; it refers to buildings generally and alterations of buildings. Let us suppose that a person purposes to add an ordinary room, not a latrine, to his building, and that the proposed room would be within fifty yards of an existing building. The Board is asked to relax the fifty yards rule. What matters are there for the Board to consider, except the question as to whether the existing building would be adversely affected from the point of view of overcrowding and health?

A further development of the argument is that a Municipal Board is composed, it is said, of persons without legal training and therefore unfit to decide such questions. It appears to be sufficient reply to this to point out that the Municipalities Act is an Act for local self-government and that the principle of local self-government is that the inhabitants and not experts should decide their own local affairs.

In dealing with this reference, I have endeavoured to elucidate the principles to be deduced from the language of the Municipalities Act. I leave it to the District Magistrate to say how far he has already come to a decision on the grounds of appeal, as it is obviously easier for him to know on what matters he has already made up his mind, and whether he intended any of his observations to be a final decision, or whether he was merely indicating on what points he desired guidance.

By the Court.—In this reference the members of this Court have not been able to agree. We therefore direct that, with the permission of the Hon'ble the Chief Justice, the case be laid before a third Judge for opinion. When the opinion is expressed, the case will come back to us for sending down an answer to the officer concerned. Our order is in accordance with Cl. 27, Letters Patent.

Sen, J.—This is a reference by the learned District Magistrate of Dehra Dun under S. 319 (1), United Provinces Municipalities Act (2 of 1916). Two learned Judges having differed in their opinion, this matter has been referred to me under Cl. 27, Letters Patent.

On 9th October 1928 the Raja Bahadur of Amawan, who owns a house at Mussoorie, now known by the name of "Amawan Palace," applied to the Municipal

Board of Mussoorie for sanction to add to the existing building three bathrooms and a verandah. Accepting the recommendation of the Public Works Committee, the Board granted the sanction on 25th October 1928. This sanction was renewed by the Board on 25th February 1930 and 11th March 1930 with some minor alterations.

Not far apart from the Raja's house, on a lower level, is the house called "Ivy Cottage" which belongs to Sardar Abdul Qayum Khan, an Afghan detenue. He, through the Assistant Political Officer, preferred an appeal to the District Magistrate of Dehra Dun against the resolution of the Municipal Board dated 11th March 1930 and challenged the propriety of the sanction upon the following grounds :

(1) The land belonging to the Sardar had been encroached upon as the result of the constructions ;

(2) The constructions aforesaid were opposed to principles of sanitation ;

(3) The sanction granted by the Municipal Board contravened the Municipal Bye-law No. 23 which had been framed in pursuance of S. 298, List 2, heading (1) Cl. (j), Municipalities Act, and which had the force of law ;

(4) The value and amenities of the objector's property were seriously affected by the constructions complained of.

The Raja appears to have availed himself of the sanction and the constructions have already been put up.

The District Magistrate saw no reason to interfere with two of the bathrooms. We are not concerned with them in this reference.

Controversy appears to have hovered round the third bathroom which was located at the north-west corner of the Raja's house. This bathroom overhangs Ivy Cottage, is supported on girders and projects right into the space from the main building.

The learned District Magistrate refused to go into the question of proprietary title raised in the appeal on the ground that such boundary disputes were matters for the decision of the civil Courts and did not concern him. He arrived at a clear and definite finding that the sanction accorded by the Municipal Board relating to this bathroom did not offend against any principles of sanitation, and that, as a matter of fact, the bathroom, as constructed, was calculated to improve the sanitation of the locality.

He also held that the construction did not contravene the provisions of Bye-law No. 23 referred to above.

The bye-law provides that

> "no building shall be erected outside bazar areas in such a manner that any portion of it should be less than : (a) fifty yards from any other building, and (b) fifteen yards from the boundary of the estate on which it is to be erected, provided that (1) the Full Board (but not the Public Works Committee) may, during the season, that is from 1st April to 31st October, for especial reasons to be recorded, exempt any such building from the operation of Cl. (a) or Cl. (b). This discretion shall not be exercised with reference to building on the Mall between Clarence House and the Library. (2) Nothing in this bye-law shall apply to bona fide repairs to an existing building. (3) Nothing in Cl. (a) shall apply to a building intended as an outhouse as regards its distance from any building which it is intended to serve or from any other outhouse."

In allowing this bathroom to be constructed, the Board had no doubt contravened the distance rule set out above. But it was within the competency of the Full Board during the season to relax the rigour of the distance rule in any particular case for especial reasons to be recorded in writing. As the Board had accorded the sanction on 25th October 1928 before the close of the season upon the ground that the projected bathroom was calculated to improve the sanitation of the locality, the learned District Magistrate came to the conclusion that the resolution of the Board was within its competence and was justified on grounds of sanitation.

In arriving at the aforesaid findings, the learned Magistrate had so far no doubts and he was faced with no difficulties.

All the three bathrooms appear to possess a common feature : "They are exceptionally prominent and unsightly." The District Magistrate was of opinion that it was not fair on the part of the Municipal Board to have allowed the Raja to build this unsightly projection, for, in putting up this construction, the Raja appears to have been inspired by "a sublime disregard for all interests but his own,"

> "in order to secure a little additional space and keep his new bathroom clear of the fabric of his main building."

The learned District Magistrate observes :

"While rejecting all his (Sardar Abdul Qayum Khan's) other points therefore, I am of opinion that the value and amenities of appellant's property are undoubtedly affected injuriously by this new bathroom at the north-west corner."

The point referred to this Court has been very clearly and concisely formulated by the District Magistrate in the following terms :

"The question for determination now is whether, in dealing with this appeal under S. 318 (1), U. P. Municipalities Act 2 of 1916, I as District Magistrate am entitled to consider a point of this kind which is after all a matter of opinion or whether it is not one which should be left to the Courts. The section says that any person "aggrieved" by an order of the Board under S. 180 (1), such as has been passed in this case, may appeal to the District Magistrate. The appellant is undoubtedly aggrieved as I have shown above, but I am doubtful whether after accepting the legality of the Board's procedure and the validity of the reasons given by it for allowing a deviation from its distance rules on sanitary grounds, I should be acting within the intention of the section if I disallowed this north-west bathroom on the ground that it detracted from the value and amenities of the appellant's property."

Under S. 319 of the Act the reference is to be restricted to the point on which doubt is entertained by the Court of appeal. It is not open to this Court to probe into the legality and propriety of the findings of the learned District Magistrate on other points on which he does not entertain any doubt and about which he has made no reference. He had no doubt whatsoever that the question of title between the parties should be left for the decision of the civil Court, that the bathroom in dispute was not open to challenge upon any sanitary ground and that the resolution of the Board did not offend against but was in accord with, the provisions of Bye-law No. 23.

Having regard to the scheme and policy of the Municipalities Act, and the bye-laws framed thereunder it is patently clear that the intention of the legislature was not to arm the Board with any power to investigate into the private rights of individuals or to unduly encroach upon the said rights except upon the grounds of public health, public safety or public convenience. The duties and functions of the Municipal Board have been enumerated in Ss 7 and 8 of the Act. It was not within the contemplation of the Act that the Board should investigate into the right, title and interest of property holders before sanctioning any work of which notice had been given to the Board. The sanction accorded does not affect any title to property or produce any legal effect beyond the purview of S. 184. Where therefore the resolution passed by a Municipal Board is not open to objection or criticism upon any ground of public health, public safety or public convenience, and is not opposed to the provisions of the Municipalities Act or of any bye-law framed under the Act, the District Magistrate is not competent in the exercise of his appellate jurisdiction under S. 318, Municipalities Act to turn down the resolution or set aside the sanction or direct the removal of the constructions upon the mere ground that the construction in dispute affects injuriously the value and amenities of the appellant's property. The appellant is a person aggrieved in a large sense, but his grievance is not one which can be attended to by the appellate Court upon grounds of public health, public safety and public convenience. He must, if he so chooses, seek his remedy in the ordinary civil Courts. Although the Municipalities Act is an Act for local self-government, it was not and could never have been the intention of the legislature to invest the Municipal Board or the appellate authority under the Act to pronounce decisions upon disputes relating to private rights between private individuals or about the amenities relating thereto. This is my opinion to the reference.

Mukerji and Bennet, JJ. — Let the following answer be sent to the reference made by the learned District Magistrate of Dehra Dun:

"It is not open to the District Magistrate to disallow the north-west bathroom of the applicant to be constructed (the applicant being the Raja Saheb of Amawan) on the ground that it detracted from the value and amenities of the appellant's property."

Copies of judgments delivered in this case will be sent along with this answer.

B.V./R.K. *Answer accordingly.*

✲ A. I. R. 1931 Allahabad 154

SULAIMAN AND YOUNG, JJ.

Niaz Ahmad Khan and *another*—Defendants—Appellants.

v.

Parsottam Chandra and *another* — Plaintiffs and Defendants—Respondents.

First Appeal No. 401 of 1928, Decided on 10th November 1930, from decision of Addl. Sub-Judge, Meerut, D/- 23rd July 1928.

✲ **(a) Civil P. C. (1908), O. 22, R. 3 (2)—Death of sole plaintiff—Omission to bring on record legal heirs in time—Abatement of suit is automatic and no formal order is necessary.**

Death of the sole plaintiff in a mortgage suit and the omission to bring his heirs on the record within the period of limitation results in an abatement of the suit. The abatement is automatic and does not require any formal order by the Court: *A. I. R.* 1930 *All.* 753; 39 *All.* 551; *A. I. R.* 1922 *All.* 396 and *A. I. R.* 1926 *All.* 217, *Foll.*; *A. I. R.* 1924 *P. C.* 198, *Ref.* [P 155 C 2]

(b) Contract Act (1872), S. 25 (3)—Limitation—Meaning explained.

The word "limitation" as used in S. 25 (3) means the limitation of time as prescribed by the law of limitation in force. A liberal interpretation ought to be put on S. 25 (3). [P 156 C 1]

(c) Contract Act (1872), S. 25 (3)—Deed obtained in lieu of amount of preliminary decree in suit, abating automatically, is not void for want of consideration.

Where a decree becomes unenforceable in consequence of the law of limitation applicable to suits and a fresh mortgage deed is obtained for the amount of such decree, the mortgage deed cannot fall to the ground owing to a total absence of a consideration, as a written promise to pay a time barred debt is equally good and binding. [P 156 C 1]

The words of S. 25 (3) cover a case in which a fresh deed is obtained in lieu of the amount due on preliminary decree passed in a suit (on a prior mortgage) which automatically abated owing to the failure of the plaintiff's heirs in that suit to apply within time prescribed for substitution of their names in place of the deceased plaintiff. Such a deed cannot be void for want of consideration. But although the mortgage deed sued upon could not be without consideration, nevertheless, if the contract was vitiated by fraud or misrepresentation to the mortgagors, it would become voidable at the option of the mortgagors. [P 156 C 1]

(d) Fraud—No order for abatement—Doubt regarding procedure to set aside abatement—Concealment of abatement or silence is not enough to establish fraud—Contract Act (1872), S. 17.

In view of the fact that there was some doubt as to the exact procedure which had to be adopted for the setting side of the abatement when no order for abatement had been passed, any concealment of the fact of abatement or mere silence on the part of the mortgagee would not be sufficient to establish fraud: [P 158 C 1]

(e) Evidence—Fraud—Onus of proof is on him who wishes to establish fraud.

For persons who wish to establish fraud it is incumbent upon them to show that it was the alleged fraud which induced the agreement and persuaded them to enter into it. [P 158 C 2]

(f) Contract Act (1872), Ss. 17 and 18—Fraud and misrepresentation — Distinction between stated.

The principal difference between fraud and misrepresentation is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true, though in both cases it is a misstatement of fact which misleads the promisor. [P 156 C 1, 2]

(g) Contract Act (1872), S. 19 — Party defrauded need not establish that he could have discovered truth.

In the case of an active misrepresentation knowing the fact to be false, as distinct from mere silence or concealment, it is not incumbent upon the party defrauded to establish that he had no means of discovering the truth with ordinary diligence. The words "fraudulent within the meaning of S. 17" as used in S. 19 apply exclusively to "silence" and not to "misrepresentation." [P 157 C 1]

(h) Interpretation of Statutes — Punctuation.

Punctuation is no part of the statute and a Court of law is bound to interpret the section without the commas inserted in the print: 14 *Cal.* 365 (*P.C.*) and *A. I. R.* 1929 *P. C.* 69, *Foll.* [P 156 C 2; P 157 C 1]

(i) Transfer of Property Act (1882), S. 67—Mortgagee subsequently acquiring interest of one of the mortgagors—Integrity of mortgage is not broken.

Where a mortgage deed was executed by four persons whose properties were jointly and severally liable, the fact that subsequently the mortgagee acquired the interest of one of the mortgagors by purchase, does not break the integrity of the mortgage. [P 159 C 2]

Iqbal Ahmad and *Mukhtar Ahmad*—for Appellants.

P. L. Banerji and *N. C. Vaish*—for Respondents.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for sale on the basis of a mortgage deed dated 21st September 1923, for Rs. 20,000 carrying interest at 9 per cent per annum with annual rests. This document was executed probably in lieu of the amount due under an earlier bond of 13th December 1916, on the basis of which a preliminary decree had been passed. There was additional consideration of Rs. 1,200 which was paid in cash before the Sub-Registrar. The first document stood in favour of Jai Kishen Das, but the second document was taken in the name of his grandsons who were minors.

The main defence to the suit was that the mortgage in question was without consideration and had been obtained fraudulently and it was also pleaded that it had not been properly attested. There was a further plea that the integrity of the mortgage was broken. The learned Subordinate Judge has overruled all these contentions and decreed the claim. The defendants have appealed from the decree and raised these points afresh.

The suit on the basis of the earlier bond resulted in a preliminary decree for sale dated 8th March 1923. It had been instituted by Jai Kishen Das as the sole plaintiff. It is now an admitted fact that the sole plaintiff died on 2nd May 1923 and no application for the substitution of the names of his heirs was ever made within the three months allowed by law. On 12th September 1923 that is to say more than three months after the death but within 60 days of the expiry of the period of three months an application was made on behalf of the heirs of Jai Kishen Das for the preparation of the final decree. The fact of the death was mentioned in this application but there was no formal prayer for the substitution of the names or for the setting aside of the abatement. The prayer was for the passing of a final decree. An order for the issue of notice was passed on the same day. It is a controversial point whether notices were actually served on the mortgagors or not. File D of that suit has now been weeded out and it is not possible definitely to ascertain whether services were duly effected. The plaintiffs have however produced the original summons issued to Dr. Vaish who was arrayed on the opposite side of that proceeding as showing that the notices must have been issued.

Before the parties appeared in Court as a result of the notice issued the mortgage deed in question was executed on 21st September 1923. It does not expressly recite the fact of the death of Jai Kishen Das but it stands in the names of his minor grandsons under the guardianship of Munshi Lal who is the clerk of Babu Duli Chand, the father of the minors.

The learned advocate for the respondents has urged before us that the suit did not abate after the preliminary decree had been passed. The lower Court however has held the contrary. So far as this High Court is concerned this point is, at least for the present, concluded by recent authorities. After the passing of of the new Civil Procedure Code it was held by this High Court in *Moti Lal* v. *Ram Narain* (1) and *Jagarnath Umar* v. *Ram Karan Singh* (2) that the death of the sole plaintiff in a mortgage suit and the omission to bring his heirs on the record within the period of limitation resulted in an abatement of the suit. It was also held by a Full Bench of this Court in *Churya* v. *Baneswar* (3) that the abatement was automatic and did not require any formal order by the Court. Since then some doubts arose in consequence of the pronouncement by their Lordships of the Privy Council in the case of *Lachmi Narain Marwari* v. *Balmakund Marwari* (4).

The High Courts of Madras and Calcutta and the Chief Court of Lucknow came to the conclusion that in consequence of this pronouncement the previous rulings of their High Courts should be overruled and it must be held that there could be no abatement after a preliminary decree. The opinion formerly expressed by these High Courts was to the contrary. Our High Court has dissented from that view. The reasons are set forth in the case of *Naubahar Singh* v. *Qadir Bux* (5) which has been followed at least by one Judge in in *Gya Prasad* v. *Jaswant Rai* (6). In view of these pronouncements we must hold that the suit did abate automatically.

The learned counsel for the appellants first contended that the document was entirely without consideration. His contention is that the previous suit having abated there was in existence no enforceable decree under which the mortgagee could realize his amount. He therefore argues that there was no consideration for the mortgage deed in question at least to the extent of Rs. 17,800. The reply on behalf of the respondents is that the case would be covered by S. 25 (3), Contract Act, under which a promise made in writing and signed by the person to be charged therewith to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation for suits, is excepted. The first suggestion made by Mt. Pearey Lal Banerji, is that the expression "limitation of suits" merely means a bar on suits and not necessarily a bar of limitation of time for suits. This suggestion does not appeal to us. We think that the word "limitation" means the limitation of time as prescribed by the law of limitation in force. There can be no question that the abatement of the previous suit was due to the rule of limitation under which an application for substitution of names had to be made within the prescribed period of three months. The learned advocate for the appellants contends that the expression is confined to the law for the limitation of suits and not to the law for the limitation of application, and argues that, inasmuch as the abatement was due to the rule of limitation applicable to application, only, the exception is of no avail to the respondents. We think that a liberal interpretation ought to be put on S. 25 (3), and there is no doubt in our minds that the decree became unenforceable in consequence of the law of limitation applicable to suits. It is therefore obvious that the mortgage deed cannot fall to the ground owing to a total absence of consideration, nor even for any part of the amount as a written promise to pay a time barred debt is equally good and binding.

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(1) [1917] 39 All. 551=40 I. C. 1006.

(2) A. I. R. 1922 All. 396=68 I. C. 251.

(3) A. I. R. 1926 All. 217=93 I. C. 313=48 All. 334 (F.B.).

(4) A. I. R. 1924 P. C. 198=81 I. C. 747=51 I. A. 321=4 Pat. 61 (P.C.).

(5) A. I. R. 1930 All. 753=125 I. C. 14.

(6) A.I.R. 1930 All. 550=125 I.C. 460.

Although the mortgage deed could not be without consideration, nevertheless, if the contract was vitiated by fraud or misrepresentation to the mortgagors, it would become voidable at the option of the mortgagors. "Fraud" is defined in S. 17, Contract Act, and a suggestion as to a fact made by a person who does not believe it to be true is fraud, and so is an active concealment of a fact by one having knowledge or belief of the fact. On the other hand under S 18 "misrepresentation" is a positive assertion in a manner not warranted by the information of the person making it. of that which is not true, though he believes it to be true. There are other cases of misrepresentation also with which we are not concerned in the present case. The principal difference between fraud and misrepresentation therefore is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true, though in both cases it is a misstatement of fact which misleads the promisor.

Under S. 19 consent to an agreement caused by fraud or misrepresentation makes the contract voidable. But there is an exception to the section which is in the following words:

> "If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of S. 17, the contract nevertheless, is not voidable, if the party whose consent was so caused had a means of discovering the truth with ordinary diligence,"

Mr. Pearey Lal Banerji for the respondents argues that the exception means that any misrepresentation which is fraudulent within the meaning of S. 17, or any silence which is fraudulent in the same way, does not make the contract voidable if the other party had the means of discovering the truth with ordinary diligence. He strongly relies on the opinion of Messrs. Pollock and Mulla in their Commentary on this section that there is in India a departure from the rule which prevails in England. The learned authors also observe that

> "If, as seems not altogether improbable, they were not intended to alter the English rule, they were chosen with singular infelicity."

No direct authority on this point has been cited before us by the learned counsel for either party. We however think that unless on account of the clear language of the section we are driven to hold that there had been a departure from the long established rule of English law we would be reluctant to interpret the section in that way. If the statute were clear it would be our bounden duty to give effect to its meaning quite irrespective of any consideration as to what the law is in England. But on the face of it the exception is ambiguously worded. The difficulty is caused mainly by the punctuation, viz. a comma after the word "silence" which seems to indicate that the words "fraudulent within the meaning of S. 17" apply both to "misrepresentation" and to "silence." But, as observed by their Lordships of the Privy Council in the case of *Maharani of Burdwan* v. *Krishnakamini Dasi* (7) and *Lewis Pugh* v. *Ashutosh Sen, A.I.R.* 1929 *P.C.* 69 at p. 71 punctuation is no part of the statute, and a Court of law is bound to interpret the section without the commas inserted in the print. If the comma after the word "silence" is to be ignored the expression "fraudulent within the meaning of S. 17" might well apply to "silence" exclusively and not to "misrepresentation." This interpretation is strengthened by the circumstance that the legislature has used the preposition "by" twice, i.e., both before "misrepresentation" and also before "silence." If the expression "fraudulent within the meaning of S. 17" qualifies "misrepresentation," the result would be that due diligence would be required in the case where misrepresentation became fraudulent, but would not be required when the misrepresentation fell within S. 18 and was just short of fraud, for the exception would be confined to the former kind only. This would be a startling result.

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(7) [1887] 14 Cal. 365=14 I.A. 20=4 Sar. 772 (P.C.).

We are therefore inclined to think that there was no intention to depart from the well-established rule of English law. It also seems to us that if we are to hold that a fraud does not vitiate a contract unless the party defrauded had no means of discovering the truth, it would have very serious consequences. For instance, in most cases advantage is taken of simple-minded people who are careless enough not to take the trouble to find out the truth which an ordinary man with sense would do with ordinary diligence. We are therefore inclined to hold that in the case of an active misrepresentation knowing the fact to be false, as distinct from mere silence or concealment, it is not incumbent upon the party defrauded to establish that he had no means of discovering the truth with ordinary diligence.

We must now therefore come to examine the allegation of fraud. The Court below has recorded a finding against the appellants and the burden lies on them to satisfy us that the Court below was wrong. There are no doubt a number of suspicious circumstances in this case. We may take it for granted that if the mortgagors had fully known all the facts and the legal consequences they would not have been so ready to execute a fresh document in lieu of the amount due under the preliminary decree at a higher rate of interest. In all probability they would have contested the application for the preparation of the final decree. One might suspect that Mr. Duli Chand, who is a legal practitioner of some standing and who took the mortgage in favour of his minor sons under the guardianship of his clerk, was aware of the legal flaw which had come in owing to the omission to apply within the time required by law and that he would have been anxious to procure a fresh document in order to get over that difficulty. On the other hand, as has been pointed out by Mr. Pearey Lal Banerji, some confusion in the minds of the members of the legal profession might have been caused in consequence of a ruling of this High Court in *Gujrati* v. *Sital Misir* (8), which was in force in 1923 and was subsequently overruled by a Full Bench in *Churiya* v. *Baneshwar* (3). There might at that time have been some doubt as to whether an application for setting aside the abatement could have been made when no formal order for abatement had been passed. Under O. 6, R. 4, the particulars of fraud and misrepresentation which are pleaded must be specifically supplied in the pleadings. There were four mortgagors, viz. Niaz Ahmad Khan, Faiyaz Ahmad Khan, Azim Dad Khan and Inamullah Khan, on whom it is alleged that a fraud was practised. Niaz Ahmad Khan filed a written statement on 14th September 1927 in which there was no suggestion even of a previous abatement of the suit. On 17th May 1928 the written statement was amended and the fact of the abatement was added, but even on that occasion there was no suggestion made that Babu Duli Chand had misled Niaz Ahmad Khan, by falsely telling him that his uncle had died within a month of the date of the execution of the mortgage deed.

On 17th May 1928 Azim Dad Khan filed a written statement in which he vaguely alleged fraud without specifying it. On the same day the Official Receiver representing Inamullah Khan, filed a written statement vaguely alleging fraud and deceit without specifying any particulars. Faiyaz Ahmad Khan filed no written statement.

It was not till 12th July 1928 that a statement was made on behalf of the defendants that the fraud alleged in the written statement was the fact that the abatement of the suit had been kept a secret from them and that the time of the death of Jai Kishen Das was stated wrongly, that is two or four days before the execution of the mortgage deed, they were told that Jai Kishen Das had died a month before. Even at that time it was not specifically mentioned that Mr. Duli Chand gave them the wrong date of the death of Jai Kishen Das.

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(8) A. I. R. 1922 All. 209=66 I. C. 554=44 All. 459.

In view of the fact that there was some doubt as to the exact procedure which had to be adopted for the setting aside of the abatement when no order for abatement had been passed, we are not disposed to consider that any concealment of the fact of abatement or mere silence on the part of the mortgage be sufficient to establish fraud. The fact whether any application had or had not been made in time could very easily have been ascertained on an inspection of the record of the case, and any person who had acted with diligence would have discovered it. We are therefore not disposed to hold that any fraud or misrepresentation sufficient to vitiate the contract was established by the mere silence of the mortgagee to disclose the fact that no application had been made within the time allowed by law.

The mortgagors have gone further. Niaz Ahmad Khan has stated that Babu Duli Chand went to him in September 1923, asking him to pay the amount of the decree, or else he would take out execution. On which he told him that he could not pay the money but that he was prepared to execute a fresh document. He says that Babu Duli Chand agreed to a fresh bond being executed and nine annas was settled as interest. Some three or four days afterwards Babu Duli Chand sent a document through Abdul Wahid, and it was said by him that, as Jai Kishen Das was dead about a month before, he would take a fresh bond in the name of his sons. The statement of Niaz Ahmad Khan does not make it clear that the statement as to the time of the death of Jai Kishen Das was made before the agreement to execute a fresh bond and to pay interest at nine annas per cent per annnm. All that he says is that such statement was made before the bond was executed.

Similarly Fiyaz Ahmad Khan says that Babu Duli Chand told him that he was going to execute the decree unless payment was made, to which Faiyaz Ahmad Khan replied that the payment could not be made for want of money; and then the fresh bond was suggested to which Niyaz Ahmad Khan agreed. He then adds that Babu Duli Chand said that the bond would stand in the name of the plaintiffs as Lala Jai Kishen Das had died a month before. The statement of Faiyaz Ahmad Khan, as it stands also does not make it clear that the agreemeat to execute a fresh bond was come to after the statement as to the time of the death of Jai Kishen Das was made. For persons who wish to establish fraud it is incumbent upon them to show that it was the alleged fraud which induced the agreement and persuaded them to enter into it. The statements of these two mortgagors however fall short of establishing such fraud.

Azim Dad Khan states that he merely signed the bond at his place and was not present when the conversation between Babu Duli Chand and Niaz Ahmad Khan took place. He does not allege any particular fraud having been practised upon him by the mortgagee. He signed the document on trust because his other relations had already signed it.

Inamullah Khan, the fourth mortgagor has not gone into the witness-box at all.

Two witnesses, Hasan Raza and Ibrahim Khan, have been produced in support of the defendants' case, but their evidence is not worthy of any great reliance. Hasan Raza Beg was a casual witness who came to Court without having been summoned. Obviously he is not one of the attesting witnesses to the deed. He deposed as to the purport of the conversation between Duli Chand and Niaz Ahmad Khan some five years after it took place and it is extremely doubtful that he would remember it. Ibrahim Khan's evidence is really inadmissible. Without naming the man, he says that he overheard a clerk of Duli Chand saying to a karinda of Dasna Estate that BabuDuli Chand had very cleverly concealed the flaw and obtained a bond for the whole amount. In the first place it is unlikely that Babu Duli Chand's clerk would state anything of this kind to a karinda of another estate. In the second place, Ibrahim Khan admits that Babu Duli Chand had another clerk who, he says, was present at that time. Thus the evidence leaves it uncertain whether it was Munshi Lal himself or another clerk who made the statement. It is difficult to say how such a statement can be at all admitted in evidence against the mortgagee. As against this we have the denial of Mr. Duli Chand and also the evidence of his clerk Munshi Lal. There are some statements in the deposition of Mr. Duli Chand, which we find very difficult to accept in their entirety. He stated that when he applied for the final decree he did not know whether it was time barred, nor did he know at the time of the execution of the bond that the suit had abated. He also said that once he was the leading practitioner in Ghaziabad and had made a lot of applications for substitution of heirs, but none since 1920, and that he did not know of the amendment of the law reducing the period for applications for substitution for names from six months to three months. But at another place in his deposition he said that in the whole of his practice he did not remember having ever applied for substitution of heirs. This is not reconcilable with the previous statement. He stated that he did not consult any lawyer, and if he had known of the three months' rule he would have put in that very application.

But as a matter of fact, even when he applied within six months he did not ask for any substitution of the names of the heirs. His clerk Munshi Lal stated that on the evening of the day of the death of Lala Jai Kishen Das, Babu Duli Chand left for Allahabad and on the next day Niaz Ahmad went to his house on a condolence visit. No such question was put to Niaz Ahmad Khan when he was in the witness box and he was not given an opportunity to deny this suggestion. Munshi Lal, who was put in three days after Niaz Ahmad Khan, was examined, is the only witness who has deposed to this condolence visit. We are therefore not prepared to accept his uncorroborated testimony.

It therefore seems to us that the evidence is far short of showing that any false statement as to the date of the death of Jai Kishen Das was made by B. Duli Chand or on his behalf by the mortgagor which induced them to enter into the agreement, but that there was merely an omission, or at the most a concealment, of the fact of the abatement of the suit from them. Although the evidence to show that Niaz Ahmad Khan was made aware of the exact date of the death of Jai Kishen Das is too meagre, there can be no doubt that the mortgagors were not diligent enough to make enquiries and ascertain the exact time of the death and the abatement in consequence. We must therefore hold that the mortgage deed cannot be avoided on the ground of fraud or misrepresentation. The plea as to absence of proof of execution cannot be seriously pressed. The evidence shows that the execution was made in the presence of witnesses, Apart from that an acknowledgment of execution would now be sufficient.

There is also no force in the contention that the integrity of the mortgage has been broken. The mortgage is executed by four persons whose properties were jointly and severally liable. Subsequently the mortgagee has acquired the interest of one of the mortgagors, Inam-ullah Khan, by means of purchase. Asthe interests are not co-extensive, the integrity cannot be broken. We must therefore overrule this plea. The result therefore is that the appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 159

SULAIMAN AND KING, JJ.

Inamullah Khan—Applicant.

v.

Lala Shambhu Dayal—Opposite Party.

Execution First Appeal No. 512 of 1928, Decided on 10th April 1930.

(a) Civil P. C., O. 21, R. 90—Sale of properties need not be in order in which they are entered.

There is no rule which requires that sales of properties should take place in the exact order in which they are entered in the list by the sale officer, breach of which rule might amount to material irregularity. [P 160 C 1]

(b) Provincial Insolvency Act, S. 28 — Mortgagor declared insolvent before final decree but after preliminary decree—Official Receiver not impleaded as party in final decree—Official Receiver's right to redeem is not extinguished—But auction sale cannot be set aside on this ground—Civil P.C. (1908), O. 21, R. 90.

Where a mortgagor has been adjudicated an insolvent after the preliminary decree but before the final decree, and the Official Receiver has not been impleaded as a party to final decree on a mortgage, the right of the Official Receiver to redeem the property is not extinguished by such omission, but it is quite clear that the judgment-debtor cannot get the auction sale set aside on that ground: *A. I. R.* 1927 P. C. 108, *Rel. on.* [P 160 C 2]

M. A. Aziz—for Appellant.

S. N. Gupta—for Respondent.

Sulaiman, J.—This is really a first appeal from an order refusing to set aside a sale which has taken place in execution of a mortgage decree. The preliminary decree was passed on 19th April 1927, and the final decree on 2nd December 1927. The mortgagor became an insolvent in September 1927, but the case proceeded against him without impleading the Official Receiver. The auction sale took place on 27th April 1928. In the application which was originally filed the only ground that was taken was as to the gross inadequacy of the price. No specific irregularity of fraud in publishing or conducting the sale was set forth. By a subsequent application the judgment-debtor took the plea that the sale had been put down as No. 23 in the list, but the property was sold first and that in consequence a number of bidders could not be present as they had gone away for Friday prayers. It was also objected that the receiver was a necessary party and should have been impleaded. It was further pleaded that notice under O. 21, R. 66, had not been served on the judgment-debtor. Last of all it was urged that the value of the property was between Rs. 16,000 and Rs. 17,000, but it was sold for the inadequate price of Rs. 1,975 only. All these objections have been overruled by the Court below.

In order to succeed it was incumbent on the judgment-debtor to show in the first instance that there was a material irregularity or fraud in publishing or conducting the sale. He cannot be allowed to go outside the scope of O. 21, R. 90, in these proceedings. The learned advocate for the appellant is unable to show to us any rule which requires that sales of properties should take place in the exact order in which they are entered in the list by the sale officer. According to the sale officer's report his practice always has been to sell first the non-ancestral properties before proceeding to sell the ancestral properties. In the absence of any rule requiring him to follow the order strictly it cannot be said that there has been any material irregularity within the meaning of R. 90. On this ground alone the application is liable to be dismissed.

The oral evidence to show that the objector was in the village on the day when the notice under O. 21, R. 66, was sent out to be served on him has been believed by the Court below. No serious discrepancies have been pointed out to us and the statement of the judgment-debtor as to his absence on 29th January 1928, when the notice was served, is uncorroborated by any other evidence. In any case the notice was affixed on the door of his house which was occupied by the other members of his family and there was thus good substituted service.

The learned advocate for the appellant has next contended that the Official Receiver was a necessary party to the mortgage suit and in his absence the sale cannot bind the mortgaged property. We find that this interpretation of the provisions of Ss. 16 (4) and (5), Provincial Insolvency Act, 1907, has been laid down by their Lordships of the Privy Council in the case of *Kala Chand Banerji* v. *Jagannath Marwari* (1). The language of the corresponding S. 28 of the new Act is practically identical. But this can only mean that the right of the Official Receiver to redeem the property has not been extinguished by the sale. It may be open to him still to sue for redemption, and it may be possible for him to object to the mortgagee's name being entered in the schedule of creditors if the security is not given up; but it is quite clear that the judgment-debtor cannot get the sale set aside on that ground. It is not for an execution Court to decide that the decree passed against the appellant does not bind him or that it is not capable of execution. So far as the appellant is concerned he is bound by the sale unless he can satisfy the Court that there has been a material irregularity in consequence of which he has suffered substantial injury. In our opinion he has failed to establish that. The appeal is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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(1) A. I. R. 1927 P. C. 108=54 Cal. 595=54 I. A. 190 (P. C.).

A. I. R. 1931 Allahabad 160

NIAMATULLAH AND KISCH, JJ.

(*Hafiz*) *Allah Bakhsh*—Plaintiff—Appellant.

v.

Hamid Khan—Defendant — Respondent.

Second Appeal No. 1772 of 1927, Decided on 15th April 1930, from decree of Addl.Sub-Judge, Agra, D/-21st June 1927.

(a) Evidence Act, S. 101—Scope (*Obiter*).

If the execution of a document which contains an admission by a debtor to have received the debt is established, the burden of proving want of consideration is shifted to the defendant who disputes it. (*Obiter*). [P 161 C 2]

(b) Contract Act, S. 25—Time-barred debt cannot be recovered on basis of mere acknowledgment to pay.

Where it is sought to recover a time-barred debt on the strength of subsequent promise to pay made in writing by the debtor, the document relied on must contain an express promise to pay. A promise to pay cannot be inferred from a mere acknowledgment: 30 *All.* 268 and *A. I. R.* 1930 *All.* 467, *Foll.*

[P 162 C 1]

(c) Specific Performance — Acknowledgment of time barred debt containing express promise to execute deed of conditional mortgage—Suit for specific performance can be brought (*Obiter*).

Where, in an acknowledgment of a time-barred debt there is an express promise to execute a deed of conditional mortgage, a suit for specific performance can be brought and in the alternative the plaintiff can pray for damages for breach of agreement to execute the mortgage (*Obiter*). [P 162 C 1]

(d) Civil P. C., O. 6, R. 17 — Amendment of plaint.

An amendment of plaint should not be granted at the stage of second appeal, when the amendment, if allowed would prejudice the defendant by debarring him from raising the plea of limitation. [P 162 C 1, 2]

A. P. Pandey—for Appellant.

N. P. Asthana—for Respondent.

Niamatullah, J.—This is a plaintiff's appeal arising out of a suit brought by him for recovery of Rs. 1,671-8-6 alleged to be due under an acknowledgment, dated 8th August 1924, executed by the two defendants: Mt. Mumtazi Begam defendant 1, and her husband Hamid Khan defendant 2. Both the Courts below have dismissed the suit. Hence this second appeal. The acknowledgment is in the following terms:

> "That the second executant (Hamid Khan) has borrowed Rs. 1,900 from Hafiz Allah Bakhsh, son of Hafiz Nabi Baksh caste Sheikh now resident of Nai Mandi, Agra City and utilized in his business, and the said Hafiz has been persistently demanding his dues and at present we cannot manage to pay off his debt we agree to execute an agreement for mortgage by conditional sale within four months of this."

It has been found, and the finding has not been contested before us, that the liability acknowledged in the writing quoted above represented certain debts due from defendant 2 to the plaintiff which had become barred by limitation. The case therefore has to be decided on the assumption that the above writing acknowledged a time-barred debt. Defendant 1, Mt. Mumtazi Begam, was joined in the acknowledgment as the shop which it was agreed would be mortgaged by conditional sale belonged to her. For some reason the plaintiff discharged Mt. Mumtazi Begam from the array of parties confining his claim to defendant 2, her husband. Both the defendants contested the suit. We need not refer to the written statement of defendant 1. Defendant 2 denied the execution of the acknowledgment, pleading that he was an illiterate man and if the acknowledgment sued on was found to bear his signature it must have been obtained by some fraudulent means. The Courts below have held that the plaintiff failed to establish the passing of consideration under the acknowledgment sued on. The lower appellate Court observes:

> "Most probably there was some debt due by the defendant to this plaintiff but its amount has not been established on the record except for the recital in the deed of agreement with which the illiterate defendant who can only sign his name cannot be bound in the absence of any reliable evidence on record that the agreement was executed with full knowledge of its contents or that it was ever read out to him."

The learned Subordinate Judge seems to have been of opinion that the plaintiff must establish not only the due execution of what he calls the agreement but also establish the passing of consideration independently of the recital. If the disposal of the appeal before us had depended upon that question, we would have in all probability differed from the view taken by the learned Subordinate Judge, as if the execution of a document which contains an admission by a debtor to have received the debt is established the burden of proving want of consideration is shifted to the defendant who disputes it. But there is a serious difficulty in the plaintiff's way to succeed in the suit.

It has already been mentioned that the sum of Rs. 1,900, acknowledged by the writing already referred to represented a time barred debt. The learned advocate for the appellant has argued before us that in so far as it is an acknowledgment of existing liability, it implies a promise to pay. Therefore, it is argued under S. 25 (3), Contract Act, a time-barred debt is a sufficient consideration for an agreement to pay. This argument is untenable in view of at least two rulings of two different Division Benches of this Court. It was held in *Gobind Das* v, *Sarju Das* (1) that:

> "where it is sought to recover a time-barred debt on the strength of a subsequent promise to pay made in writing by the debtor, the document relied on must contain an express promise to pay. A promise to pay cannot be inferred from a mere acknowlegment."

In this case like the one before us the plaintiff had sued on the basis of an acknowledgment regarding a time-barred debt. The argument put forward on his behalf was that in so far as an acknowledgment implied a promise to pay S. 25 (3), Contract Act, applied and consequently the acknowledgment in suit should be deemed to be for consideration and not void for want of it. This argument was rejected by this Court and the suit was dismissed. Recently, another Bench of this Court followed the aforesaid ruling. It was held in *Raj Narain Rao* v. *Ram Sarup* (2), that S. 25, Contract Act applied only to a case in which there was an express promise to pay and had no application to a case where an implied promise was inferred from a mere acknowledgment. In this view, the plaintiff's suit for recovery of money on foot of an implied promise to pay must fail on the ground that the agreement sought to be enforced is without consideration, S. 25 (3), Contract Act, not being applicable to the case.

The learned advocate for the appellant, in the last resort, requested us to allow him to amend the plaint so as to make his suit one for specific performance. It is quite true there is an express promise to execute a deed of conditional mortgage and, if the suit had been one for specific performance, S. 25 (3), Contract Act, could have been invoked by the plaintiff for enforcement of an agreement to have a deed of mortgage by conditional sale executed by the defendant. We express no opinion as to whether a suit for specific performance of that nature could have succeeded on the merits, but such a suit could have been conceivably brought and in the alternative the plaintiff-appellant could have claimed damages for breach of an agreement to execute a deed of mortgage by conditional sale. This however is not the present frame of the suit and to allow the plaint to be amended at this stage will be to deprive the defendant of the plea of limitation applicable to a suit for specific performance. The amendment of the plaint, if allowed, would date back to the institution of the suit, and is for that reason calculated to prejudice the defendant to a very great extent. Under these circumstances, we are unable to exercise our discretion in second appeal in allowing the amendment of the plaint to be made in the manner desired by the plaintiff-appellant. In the view of the case that we have taken, this appeal must fail. It is accordingly dismissed with costs, including counsel's fees in this Court on the higher scale.

S.N./R.K. *Appeal dismissed.*

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(1) [1908] 30 All. 268=5 A. L. J. 274=(1908; A. W. N. 129.

(2) A. I. R. 1930 All. 467.

✲ ✲ A. I. R. 1931 Allahabad 162

Full Bench

MUKERJI, BANERJI, KENDALL, KING AND SEN, JJ.

Anand Prakash and *another* — Applicants.

v.

Narain Das-Dori Lal and *another* — Opposite Parties.

Second Appeals Nos. 7 and 8 of 1928, Decided on 12th November 1930, from order of Dist. Judge, Moradabad, D/- 16th January 1928.

✲ ✲ **(a) Provincial Insolvency Act (1920), S. 28—Hindu father governed by Mitakshara adjudicated insolvent—His joint son's share does not vest in Official Receiver though debt payable is one which it is pious duty of sons to pay—Hindu law, Debts.**

When a joint Hindu father governed by Mitakshara law is adjudicated an insolvent, his joint son's share, assuming that the debt payable by the father is one which it is the pious duty of the son to pay, does not vest in the receiver : *A. I. R.* 1925 *P. C.* 18, *Rel.·on*; (*Case law discussed*). [P 167 C 2 P 168 C 1]

✲ ✲ **(b) Provincial Insolvency Act (1920), S. 28 — Receiver can seize son's share and sell it to satisfy father's debt which it is the pious duty of sons to pay — Hindu law, Debts.**

It is open to the receiver in insolvency to seize the Hindu son's share and sell it in order to satisfy the debts payable by the father when the debt payable by the father is one which it is the pious duty of the son to pay : *A. I. R.* 1925 *P. C.* 18, *Rel. on.*, (*Case law discussed*). [P 171 C 1]

(c) Provincial Insolvency Act (1920), Scope—Insolvency law being administrative or adjective law· provisions are of general character.

The insolvency law is mainly an administrative or adjective law a law of machinery to bring about certain results, namely the satisfaction of the insolvent's debts. The provisions contained in the Act are therefore of a general character. [P 168 C 1]

✱ ✱ **(d) Provincial Insolvency Act (1920), S. 28 (2) — "Whole property" means entire joint family property which father can transfer.**

The expression "whole property" in S. 28 (2) means the entire joint family property which the father himself can transfer, or against which execution may be had to enforce payment of the debt. [P 169 C 2]

(e) Precedent—Case is authority for only what it decides.

A case is an authority only for the proposition that it decides and not for every proposition that may appear to follow logically from the decision. Law is not always logical. *Quinn* v. *Leatham*, (1901) *A. C.* 495, *Ref.* [P 172 C 2]

(f) Precedent—Duty of Court—Court in India must not depart from consistent course of decisions on basis of dictum of Privy Council not necessary for deciding case before them.

The Courts in India must not depart from a long consistent course of decisions simply on the basis of a dictum or a supposed dictum of their Lordships themselves on a matter on which it was not directly necessary for their Lordships to decide in the case : *A. I. R.* 1924 *P. C.* 50, *Foll.* [P 172 C 2]

(g) Interpretation of Statutes—Language clear—Argument of convenience is not sound argument.

The argument of convenience is not very often a sound argument when the language of the law is clear beyond doubt. [P 173 C 2]

(h) Interpretation of Statutes — Principle underlying statute should not be discussed unless words are ambiguous and principle helpful in clearing ambiguity.

It is not either necessary or permissible to examine and discuss the principle underlying a statute unless the words of the statute are vague and ambiguous and unless the principle is helpful in clearing up the ambiguity. [P 175 C 2]

(i) Interpretation of Statutes — Language of statute should be examined and its natural meaning taken except in case of technical terms--Rules for interpretation explained.

In interpreting a statute the proper course is in the first instance to examine the language of the statute itself and ask what its natural meaning is. Except where the terms used in the statute have acquired a technical sense, ordinary meaning should be attached to the word or words used ; and the intention of a statute has to be gathered from the words used and not from any speculation about its object. Regard has to be paid to three important factors :

1. A statute enacts everything essential to its existence.
2. Remedial measures must be liberally construed so as to advance the remedy.
3. Where the words are ambiguous and two meanings are possible, scope and object of the enactment may be looked at for the elucidation of the meaning. [P 175 C 2 ; P 176 C 1]

(j) Presidency Towns Insolvency Act (1909), S. 52 (2) (b)—Ruling based on S. 52 (2) (b) also applies to Provincial Insolvency Act.

There is nothing in the Provincial Insolvency Act corresponding to S. 52 (2) (b), Presidency Towns Insolvency Act, but the omission does not furnish any ground that a ruling based on S. 52 (2) (b) does not apply to the Provincial Insolvency Act : *A. I. R.* 1924 *Mad.* 411 (*Other cases referred.*) [P 173 C 2]

Iqbal Ahmad, Panna Lal, Haripal Varohini and *U. S. Gupta* — for Applicants.

P. L. Banerji, M. A. Aziz and *Shabd Saran*—for Opposite Parties.

Sen, J.—This and the connected appeal raise the same questions of law and may be disposed of together.

A creditor firm known by the style of Narain Das Dori Lal applied that the following six firms be adjudicated insolvents : (1) Hazari Lal Tota Ram of Bahjoi; (3) Bhekhari Das Hazari Lal of Bombay; (3) Bhekhari Das Hazari Lal of Jallandhar ; (4) Bhekhari Das Hazari Lal of Hoshiarpur ; (5) Bhekhari Das Ishar Das of Hapur and (6) Bhekhari Das Hazari Lal of Bahjoi.

The petitioning creditors stated in their application, dated 21st May 1925, that the partners of these firms were 29 in number and included Hazari Lal, Tota Ram and their minor sons. Anand Prakash is a minor son of Hazari Lal. Chaitan Sarup is a minor son of Tota Ram. It has not been controverted that Hazari Lal and Tota Ram, together with their sons, adults and minors, are members of a joint Hindu family. The application for adjudication was opposed, amongst others, by Anand Prakash and Chaitan Sarup upon a variety of grounds. They contended that they were minors and as such could not be adjudicated insolvents. They disowned all connexion with the first five firms which have been mentioned above, and contended that they were not liable for the debts contracted by those firms inasmuch as the debts were incurred not for the benefit of the family, but to meet losses in wagering transactions which used to be carried on by those firms. They further contended that the firm of Bhekhari Das Hazari Lal of Bahjoi was their ancestral business and that the assets of the said firm or their interests therein could not be seized in insolvency.

The parties agreed that the first five firms mentioned above may be adjudicated insolvents. Acting upon this agreement the Court by its order dated 17th June 1926 declared them to be insolvents and appointed Babu Raghubir Saran

Vakil as the Official Receiver. The Court made no pronouncement on the question as to the minors' liability to be declared insolvents and left the questions open as to whether the minors were partners in the firms and whether their properties were liable for the debts of the petitioning creditors.

Later on these matters were considered by the Court, and it came to the conclusion that the firms had been adjudged insolvents and not the minors individually, but that the adjudication could be operative against the minors' interest in the joint family business for the payment of their father's debts. The Court further held that the minors had failed to prove that the debts were due to losses arising from gambling transactions entered into by their fathers and that the interests of the minors in the firms were liable for the payment of such debts.

> "All the property belonging to the insolvent firms, including the objectors' shares therein, is responsible for the payment of debts due from the insolvent firms."

As the result, the minors' objections were overruled.

The lower appellate Court has affirmed the decision. While conceding that a minor cannot be adjudicated an insolvent, it has held that

> "against the minors' interest in a firm adjudication may be made"

and

> "that the receiver can, in circumstances like the present, sell the property of the sons of the father, (in a joint Hindu family) who has been declared an insolvent."

Reliance has been placed upon *Jag Mohan* v. *Grish Babu* (1) and *Om Prakash* v. *Moti Ram* (2). It further came to the conclusion that the onus of proving that the debts were incurred on account of losses in gambling lay upon the minors which they had failed to discharge.

One of the pleas raised in the memorandum of appeal is clearly due to a misapprehension. The minors could not have and have not been adjudicated insolvents. There is the clearest pronouncement of both the Courts on this point. This matter therefore need not be canvassed any further.

This Court is bound by the finding of fact reached by the lower appellate Court as to the nature of the debt. The onus clearly lay upon the sons who were challenging the legality or validity of the debt. This they have failed to prove and the finding of the lower appellate Court must be accepted that the debts are not tainted either with immorality or illegality.

It is not questioned and, indeed it cannot be controverted, that the assets of the bankrupt father vested in the Official Receiver. It is equally clear that the sons of a Hindu father are under a pious obligation to discharge his debts. The point which calls for determination is whether the interest of the sons in the joint estate vests in the receiver upon the father's bankruptcy or is the property of the insolvent, which the receiver can sell, under S. 28 (2), Act 5 of 1920.

In *Bawan Das* v. *O. M. Chiene* (3) Piggot and Walsh, JJ., held that as the effect of adjudication the receiver took over all rights in the property of the insolvent father, including the right to alienate coparcenary property belonging to himself and his minor sons in satisfaction of antecedent debts, not tainted with immorality. The decision proceeds mainly upon the authority of *Fakir Chand Moti Chand* v. *Moti Chand Harakh Chand* (4) and *Rangaya Chetty* v. *Thalikachalla Mudali* (5). These decisions however were not founded either upon the text or upon the general scheme of the Provincial Insolvency Act. They have been reviewed in detail by the Privy Council in *Sat Narain* v. *Behari Lal* (6).

A similar view appears to have been taken in *Official Assignee* v. *Ram Chandra Ayyar* (7), *Khem Chand* v. *Narain Das* (8), *Sellamuttuservai, In re* (9), *Sankaranarayana Pillai* v. *Rajamani* (10) and *Kuppuswami Goundan* v. *Marimuthu Goundan* (11).

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(1) [1920] 42 All. 515=58 I.C. 557.
(2) A.I.R. 1926 All. 447=94 I.C. 175=48 All. 400.
(3) A. I. R. 1922 All. 179=64 I. C. 976=44 All. 316.
(4) [1883] 7 Bom. 438.
(5) [1896] 19 Mad. 74.
(6) A. I. R. 1925 P. C. 13=84 I. C. 883=52 I. A. 22=6 Lah. 1 (P. C.).
(7) A. I. R. 1923 Mad. 55=68 I. C. 898=46 Mad. 54.
(8) A. I. R. 1926 Lah. 41=89 I. C. 1022=6 Lah. 493.
(9) A. I. R. 1924 Mad. 411=80 I. C. 108=47 Mad. 87 (S. B.).
(10) A. I. R. 1924 Mad. 550=83 I. C. 196=47 Mad. 462.
(11) A. I. R. 1925 Mad. 52=82 I. C. 438.

In *Om Prakash* v. *Moti Ram* (2) one of the members of this Bench referred to S. 28, Cl. (2), Provl. Insol. Act (5 of 1920) and made the following observation:

> "The question is whether the expression "property of the insolvent, means the property which the insolvent, as the father of his sons, was entitled to call his own and sell it under certain circumstances or that share which goes to the father in the event of a partition between himself and the sons. On the authority so long prevailing in this Court we take it that the former meaning is the proper meaning of the property as used there."

Sulaiman, J, also referred to the trend of authorities of this Court which

> "allowed the receiver in insolvency to dispose of the joint family property in lieu of the debts of the father."

The learned Judges did not think that those authorities had been overruled by the Privy Council by their decision in *Sat Narain* v. *Behari Lal* (6). In the *Allahabad Bank Limited, Bareilly* v. *Bhagwan Das Johri* (12) Dalal and Boys, JJ. held that the insolvency of a Hindu father did not vest interests of the sons in the joint family property in the receiver. They followed the decision of the Privy Council in *Sat Narain* v. *Behari Lal* (6) upon the ground that although the sections construed in that case were those of the Presidency Towns Insolvency Act 3 of 1909, the definition of property in the last mentioned Act corresponded to that of the Provincial Insolvency Act (S. 2 (d), Act 5 of 1920.) In *Trayam Keshar Prashad* v. *B. Basant Kumar Mukerji*, *A. I. R.* 1930 *Oudh* 36 Stuart, C. J., and Raza, J. have held that upon the bankruptcy of the father, the share of the insolvent coparcener does not vest in the assignee. They have referred to the decision of this Court in *Om Prakash* v. *Moti Ram* (2) and *Bawan Das* v. *O. M. Chiene* (3) and refused to follow the same. In *T. S. Bala Venkata Seetharama Chettiar* v. *The Official Receiver, Tanjore* (13) it was held that on the insolvency of a Hindu, his power to sell his sons' share for paying his just and proper debts vests in the Official Receiver but the sons' shares themselves do not so vest. The Judges were agreed that the power vests in the receiver under S. 28 as the insolvent's property but they were not agreed as to whether it vested as "property" under S. 2 (d) of the Act. In *Chairman, District Board, Monghyr* v. *Sheodutt Singh* (14), Ross and Kulwant Sahay, JJ., held that the receiver has, in circumstances similar to the present, the right to sell the share of the son to liquidate the father's debt not incurred for immoral purposes. In *Shripad* v. *Basappal* (15) at p. 787 (of 49 *Bom.*) Macleod, C. J., held that the power of a manager of a joint family to sell did not vest in the receiver; but his view was not shared by Coyajee, J.

It is manifestly clear from the above that there is a sharp cleavage in the views of the Indian Courts, and no less than three sets of divergent views emerge from these decisions.

The trend of the rulings of this Court has been that it is permissible to a receiver in bankruptcy to dispose of the entire joint family property in liquidation of the debts of the father who has been declared insolvent. It is not necessary to enumerate these decisions. The decision in *Bawan Das* v. *O. M. Chiene* (3) may be referred to as a typical instance.

It has been argued that the authority of these decisions has been considerably weakened, if not overruled, by the pronouncement of the Privy Council in *In re Sat Narain* v. *Behari Lal* (6). Their Lordships had to consider in that case the texture and scheme of the Presidency Towns Insolvency Act, and their judgment was mainly founded upon the language and effect of S. 52 of that Act. They concluded that the insolvency of the father did not, under the said Act, vest the property of the sons in the Official Receiver so as to deprive the sons of their right to maintain a suit for pre-emption. They emphasized upon that fact and made it perfectly clear that the question in issue before them had to be determined by an examination of the provisions of the Presidency Towns Insolvency Act and that a recourse to any other Act or Acts was not legitimate or permissible.

The point which arises in this appeal has to be answered upon a consideration of the provisions of the Provincial Insolvency Act (5 of 1920). Many of the provisions of the two Acts are common.

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(12) A. I. R. 1926 All. 262=92 I. C. 309=48 All. 343.

(13) A. I. R. 1926 Mad. 994=97 I. C. 825=49 Mad. 849 (F. B).

(14) A. I. R. 1926 Pat. 458=95 I. C. 361=5 Pat. 476.

(15) A. I. R. 1925 Bom. 415=89 I. C. 996=49 Bom. 785.

The scheme and the objective are also common. The two Acts are in many respects in pari materia. S. 2 (d), Provl. Insol. Act, is a verbatim reproduction of S. 2 (c), Presidency Towns Insolvency Act. Again S. 17 corresponds to S. 29 (2), Act 5 of 1920. But S. 52, Act 3 of 1897 has no counterpart in Act **5 of 1920.**

It has been strenuously contended that the Privy Council decision contains some general observations which have the effect of oversetting the decision of this Court, if not expressly, at least by implication. This argument proceeds upon an assumption for which no justification can be found in any part of that decision. The entire fabric rests upon a construction of S. 2, Cl. (e), and Ss. 17 and 52. After quoting a passage from the written statement of Behari Lal and Jamna Das, their Lordships observe:

> "That means that when a Hindu who happens with his sons to constitute a joint family, subject to the law of Mitakshara, is adjudged an insolvent under the Presidency Towns Insolvency Act, 1909, not only his own right but all the rights and interests of the sons who are his coparceners in joint family property vest in the Official Assignee, by virtue of the adjudication alone, that is a startling proposition.
>
> It must depend upon the wording of the Presidency Towns Insolvency Act, 1909. . . . .

Again their Lordships observe at p. 89:

> "Their Lordships are of opinion that the question to be decided in this appeal must be decided on the wording of the Presidency Towns Insolvency Act, 1909, and on that Act alone."

In view of these observations, there is no room left for the argument that the Privy Council laid down any general propositions as to the effect of insolvency outside the purview of Act 3 of 1909.

There can however be no doubt that the decision of the Privy Council substantially rests upon the definition of property. It has been noticed already that the definition of property in the two Acts is identical. Their Lordships observed:

> "The father's power to dispose of the joint property is not absolute but conditional on his having debts which are liable to be satisfied out of that property and S. 2 seems to contemplate an absolute and unconditional power of disposal."

The power to dispose of the property will thus depend upon the nature and character of the debt. Where a dispute exists as to the legality or propriety of the debt, does the decision rest with the receiver ? Does it rest with the insolvency Court ? Does the property vest in the receiver immediately and at once as the result of the father's insolvency in anticipation of a decision on the point ? Does it vest as the result of a decision subsequently arrived at ? Has the word "property" in the Provincial Insolvency Act a wider connotation? Does the absence of a section corresponding to S. 52, Presidency Towns Insolvency Act, justify a more liberal construction of that term in the Provincial Act, so as to warrant either the immediate vesting of the estate in the receiver or arm him with a power to sell ? These matters have not been sufficiently considered in the majority of the cases that have been cited by the counsel on either side.

In view of the fact that the question dealt with above is one of general importance and on which there is a great divergence of judicial pronouncement of the Courts of this country including this Court, it is desirable that the point should be referred to a larger Bench for decision.

Mukerji, J.—I agree with my learned brother that there is no order adjudicating the appellants as insolvents and they therefore need not be apprehensive on that point. I also agree that the debts in respect of which the appellants' fathers have been declared insolvents have not been proved to be such as it is not the duty of a joint Mitakshara son to pay. On the third and more important question however I am unable to share the doubts of my learned brother.

I have definitely held in the case of *Om Prakash* v. *Moti Lal* (2) that it is open to a receiver in insolvency to seize the joint family property, where the insolvent is a father, by sale, not only of the father's share in the joint family property, but also the share of the son, provided of course the debt or debts which have to be paid are not tainted with immorality. This I held sitting with Sulaiman, J. In a subsequent case I again expressed the same view sitting with Bennet, J., in *Ram Ghulam* v. *Kailash Narain* (16). This opinion was expressed in conformity with the Full Bench case of Madras reported in *Bala Venkata* v. *Official Receiver, Tanjore* (13) and the Patna report in *Chairman, District Board, Monghyr* v. *Sheodutt Singh* (14).

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(16) A. I. R. 1931 All. 59=127 I. C. 584=52 All. 493.

There is however a Division Bench case of this Court in *The Allahabad Bank* v. *Bhagwan Das* (12) in which two learned Judges of this Court, namely Dalal and Boys, JJ., have taken a contrary view.

My brother Sen, J., seems to be inclined to accept the view expressed by Dalal and Boys, JJ. In this state of affairs the opinion in this Court seems to be evenly divided. Sulaiman and Bennet, JJ., and myself take a different view and Sen, J., is inclined to agree with Dalal and Boys, JJ.

In these circumstances I agree that this case should be referred to a larger Bench and it is desirable that the Bench should be as large as possible, having regard to the fact that six Judges of this Court have already expressed their views one way or the other.

Reference. — Having regard to our judgments we direct that the following points be referred to a Full Bench for decision:

(1) When a joint Hindu father governed by the Mitakshara law is adjudicated an insolvent, whether his joint son's share vests in the receiver (assuming that the debt payable by the father is one which it is the pious duty of the son to pay)?

(2) Whether it is open to the receiver in insolvency to seize the son's share and sell it in order to satisfy the debts payable by the father (assuming that the debt payable by the father is one which it is the pious duty of the son to pay)?

(3) If the receiver in insolvency cannot proceed against the son's share (in the aforesaid circumstances) has the receiver any and what remedy against the son's share in the joint family property?

Opinion.

Mukerji, J.—The questions that have been referred to a Full Bench for decision are three, namely:

(1) When a joint Hindu father governed by the Mitakshara law is adjudicated an insolvent, whether his joint son's share vests in the receiver (assuming that the debt payable by the father is one which it is the pious duty of the son to pay)?

(2) Whether it is open to the receiver in insolvency to seize the son's share and sell it in order to satisfy the debts payable by the father (assuming that the debt payable by the father is one which it is the pious duty of the son to pay)?

(3) If the receiver in insolvency cannot proceed against the son's share (in the aforesaid circumstances) has the receiver any and what remedy against the son's share in the joint family property?

On the first question, namely whether in the case of the insolvency of a Hindu father governed by Mitakshara law, his joint son's share vests in the receiver, it being assumed that the debt payable by the father is one which it is the pious duty of the son to pay, the answer ought to be in my opinion, in the negative and for these reasons: The law which declares what is the property that in the case of adjudication of a person, should vest in the receiver, is contained so far as these provinces are concerned, in S. 28, Provl. Insol. Act of 1920. Sub-S. 2 of that section reads so far as it is material for our present purposes, as follows:

> "On the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided. . . ."

Now, I take it that only that property can vest in the Court or in a receiver which was, before the vesting, vested in the insolvent himself. Can we say, in the case of a joint Hindu family governed by the law of Mitakshara that the son's share was vested in the father? We cannot say so, for the simple reason that while the family is joint, no member of the family is in a position to say what property is vested in him. The entire property belonging to the family is vested in each and every one of the several members constituting the family. In Mayne's Hindu Law, Edn. 9, at p. 344, the following occurs as a description of an undivided Hindu family:

> "There is no such thing as succession, properly so called in an undivided Hindu family. The whole body of such a family consisting of males and females, constitutes a sort of corporation, some members of which are coparceners that is, persons who on partition, would be entitled to demand a share, while others are only limited to maintenance."

Such being the nature of the property held by a joint Hindu family, it is impossible to say that the father, even as the head of the family has in him vested any portion of the family property. Much less can it be said that the son's share that is to say, the share which a son might get on partition in the family is vested in the father. If that be the case, it must follow that on the declaration of the father as an insolvent, the son's share does not vest in the receiver. My answer therefore to point 1, is as already stated, in the negative.

The Privy Council in the case of *Satnarain* v. *Behari Lal* (6), expressed the same view, .though for different reasons. I shall examine that case, at length, later on.

Point 2—The question that is to be answered, when put in different words, is whether the receiver is entitled to alienate, not only the share which an undivided father would get in the family property, if a partition were effected at the date of the adjudication or whether the receiver is entitled to alienate not only the father's share as described above, but the whole of the family property in the hands of the father?

The answer to this question will depend on a clear perception of the sense of the word 'property' as used in sub-S. 2, S. 28, Insolvency Act of 1920. Before I proceed to consider this point, I would like to make a few general remarks as to the scheme of the Insolvency Act and its object.

The Insolvency Act is designed to give relief to a debtor. When a man has incurred several debts which he is unable to pay, the insolvency Court grants him relief from being harassed by his creditors, if, to speak broadly, two conditions are fulfilled.

One is that the debtor has not done any act of dishonesty with respect to the debts and the second is that he gives over the entire property that he possesses (excepting those enumerated in sub-S. 5, S. 28) into the hands of the Court. The insolvency law provides the machinery by which the insolvent can be given relief and also the machinery by which the creditors, who are not secured in the payments of their debts, are to be satisfied. The law, therefore is mainly an administrative or adjective law, a law of machinery to bring about certain results, namely the satisfaction of the insolvent's debts. One or two provisions by way of substantive law may be found within the four corners of the Act, but we are not concerned with them at present.

Such being the character of the Insolvency Act, the provisions contained therein must be general, namely such as may apply to all kinds of debtors whether they are Hindus or Mahomedans or Christians, Buddhists or Jains. What the law requires in the case of each debtor, who wants to be declared an insolvent or whom his creditors want to be declared an insolvent, is that "the whole of the property" of the insolvent shall be handed over to the Court or to the receiver that the Court may appoint.

Now, what a person possesses may be different in the case of different substantive laws that govern him. For example, where an insolvent is a Mahomedan widow, she may possess a claim against her husband's estate, for dower. This claim against the husband's estate for dower will be one of the properties owned by her. In the case of a Hindu widow, if she happens to have inherited any property from her husband, her life-estate in her husband's property would be one of the properties owned by her. In the case of a Christian woman, she may possess a decree for alimony against her husband. Thus, it will be seen, that what would be the property of a particular insolvent may be different in different cases. It would all depend on the personal law of property that governs the insolvent.

The law of insolvency has been borrowed in India from the English law and in many cases, the language employed in codifying the law in India is the same as employed in England. This fact will go to strengthen my opinion that the insolvency law is a perfectly general law and it would be a mistake to suppose that the legislature has taken into consideration the case of a joint Hindu father, particularly. I do not expect to find within the four corners of the Insolvency Act of 1920 any particular provision which may have been meant to apply to a joint Hindu father and to him alone.

Bearing in mind the above remarks, we have now to proceed to see what is the property of the father which should be available to the receiver or the Court in order that the insolvent father's debts may be paid.

The father, under the peculiar system of Mitakshara law holds a unique position with regard to his family. If he or any of his sons seeks partition, the father may be given a particular share according to the circumstances of the family, at the moment of the partition. The father's share may vary from time to time. If an additional son is born, the share to be received on partition is diminished and if one of several sons happens to die, the share would increase. This is one position of the father. Another position of the father is that he is the head of the family and as such, the support and maintenance of the family is under his care. He must have credit in the market for the sake of the family and the traders who would deal with him will naturally look upon him, not as a person holding a certain fractional share in the family property but as the man re-, presenting the whole family. For practical purposes therefore it was necessary to give the father larger power over the estate of the family than his fractional share in the family taken by itself would warrant. The necessity for giving the father credit in the market led to the invention of the fiction that it is the son's duty to pay a father's debt. I am not ignoring the religious side of the question. On the religious side it is the duty of a son to pay his father's debts irrespective of whether he has got any assets from the father and irrespective of whether there is any joint ancestral property left. We are however not concerned with the religious aspect of the case. It is now settled law, so far as the British Indian Courts are concerned that a joint son cannot be made liable for his father's debts unless there is any joint family property in his hands out of which to pay it.

To go back to the history of the son's liability for father's debt we find that the doctrine of the pious duty of a son to pay the father's debt has led to the following rules of law, as laid down by their Lordships of the Privy Council in *Brij Narain* v. *Mangal Prasad* (17) at p. 104 (of 46 *All.*) (1). The father . . . by incurring debt so long as it is not for an immoral purpose may lay the estate open to be taken in execution proceeding upon a decree for payment of that debt. (2) The father is entitled to alienate the entire family property in order to discharge his own antecedent debts.

(3) The liability of the sons to pay the father's debt, i.e., the liability of the son's share in the estate for the father's debt is not affected by the question whether the father is alive or dead.

In Mayne's Hindu Law and Usage, Edn. 9, 1922, the law on the subject is stated at p. 409:

> "After some conflict of decisions, the last view (the whole property of the family in the hands of the father as representing the joint family, is liable for the father's debt) has been finally decided to be the correct one."

At p. 413 the law is stated as follows:

> "The general rule is that no member of an undivided family can by any process appropriate for his own benefit a larger portion of the family property than the share he would obtain on partition. The exception is that, where the father has incurred a debt which would bind his son the creditor can obtain satisfaction of the debt either by a conveyance from the father or by a decree of Court to the extent of even the whole family property."

In this state of Hindu law, the question is what is the "whole property." of the father within the meaning of S. 28, sub-S. 2, regard being had to the fact that the father's debts which are binding on the son being debts untainted with immoralitly that is to say whether it is the fathers' undivided fractional share being equal to that of any one of the sons or whether it is the entire family property which the father is entitled to sell to pay his own debts or which a creditor is entitled to take by way of attachment and sale to enforce payment of his debts contracted by the father. Ordinarily it would appear to me that the "whole property" should mean the entire joint family property which the father himself can transfer or against which execution may be had to enforce payment of the debt.

The argument however on the other side is that the property of the father is only his undivided share in the joint family property although the father may have a right under the Hindu law to sell the son's share as well in order to pay his own debts. It is further urged that the "right" which the father has so to sell cannot be "property" at all. I am unable to accept this view of the case. Strictly speaking in a joint family the father has no definite share in the joint family property till partition has been agreed upon or affected. Mayne, in his Hindu Law and Usage, Edn. 9 at p. 345, describing the position of a member in a joint Hindu family, governed by the Mitakshara law, says:

> "The position of any particular person as son, grandson or the like or as one of many sons or grandsons, will be very important when the time for partition arrives because it will determine the share to which he is then entitled. But until that time arrives he can

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(17) A. I. R. 1924 P. C. 50=77 I. C. 689=51 I. A. 129=46 All. 95 (P.C.).

never say, I am entitled to such a definite portion of the property because next year the proportion he would have a right to claim on a division might be much smaller, and the year after much larger as births or deaths supervene."

Therefore when we talk of an insolvent's undivided property which should vest in a receiver, are we to take the insolvent's share as he would get on partition at the date of his application to be adjudged an insolvent or at the date of his adjudication? Then again a wife, a mother or a grandmother is entitled to a share in particular cases or where they get such shares the father's share diminishes. In finding out the "undivided share" of the father what rule of partition will be followed? If we treat the partition as at the instance of a son, the wife, theson's mother, would get a share. The Insolvency Act does not lay down any rule on the point. Indeed,till a partition is effected, it cannot be said what the share of the insolvent is there in the family property.

Again in one sense where a Hindu father being the leader of a joint Hindu family is adjudged an insolvent he had no property at all and therefore nothing vests in an Official Receiver. On the other hand because the father is entitled to treat the entire family property as his own and separate property for the purposes of satisfaction of his own debts it may very well be urged that the receiver is entitled to sell the entire family property however small the share to be allotted to the insolvent on partition at any particular time may be. In the view however that the father's undivided share vests in the Official Receiver it must be taken that the father's right to sell his son's share also vests in the receiver. The question then that remains to be considered is whether such a right is also "property" and whether such right vests as property in the Official Receiver. This leads me to a consideration of what property is. Williams in his Principles of the Law of Real Property, Edn. 24, 1926 deals with the nature of property and I propose to make some extensive quotations from the book. In the very introductory chapter he deals with the subject and starts by saying at pp. 3 & 4 that the word property is used to denote different things. Then he goes on to say :

"Property then may mean, either (1) ownership or (2) the object or objects of ownership or (3) valuable things, according to the context."

We are entitled to say when we read in S. 28, sub-S. 2 that the whole of the property of the insolvent shall vest in the Court or in a receiver, that the word " property " is used in the sense of " valuable things." That is to say all things that can be turned into money in order to pay off the insolvent's debts.

Williams continues (at p. 4),

"And property, as meaning valuable things, includes incorporeal as well as corporeal things. That is to say, property consists of two kinds of things : (2) tangible things in their owner's possession ; (2) valuable rights of various kinds unaccompanied with possession of anything corporeal. Or, if it be preferred to treat property as an aggregate of rights, the same classification may be propounded in this way : Property consists: (1) of rights of ownership in tangible things clothed with possession ; (2) of bare rights or mere rights, unaccompanied with possession, which are nevertheless valuable. But it is more in accordance with the treatment of the subject which has obtained in our law, as well as with common usage, to classify property as consisting of corporeal things, as land or moveable goods, or of incorporeal things, as mere rights regarded objectively as a source of profit."

Then at p. 5 the author further goes on to say :

"All these things, however are mere rights, unaccompanied with possession of anything corporeal. Some, as we have seen, are rights over land, of which others are in possession as owners. A debt is nothing more than the right to sue another for money due."

Again at p. 6:

"All these different rights are however valuable ; they may be turned into money and their worth can be assessed in money. Being valuable things they are reckoned as property. But in including such incorporeal things in property, no heed is paid to the nature of the rights of which they consist ; they are simply regarded objectively as sources of profit."

After this exhaustive treatment of the subject by Willams in his admirable book, it is not necessary for me to add anything further on the subject. I may, however, point out that if a right to sell the mortgagor's property given by contract, by a mortgagor to the mortgagee, be property, which undoubtedly it is, I fail to see why the right of the father to sell his sons' property in order to raise money to pay his own debt should not be " property " equally. The mere fact that in the latter case, the right is given by Hindu law and not by contract should make no difference. The right of the father which we are at this moment considering is certainly not like a power held under the English law under a settlement or otherwise by a party to appoint a property to anybody or to oneself. There, although the right is exercised with respect to property, it is a right which depends entirely on the choice of the person to whom the right of appointment is given. Here, even if the father did not choose to exercise the right, his .creditors might compel him and his sons to yield the entire family property to satisfy their claim. What is or is not property is sometimes difficult to decide, but in this particular case, having regard to the fact that the satisfaction of the father's debt from the entire family property does not entirely depend on his own volition, makes the right of the father very valuable to himself and to the creditor.

Accordingly, the right which a father possesses to sell what might fall into the sons's share on a partition must be regarded as a valuable thing and therefore property. The father may be taken as the owner of his undivided share in the joint family property and as having the right to sell or otherwise dispose of the undivided share of his son in order to pay his own debts. In this view I do not see why the receiver or the Court should not be vested with the insolvent's share in the undivided property and along with it, with the father's right to satisfy his own debts by disposing of the undivided share of his sons. As I have pointed out, such a right would be property and would come within the expression, " the whole of the property " in S. 28, Sub-S. 2.

A contrary view would suggest that while the father's undivided share vests in the Court or the receiver, his right to sell or otherwise dispose of his son's undivided share lapses by sheer want of .a person to use that right. In my opinion, there is no reason to take such a narrow view of the position.

It is conceded that the position which the father holds and the rights which his creditors possess have received recognition of the Courts for many years and there is not a single reported case decided prior to the decision in *Sat Narain's* case, to be shortly mentioned, in which it has ever been held that on insolvency of a Hindu father, living jointly with his sons, the Court or the receiver is not entitled to sell the entire family property. It is however said that the judgment of their Lordships of the Privy Council, in *Sat Narain* v. *Behari Lal* (6) compels us to alter the rule of law which, so far has prevailed in the Courts, and to hold that the father's undivided share is alone capable of being disposed of by the insolvency Court or the receiver appointed by it, and that the creditors, if they want to pursue their remedy against the remaining family property in the hands of the sons, they must proceed in the way of suits against the sons. This leads me to a consideration of the case.

The facts of *Sat Narain's* case, briefly, were these : the father of the appellant before their Lordships of the Privy Council was adjudged an insolvent in Bombay under the Presidency Towns Insolvency Act (Act 3 of 1909). By S. 17 of the Act:

"on the making of an order of adjudication, the property of the insolvent . . . . vested in the Official Assignee.'

The appellant Sat Narain brought a suit to pre-empt, under the Punjab Pre-emption Act, a certain house in the neighbourhood of the family house owned by himself and his brothers and father, on the ground of vicinage. The purchaser of the adjoining house raised the plea that the plaintiff's share in the house had vested in the Official Assignee by virtue of S. 17, Presidency Towns Insolvency Act, and that therefore the plaintiff had no such right on foot of which he might maintain a claim for pre-emption. Their Lordships of the Privy Council entirely disagreed with this contention and said that it was a startling proposition to maintain that on one of the members of the Hindu joint family being adjudged an insolvent the shares of the remaining members of the family should also vest in the Official Assignee. Their Lordships arrived at this conclusion on a consideration of the language of the Insolvency Act (Act 3 of 1909). Even if the matter were not concluded by the decision of their Lordships, I should have had no hesitation in coming to the same conclusion as their Lordships. I need not go over the ground of my decision on point 1, but I may again point out that the father himself was never vested with what is called the undivided shares of his sons and that being so, the Court or the Official Assignee or the receiver in insolvency can never be vested with what was not vested in the father. Before the father was adjudicated an insolvent, he had undoubtedly the right to pay his own debts out of the entire joint family property including the shares of his sons. But this fact did not prevent the sons, before the insolvency, from instituting a suit for pre-emption on the basis of their share in the family property. The fact that the father became an insolvent should not therefore alter the position of the sons who would remain joint owners with the father of the family property, till the property had actually passed out of the family on being sold to satisfy the father's debt. *Satnarain's* case (6), therefore, looked at from this aspect also declares what is the true view of the Hindu law.

Let us now consider whether the decision of their Lordships of the Privy Council in *Satnarain's* case (6) really means that the father's right to bring the sons' share to sale is not vested in the Court or the receiver? I see nothing in the judgment as giving any expression to such a view on the part of their Lordships. Indeed, when it was urged before their Lordships as a matter of argument that the Official Assignee may sell the property of the sons, their Lordships said at p. 23 (of 6 *Lahore*) as follows :

> "It may be that under the provisions of S. 52 or in some other way, that property (sons' property) may, in a proper case, be made available for payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone, it vests in the assignee and no such provision should be read in the Act."

This is a clear indication of their Lordships' view that their Lordships were not considering and were not giving expression to any opinion as to what would happen when the question of sale by the Court or receiver of the sons' undivided shares arose in order to pay off the insolvent father's debts. Thus, in my opinion, the case of *Satnarain* v. *Behari Lal* (6) is no authority for us on which we should be justified in holding that their Lordships meant that the receiver or the insolvency Court could not touch the undivided shares of the sons in order to pay the father's just debts.

It must be remembered, as remarked by his Lordship Lord Halisbury in *Quinn* v. *Leatham* (18) that a case is an authority only for the proposition that it decides and not for every proposition that may appear to follow logically from the decision. Law is not always logical : see *Quinn* v. *Leatham* (18). I would therefore be loth to treat their Lordships' decision as a decision on the point before us.

I have already pointed out that without any exception up to this date, it has always been held that it is open to the insolvency Court or the insolvency receiver to deal with the entire family property in payment of the father's untainted debts. Thus, there is a course of decision which has been throughout uniform. Their Lordships of the Privy Council do not look with favour on a departure from a consistent course of decisions merely on the basis of an obiter dictum on the part of their Lordships themselves in any case. In the case of *Brij Narain* v. *Mangal Prasad* (17) at p.100 (of 46 *All.*), their Lordships make the following remarks :

> "Before the present case came to their Lordships, the expression used in *Sahu Ram Chandra's* case (19) had come before the consideration of the High Court in Madras in the case of *Vankanna* v. *Deekshatulu* (20) and again in *Arumugam Chetty* v. *Koundan* (21), where the question was referred to a Full Bench."

Again at p. 102 (of 46 *All.*) their Lordships say :

> "In such a matter as the present, it is above all things necessary stare decisis, not to unsettle what has been settled by a long course of decisions. Their Lordships entirely agree with the views taken by the Chief Justice in the Full Bench Madras case *Arumugam Chetty* v. *Koundan* (21) at p. 730. They think that *Sahu Ram Chandra's* case (20) must not be taken to decide more than what is necessary for the judgment namely . . . ."

It is therefore the settled opinion of their Lordships of the Privy Council themselves that the Courts in India must not depart from a long consistent course of decisions simply on the basis of a dictum or a supposed dictum of their Lordships themselves on a matter which was not directly necessary for their Lordships to decide in the case. I have pointed out that the conclusions at which their Lordships arrived would follow even on a consideration of the Hindu law itself and certainly on considerations applied by their Lordships themselves, their Lordships never considered the point of law which we have to consider, and I am clearly of opinion that their Lordships' judgment is no authority for us to depart from the consistent practice obtaining in India.

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(18) [1901] A. C. 495=70 L. J. P. C. 76=85 L. T. 289=50 W. R. 139=65 J. P. 708=17 T. L. R. 749.

(19) A. I. R. 1917 P. C. 61=39 I. C. 280=44 I. A. 126=39 All. 437 (P C.).

(20) [1919] 41 Mad. 136=43 I. C. 225.

(21) [1920] 42 Mad. 711=52 I. C. 525 (F.B.).

It is however urged that their Lordships have considered the language of various sections of the Presidency Towns Insolvency Act, that the language of that Act and of the Provincial Insolvency Act are materially the same and that therefore we must accept their Lordships' interpretation of those sections in the Provincial Insolvency Act as well. I am prepared to accept this argument in its entirety, but what do their Lordships say? Their Lordships say that S. 2, Cl. (e), Presidency Towns Insolvency Act, means property over which the insolvent has an absolute power of transfer and not merely a power which arises under particular circumstances of a case, i. e., where the debt to be paid is untainted with immorality. I do not rely on S. 2, Cl. (d), Provl. Insol. Act, which contains, in similar terms, the definition of property. I have tried to show that the insolvent's right to sell his sons' undivided shares arises from a consideration of the language of S. 28, Provl. Insol. Act, corresponding to S. 17, Presidency Towns Insolvency Act. Their Lordships did not consider S. 17 to find out whether the sons' share vested or not in the Court or the Official Assignee by virtue of S. 17. And even if their Lordships had come to the conclusion that the sons' share did not vest under the provisions of S. 17, that would have left the point before us untouched because the question here is whether the insolvent's right to sell the undivided share of his sons could vest or not in the Official Assignee under the provisions of S. 17 of the Act.

Then it is urged that in the Presidency Towns Insolvency Act there is a provision under S. 52, being sub-S. 2, Cl. (b), as the only provision under which a Hindu father's right to transfer the undivided sons' shares could vest in the Official Assignee, and that as there is no corresponding provision in the Provincial Insolvency Act, therefore, it must be held that in the Provinces the Court or the receiver has no right to deal with the undivided sons' shares. But their Lordships of the Privy Council have nowhere said that it is by virtue of S. 52, sub-S. 2, Cl. (b), alone that the Official Assignee can acquire the rights of the father to deal with the sons' undivided shares, in order to pay off the just debts. It is true that their Lordships, in the sentence quoted above from p. 23, say :

> "It may be that under the provisions of S. 52 or in some other way that property may in an appropriate case be available for payment of the father's just debts, etc."

But surely this cannot be taken as a decision by their Lordships of the Privy Council that S. 52 alone indicates the manner in which the Official Assignee may make the property of the sons available to pay the father's just debts. I have relied on S. 28 (corresponding to S. 17, Presidency Towns Insolvency Act) as the authority for the Court or the receiver dealing with the undivided shares of the sons. I am not in a position to say why a provision similar to S. 52, sub-S. 2, Cl. (b), is not to be found in the Provincial Insolvency Act. It may be that 11 years after the passing of Act 3 of 1909, it was found that the aforesaid provision was redundant and unnecessary. But surely I see no reason to make the omission the basis of an argument that the object of the omission was that in the Presidency towns the Official Assignee should be able to sell the undivided sons' shares to pay the father's debts, while in the mufassil towns the Court or the receiver should not be in a position to do so. I can see no reason whatsoever for the legislature to make such a differentiation. Nobody has as yet pointed out that in practice any difference existed at the two different places. I may also again point out that the insolvency law was framed, as it was bound to be framed without reference to the personal laws of anybody and was framed in most general language. The personal law of the insolvent comes in, in order to determine what property can be called his own and what cannot be called his own.

The argument of convenience is not very often a sound argument where the language of the law itself is clear beyond doubt. But having regard to the anomalous position of the father, having regard to his personal capacity as the head of the family and as the father of the family under the Hindu law, it may surely be said that it is not quite clear whether his "whole property" should be his undivided property or his undivided property plus his right to have recourse to the rest of the family property in order to pay off his debts, untainted with immorality. If there be an ambiguity then we shall be justified in adopting that interpretation alone that will bring about a satisfactory result and must reject that interpretation which can only lead to confusion.

As I have indicated above the insolvency law was enacted to give relief to insolvent debtors, people who could not pay their own debts. A Hindu father will never go to an insolvent Court or will never be taken there by his creditors, so long as the entire family property in his hands is capable of paying off his father's debts. Because if the whole family property is enough to pay his debts, a father would use it for the purpose or his creditors would attach and sell those joint family properties. It is only when the entire joint family property proves insufficient to pay the debts that the father will go to or will be dragged into an insolvency Court. In these circumstances it is to the interest of the father and his creditors that the father's debts should be paid off by the insolvency Court out of the entire joint family property. It is also to the interest of the sons themselves that their shares in the undivided joint family property be also availed of in order to pay the father's debts. For the sons' undivided shares can in no way escape the payment of the debts. It is argued that while the Court or the receiver will be dealing only with the father's share, it would be open to the creditors to proceed against the sons' shares. As I have already pointed out, that in every case of insolvency the sons' shares must be insufficient to pay the father's debts, if that is so, the sons would like to hand over their shares also to the Court and save the worry of litigations and executions that are inevitable, at the instance of creditors who would try their best to realize their debts from such undivided shares of the sons. The result of the interpretation which we are asked to put on the Privy Council case of *Sat Narain* (6) by the learned counsel for the appellants is this: Simultaneous proceedings will go on in the insolvency Court and numerous other Courts. This is a position which is hardly desirable. It benefits nobody. It leads to multifarious suits and the very object of insolvency law is frustrated.

I find that by far most of the decisions of the Courts given since their Lordships of the Privy Council decided the case of *Sat Narain* v. *Behari Lal* (6) have arrived at the conclusion that their Lordships of the Privy Council's decision does not touch the point now before us.

To begin with our own Allahabad High Court, we have got three decisions in this Court. In *Om Prakash* v. *Moti Ram* (2) and *Ram Ghulam* v. *Kailash Narain* (22) three Judges in two Division Benches (one Judge being common to both the Benches) have held the view that *Sat Narain's* case (6) has no bearing on the question before us. No doubt in *Allahabad Bank* v. *Bhagwan Das* (12) two learned Judges of this Court held a contrary view. But the point arose more or less casually and was therefore naturally dealt with in like manner. In this case of *Allahabad Bank* v. *Bhagwan Das* (12) the son's shares along with the share of the father had already been attached by a decree-holder before the father was adjudged insolvent. Owing to this attachment the sons' shares could be dealt with by the receiver in insolvency only subject to the attachment; because the sons not having been adjudged insolvents their shares would not vest in the assignee. Only the right of the insolvent to deal with those shares could vest in him. However there is the position that two learned Judges of this Court did take a contrary view. A contrary view was also taken by the Oudh Court in the case of *Trayambakeshwar* v. *Basant Kumar Mukerji*, *A. I. R.* 1930 *Oudh* 36. But as against this, a Full Bench of the Madras High Court in *T. S. Balavenkata* v. *The Official Receiver, Taniore* (13), after an exhaustive consideration of the decision in *Sat Narain's* case (6) came to the conclusion that the present law was not affected and that the right of the father to sell the property vested in the receiver in insolvency. The Madras Court subsequent decisions followed the same view. In Lahore [*Khem Chand* v. *Narain Das* (8)] the same view was taken as by the majority of Judges in this Court. Their decisions was based on Hindu law, and *Sat Narain's* case (6) was distinguished.

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(22) A. I. R. 1931 All. 59=127 I. C. 584=52 All. 493.

In Bombay [*Shripad* v. *Basappa* (15)], Macleod, C. J., was inclined to take the view that in the case of the insolvency of a father the "power" which he has got before his insolvency to dispose of family estate for proper purposes did not vest in the receiver but his learned colleague Coyajee, J., did not express his concurrence with this view.

On principle and on authority therefore I am of opinion that the answer to question 2 must be returned in the affirmative.

Point. 3.—In point 3 we are asked to indicate what would be the remedy, if any, of the receiver against the son's share in the joint family property, if questions 1 and 2 were answered in the negative. I would say that the answer to point 3 must also be in the negative. For the receiver will be nobody, so far as the sons are concerned and he will have no right to proceed against the sons' shares either in the insolvency proceedings or by way of a suit. In the view however which I take on point 2, question 3 would not arise, as the question itself indicates.

Sen, J.—The facts of the case which have led to this reference have been set out in my judgment, dated 19th February 1930 and they need not be recapitulated in detail. The points referred to this Bench are:

(1) When a joint Hindu father governed by the Mitakshara law is adjudicated an insolvent, whether his joint sons' share vests in the receiver (assuming that the debt payable by the father is one which it is the pious duty of the son to pay).

(2) Whether it is open to the receiver in insolvency to seize the son's share and sell it in order to satisfy the debts payable by the father (assuming that the debt payable by the father is one which it is the pious duty of the son to pay).

(3) If the receiver in insolvency cannot proceed against the son's share (in the aforesaid circumstances) has the receiver any and what remedy against the son's share in the joint ancestral property?

Points 2 and 3 are interconnected and interdependent and hang or fall together.

The father has been declared insolvent. The sons have not been declared insolvents. The father and sons are members of a joint Hindu family and own a joint ancestral estate. Under Hindu law, the sons are under a pious obligation to pay their father's debt which is not tainted with immorality. It is within the competence of the father to alienate joint ancestral property belonging to himself and his sons for payment of his antecedent debts or debts incurred for family necessity. The power of disposition by the father is not absolute but depends upon the fulfilment of certain conditions.

The questions which emerge for decision are:

Upon the father's insolvency, what property vests in the receiver and has the receiver any power in the insolvency jurisdiction to attach and sell the son's interest in the joint ancestral property where the debts are not tainted with immorality?

These questions fall to be answered by a reference to the provisions of the Provincial Insolvency Act (Act 5 of 1920).

The object and policy of the law relating to bankruptcy are well known and well understood. In the language of a standard authority (Ringwood) they are

> "designed to meet the case of an individual who has no reasonable prospect of being able to pay his debt. Its aim is twofold: First, to distribute the debtor's property among the creditors in the most expeditious and economical manner. And secondly, to give the debtor a new start in life from the demand of his creditors. when he has not been guilty of certain serious offences."

It is not however either necessary or permissible to examine and discuss the principle underlying a statute, unless the words of the statute are vague and ambiguous and unless the principle is helpful in clearing up the ambiguity.

The present case hinges mainly upon the construction of Ss. 28 (2) and 2 (d) of the Act.

In interpreting a statute the proper course is in the first instance to examine the language of the statute itself and ask what its natural meaning is. Except where the terms used in the statute have acquired a technical sense, ordinary meaning should be attached to the word or words used and the intention of a statute has to be gathered from the words used and not from any speculation about

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its object. Regard has to be paid to three important factors:

(1) A statute enacts everything essential to its existence.

(2) Remedial measures must be liberally construed so as to advance the remedy.

(3) Where the words are ambiguous and two meanings are possible, scope and subject of the enactment may be looked at for the elucidation of the meaning.

Again in construing a statute one must guard against two pitfalls: (a) Positive law cannot be extended by analogy or parity of reasoning; (b) the creation of anomalies even where anomalies may arise can be no ground for not giving effect to the ordinary meaning.

Section 28 (2) provides as follows:

> "On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act, shall during the pendency of the insolvency proceedings have any remedy *against the property of the insolvent* in respect of the debt or commence any suit or other legal proceedings, except with the leave of the Court on such terms as the Court may impose."

The italics are mine.

The entire joint family property belonging to a Hindu father and his sons is not "the property of the insolvent." Before partition, the property in the hands of the father and the sons is coextensive. No member of the joint family can claim any portion of the joint family property as exclusively his own so long as his rights and interest in the property have not been defined and separately allocated to him. Before partition, the Hindu father as also each of the Hindu sons governed by the Mitakshara has an undivided share in the joint ancestral property. This undivided share is owned by the father and vests in him, and in the same way, the undivided share of each of the sons vests in them. An undivided share is not capable of physical possession but property may be owned and may vest in the person owning the same even though it be not capable of physical possession. I am not prepared to endorse the proposition that

> "where a Hindu father being the head of a joint family, is adjudged an insolvent, he has not property at all and therefore nothing vests in an Official Receiver."

Even before partition, the father has an undivided share which is property. For many purposes this share does not materialise before partition has taken place; but the undivided share is there and the owner of the undivided share is also in existence. If the undivided share has no owner it must escheat to the Crown.

It is in each case a question of fact as to what is the property of the insolvent. For answer to the question, one must turn to the personal law of the insolvent. Where the insolvent has got no more than an undivided interest in the joint ancestral property this interest and this interest alone vests in the receiver under S. 28 (2). The undivided interest of the sons in the joint ancestral property is not the property of the insolvent.

The word "property" has not been exhaustively defined in the Provincial Insolvency Act. Under S. 2 (d), "property" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. The Hindu father has undoubtedly the power to alienate property held in jointness by himself and his sons provided that certain conditions are fulfilled. He has no absolute power of disposal. He cannot gift away the property in whole or in part in praesenti. Equally, he cannot transfer his undivided share by testamentary devise. He has however the power or the right to mortgage or sell the sons' interest in the property to pay off an antecedent debt or to meet a legal necessity. The question is whether the disposing power possessed by the father under these circumstances can come within the definition of property as given below:

The question did not arise in the case of *Brij Narain Rai* v. *Mangla* (17), and this decision is not helpful for the determination of the issue raised in the present case. A case is an authority for what it decides and for nothing more.

There is a distinction between *a power* relating *to* a property and *a right* in the property. A right in the property may be carved out from the dominium either horizontally or vertically. Many of these rights are of the nature of *jura in re aliena* and are proprietary rights. They are rights in the property as distinguished from a power with reference to the same. When I speak of "power" I do not mean "power" in its technical sense which is a term of art in English jurisprudence.

> "'Power' technically is an authority reserved by, or limited to, a person to dispose of, either for his own benefit or for that of others. The word is used as a technical term and is distinct from the dominion which a man has over his own estate by virtue of ownership: Farewell on Powers, Edn. 2, p. 1."

There can however be no doubt that the power of the Hindu father, although not technically a "power" as defined above, has a close resemblance to it. It is not in any case a dominion over ownership. It is important to remember that the power is personal to the Hindu father. No other member of the joint family possesses the same power as he. In no other system of jurisprudence we come across a case similar to that of a Hindu father having rights of disposition over the property of the sons for the payment of his antecedent debts not tainted with immorality. The Provincial Insolvency Act is a general statute applicable to Hindus, Mahomedans, Christians, Buddhists and Sikhs. It must be presumed to proceed upon a common basis as regards the notion of property, and it is doubtful if the legislature could have intended to bring within the fold of the Act, and to treat the father's power to alienate as being equivalent to property.

If we turn to other systems of law, we do not get any materials for our safe and sure guidance. Vijnaneshwar, the author of Mitakshara does not attempt any technical or scientific definition of ownership. He enumerates property, explains the sources of acquisition but does not define property. Jimuta Vahana, the author of Dayabhaga, defines ownership as an absolute use of a thing according to the pleasure of the owner. This fits in with the Dayabhaga system of jurisprudence under which the father is the absolute owner of the property and the sons are not joint owners with him. Under the Roman law, dominium or proprietas is the aggregate of rights which constitute ownership. In the French Code property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes. In the New York Code the ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others "The thing of which there may be ownership is called property." According to Wharton, property is the highest right a man can have to anything being used for that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy. Wharton subdivides property into absolute, qualified and possessory. According to Austin, property or ownership is the right over a determinate thing, indefinite in point of use, unrestrained in point of disposition and unlimited in point of duration.

It is clear from the above that the father's power of disposition cannot, without straining the language, be described as a right of ownership in the property under any of the systems noted above.

Williams in his Principles of the Law of Real Property (24, Edn 1926, p. 2) observes as follows:

> "Without pretending to formulate a definition, we may venture to assert that ownership chiefly imports the right of exclusive enjoyment of something .... Another incident of absolute ownership is free power of disposition, that is, the right of the owner to transfer as he will the whole or any part of his rights over the thing owned. And in modern times free power of disposition is generally incident to, and indeed inseparable from, any ownership."

According to Williams, one of the meanings of property is valuable things:

> "Things which can be turned into money or assessed at a money value; in other words right; which may be exchanged for the owership of money."

He adds:

> "It is in this last sense that the word 'property' seems to be used when a man speaks of all his property or of his real as opposed to his personal property."

Property may be corporal or incorporal. The power of disposition of another's property (that is of the undivided interest of another in the joint property) is manifestly outside the definition.

The father has the power of disposition and he may exercise that power. Is he competent to sell that power and can the purchaser exercise the power on his own account? The answer is obvious and it must be in the negative.

The provisions of Ss. 28 (2) and 2 (d), Prov. Insol. Act correspond to Ss. 17 and 2 (e). Presidency Towns Insolvency Act (Act 3 of 1909). The latter Act contained amongst others the following provisions:

> "*Section* 52 (2). Subject as aforesaid the property of the insolvent shall comprise the fol-

lowing particulars, viz .... (b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency proceedings or before his discharge."

These sections have been construed by the Judical Committee in *Sat Narain* v. *Behari Lal* (6). The facts of the case which gave rise to this appeal lie within a very narrow compass and were as follows: Rai Bahadur Sri Kissen Das and his two sons were members of a joint Hindu family and were possessed of joint family property as coparceners. Srikissen Das was adjudicated insolvent by the High Court of Bombay, and by S. 17, Presidency Towns Insolvency Act, his property vested in the Official Assignee and became divisible among his creditors. Of the property belonging to the joint family was a house in Delhi. One Lala Munnun Lal having sold his house in Delhi to Behari Lall and Jamna Das, one of the sons of the insolvent brought a suit for pre-emption under the Punjab Pre-emption Act. The defendants contended that as the result of the insolvency of Sri Kissen Das who was the father of the plaintiff and the head and manager of the family, the whole of the family estate and effects as well as the right, title and interest of the insolvent, became vested in the Official Assignee of Bombay. After reviewing the case law to which their attention was drawn, their Lordships observed as follows:

"Now as to the subject matter, namely the joint property of an undivided Hindu family, it is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interest in the joint family property and from the female members their right to maintenance, and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors. The father's power to dispose of the joint property is not absolute, but conditional on his having debts which are liable to be satisfied out of that property and S. 2 seems to contemplate an absolute and unconditional power of disposal. And if the later sections of the Act are examined it becomes apparent that this cannot have been the intention of the statute. . . . . . ."

The other sections which they examined are 52, 23 and 76. There is no section corresponding to S. 52 (2) (b) in the Provincial Insolvency Act, but the other portions of this section correspond to S. 28 (5) (4) and (3). S. 23 corresponds to Ss. 37 (1), and 43 (2), Provl. Insol. Act, and S. 76 correspond to S. 67, Provl. Insol. Act.

In view of the fact that the two Acts are in many respects in pari materia, that the sections in controversy are common to both and that the scheme and objective of the two Acts are also common, it is permissible to use the decision in *Sat Narain* v. *Behari Lal* (6) as an authoritative ruling for our guidance as to the interpretation of S. 28 (2) and (2) (d). The interpretation put upon the text of the Presidency Towns Insolvency Act has been followed in *Allahabad Bank Ltd., Bareilly* v. *Bhagwan Das Johri* (12) and in *Tryam Kishore Prasad* v. *Basanta Kumar Mukerjee, A. I. R.* 1930 *Oudh* 36. It has been held in these cases that the insolvency of a Hindu father did not vest the interest of the sons in the joint family property in the receiver. It cannot be said that the learned Judges who decided these cases did not give sufficient thought to the Privy Council ruling.

In *Om Praksah* v. *Moti Ram* (2), which was decided by Sulaiman and Mukherjee, JJ., one of the learned Judges sought to distinguish the Privy Council ruling and observed as follows:

"The question is whether the expression "property of the insolvent" means the property which the insolvent, as the father of his sons, was entitled to call his own and sell under certain circumstances or that share which goes to the father in the event of partition between himself and his sons. On the authority so long prevailing in this Court, we take it that the former meaning is the proper meaning of the word "property" as used there. I find nothing in the Privy Council case which shows that interpretation would be wrong."

No reason has been assigned for the view why the property of the insolvent should be construed to include the property of the sons who are not insolvents. Reference has been made to *Official Assignee* v. *Ramchandran* (7) and to "the authority so long prevailing in this Court" in support of this view. The only decisions of this High Court which have been referred to us are *Bawandas* v. *O. M. Chine* (3) and *Sita Ram* v. *Beni Prasad* (23). Neither of these cases is based upon the construction of the relevant sections of the Provincial Insolvency Act. In *Bawandas's* case (3) the learned Judges founded their decision upon the principle of Hindu Law that before partition the minor sons should be required to make provision for all debts due by the joint family including the debts due by the father. They follow the decisions in *Fakir Chand* v. *Moti Chand* (4) and *Rangala Chetty* v. *Thanikachala Mudali* (5). Neither of these two cases was founded upon the Provincial Insolvency Act. As pointed out by their Lordships of the Judicial Committee these cases were decided under a different statute, viz. 11 and 12 Victoria, Chap. 21. Their Lordships doubted the correctness of the interpretation of S. 7 of the said statute and observed as follows :

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(23) A. I. R. 1925 All. 221=84 I. C. 790=47 All. 263.

> "If their Lordships are to construe S. 7, 11 and 12 Victoria, Chap. 21, they would doubt that the Imperial Parliament sitting at Westminster, in passing 11 and 12 Victoria, Chap. 21, ever contemplated or intended that the real and personal estate of such petitioner which a Court might order to be vested in an Official Assignee or a right to sell it for the debts of a Hindu father might be held to include, or should include, the unpartitioned, separate interest of a Hindu coparcener, who was not a petitioner, in the immovable property of a joint family."

Sulaiman, J., also followed the same decisions in support of the view that the receiver in insolvency was competent to dispose of the joint family property in lieu of the debt of the father where the latter has been declared insolvent. The decision in *Om Prakash* v. *Moti Ram* (2) has been followed by Mukherjee and Bennet, JJ., in *Ram Ghulam* v. *Kailas Narain* (22).

It is not necessary to review the rulings of the other High Courts. If there are any reasons for holding that the Privy Council did not decide the points in issue those reasons are capable of being definitely formulated. I have not been able to find any adequate grounds for not following the Privy Council decision.

In view of the text of S. 2 (d) and 28 (2) and the constructions put by the Privy Council upon the corresponding sections of the Presidency Towns Insolvency Act, I am clearly of opinion that question 1 should be answered in the negative. The property of the sons is not the property of the father who alone has been adjudicated insolvent, and that it does not vest in the Official Receiver (assuming that the debt was one which the son was under a pious obligation to discharge).

Now I take up point 2. There is nothing in the Provincial Insolvency Act which authorizes the receiver to seize the son's share in order to satisfy the debt payable by the father. The following points are worthy of consideration :

(1) Under S. 28 (2) the property which vests in the receiver is the property of the insolvent and not of the sons'.

(2) The sons are under a pious obligation to discharge the father's debt. The creditor is debarred from having any remedy against the property of the insolvent in respect of the debt but he is not precluded from recovering his money by a suit against the sons who are strangers to the bankruptcy.

(3) The sons' interest in the joint family property is not property over which the insolvent father has an absolute and unconditional power of disposition within the meaning of "property" defined in S. 2 (d) and as explained by the Privy Council. It is therefore not "the property of the insolvent" under S. 28 (2).

(4) It is pregnant with some significance that there is no section in the Provincial Insolvency Act corresponding to S. 52 (2) (b) according to which the property of the insolvent shall comprise :

> "the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge."

(5) Under S. 59, Provl. Insol. Act, the powers and duties of the receiver have been enumerated, which include amongst others the power to sell all or any part of the property of the insolvent and to institute, defend or continue any suit or other legal proceedings relating to the property of the insolvent.

It is patent from the above that the receiver has not been clothed with any power to seize and sell the property of the son. But in *Sat Narain's* case (6) the Privy Council made the following observation :

> "Having regard to these considerations and to the scope of the Act, their Lordships are satisfied that it was not the intention of the Act that on the insolvency of a father, the joint property of his family should at once vest in the assignee. It may be that under the provisions of S. 52 or in some other way that property may in proper case be made available for payment of the father's just debts ; but it is

quite a different thing to say that by virtue of his insolvency alone it vests in the assignee, and no such provision should be read into the Act."

It has not been indicated what is the way in which the property of the son may be available to the receiver for the payment of the father's just debts. The Indian High Courts however have in a very large number of cases recognized the power of the receiver to attach and sell the interest of the son in joint family property. Although these decisions receive no support from the language of the statute they have held the field for over half a century. There is the further fact that there are no decisions to the contrary. Upon the principles of stare decisis it is not desirable to run against the current of these decisions.

It cannot be lost sight of that the receiver in insolvency represents the general body of creditors. The liability of the sons to discharge their father's debt, where it is not tainted with immorality, is not open to cavil or question. The Courts in India have uniformly allowed the receiver to enforce against the sons their pious obligation to pay by attachment and sale of their interest in the joint ancestral property. S. 4 (1), Prov. Insol. Act invests the Insolvency Court with very extensive powers to decide all questions which may arise in any case of insolvency to enable the Court to do complete justice or make a complete distribution of property.

The position therefore is that although the power of the receiver to attach and sell the son's property is not supported by the express text of the Provincial Insolvency Act, yet having regard to the general principles indicated above and the unbroken current of authority, I am of opinion that the answer to question 2 must be returned in the affirmative.

Question 3 does not call for a separate treatment.

Banerji, J. The first question which has been referred to the Full Bench for decision is that when a joint Hindu father governed by the Mitakshara law is adjudicated an insolvent, whether his joint son's share vests in the receiver (assuming that the debt payable by the father is one which it is the pious duty of the son to pay).

I would answer the question in the negative and my reasons are that in the case of *Sat Narain* v. *Behari Lal* (6) their Lordships of the Privy Council in interpreting the definition of "property" in the Presidency Towns Insolvency Act (1909), which is word for word the same as the Provincial Insolvency Act said as follows :

"And that by S. 2 'property' is defined as including any property over which any person has a disposing power which he may exercise for his own benefit ; and it may be said that a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts is such a power."

But the definitions in S. 2 are only to apply "unless there is something repugnant in the subject or context", and it is necessary therefore to consider the effect of the definition of "property" contained in that section in relation to the subject matter which is being dealt with and the other sections of the Act. Now, as to the subject matter, namely:

"the joint property of an undivided Hindu family it is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interests in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors. The father's power to dispose of the joint property is not absolute, but conditional on his having debts which are liable to be satisfied out of that property ; and S. 2 seems to contemplate an absolute and unconditional power of disposal."

The second question is whether it is open to the receiver in insolvency to seize the son's share and sell it in order to satisfy the debts payable by the father (assuming that the debt payable by the father is one which it is the pious duty of the son to pay).

I would answer this question in the affirmative. The question arises upon the particular facts of the case, namely that the debts are such that it is the pious duty of the son to pay them. Under S. 28 (2), Prov. Insol. Act, itis provided that

"On the making of an order of adjudication the whole property of the insolvent shall vest in the Court."

The expression "the whole property of the insolvent" has in my opinion been very widely used, as appears from Cl. (3), S. 28. Although the joint son's share does not vest in the receiver the rights of every kind, which an insolvent has and which can be turned into money for paying off the debts of the insolvent must, in my opinion, be deemed to vest in the receiver by reason of the words used in S. 28 (1). It is not denied that a father in a case where the debt is such which it is the pious duty of his sons to pay, can dispose of the whole of the joint family property. Whatever may be the rights of the father to otherwise transfer the property is not before us and I confine myself to answering the question as referred to this Bench for decision.

The third question is if the receiver in insolvency cannot proceed against the son's share (in the aforesaid circumstances) has the receiver any and what remedy against the son's share in the joint family property?

The answer that I would give to this question is that in view of what my conclusion is as to question No. 2, this question does not arise. If the answer to question No. 2 is in the negative, then I would answer this question also in the negative.

King, J.—In considering the questions referred for our decision we have to bear in mind that we are dealing with a joint Hindu family consisting of a father (as manager) and his sons, and that the debts incurred by the father are untainted debts, such as the sons are under a pious obligation to pay; and that the father alone has been adjudicated an insolvent. Although the appeal arises from the adjudication of certain firms as insolvents, the order of reference makes no mention of firms. We are not called upon to consider the effect of the order of adjudication upon the interests of the minor sons in the firms with reference to S. 247, Contract Act, or to any other rule of law relating to firms or partners. We only have to consider the effect of the order upon the joint family property and especially upon the son's interests in that property.

The first question is in my opinion concluded by the authority of *Sat Narain* v. *Behari Lal* (6). Their Lordships held that the adjudication of the father of a joint Hindu family as an insolvent under the Presidency Towns Insolvency Act, 1909, did not have the effect of vesting the property of the joint family, consisting of the father and his sons, in the Official Assignee. The rights and interests of the sons in the joint family property did not vest in the assignee by virtue of the adjudication alone. The sons retained their proprietary interests in the property, so as to enable them to maintain a suit for pre-emption on the strength of their proprietary rights. It is true that this ruling was based, as their Lordships were careful to observe, strictly upon an interpretation of the Presidency Towns Insolvency Act, 1909, and mainly upon the interpretation of Ss. 2 (e), 17 and 52 of that Act. We have to interpret the Provincial Insolvency Act, 1920; but the language of the relevant sections of the two Acts is so similar that the reasons for the decision seem to apply with equal force to the latter Act. The definition of "property" in S. 2 (1) (d) of the latter Act is word for word the same as in S. 2 (e) of the former Act. S. 28 (2) of the latter Act is practically identical with S. 17 of the former. It must be noted that there is nothing in the latter Act corresponding to S. 52 (2) (b), Presidency Towns Act but I cannot see that this omission furnishes any ground for holding that the ruling does not apply to the Provincial Act. This view has been taken in numerous decisions referred to by my learned brothers. I need only refer to the Full Bench ruling of the Madras High Court in *Seetharama Chettiar* v. *Official Receiver, Tanjore* (13) and think it unnecessary to labour the point any further. I hold therefore that the shares of the sons (i. e. the proprietary rights of the sons) do not vest in the receiver under S. 28 (2) as being "the property of the insolvent."

The second question is whether it is open to the receiver to seize the sons' share and sell it in order to satisfy the debts payable by the father. This is a question which has expressly been left undecided in *Sat Narain's* case (6) and it is more difficult to determine. Their Lordships suggested that "under the provisions of S. 52 or in some other way" the property of the sons might be made available for payment of the father's just debts. The reference to S. 52 was apparently intended to refer more particularly to S. 52 (2) (b) which lays down that the property of the insolvent divisible amongst his creditors shall comprise

> "The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been

exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge."

The father has power to alienate the joint family property, so as to bind the sons, if the alienation is for the discharge of an antecedent untainted debt. This power seems to be covered by the terms of S. 52 (2) (b), but there is nothing corresponding to this provision in the Provincial Act.

The question then is whether the father's power of disposal of the joint family property can be held to be included in "the property of the insolvent" which vests in the receiver under S. 28 (2).

The term "property" has, or may have, a very wide meaning. In construing the words "the whole of the property of the insolvent," I think we should be justified in including any valuable right belonging to the insolvent, i. e. any right which the insolvent could exercise so as to raise money for his own benefit. This would include the father's right to sell the joint family property for the discharge of his personal debts if antecedent and untainted as in the case before us. The notion that the "property" of a person includes a power of disposal of property which does not belong to him, or which does not wholly belong to him, is nothing new or strange. In S. 60 (1), Civil P. C. of 1908, the property of a judgment-debtor, which is liable to attachment and sale, is defined as including property:

"over which, or the profits of which, he has a disposing power which he may exercise for his own benefit."

This shows that a certain kind of disposing power over property is regarded as a sort of proprietary right. In S. 2 (1) (d), Provl. Insol. Act, 1920 "property" is defined as including:

"any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit."

The same definition is given in the Presidency Towns Insolvency Act.

In *Sat Narain's* case (6) their Lordships have held that this definition contemplates an absolute and 'unconditional power of disposal and therefore does not cover a Hindu father's power of disposal which is conditional.

It is true that in the case propounded to us the conditions necessary for an absolute power of disposal are fulfilled. The debts are antecedent and untainted and the father has therefore an absolute power to sell the joint family property for the purpose of discharging them. We cannot however hold that, as the father's power of disposal is "absolute" in the present case, therefore, the property over which he exercised that power is his property 'under the definition of "property" in S. 2 (1) (d). The result of holding this would be that the property itself (i. e. the whole joint family property including the interests of the sons) must vest in the receiver under S. 28 (2). I have already held that this view is untenable in the face of the ruling in *Sat Narain's* case (6). We cannot therefore invoke the aid of the definition in S. 2 (1) (d) as applying in terms to the father's power of disposal. The definition is only helpful to this extent, that it shows that a certain kind of power of disposal of property is regarded as a species of a proprietary right.

Section 52 (2) (b), Presidency Towns Insolvency Act, goes further and shows that a certain kind of power of disposal to property may be regarded not merely as a kind of proprietary right but as "property."

In the law of England also a bankrupt's "property" is described as including the capacity to exercise all such powers over property as might have been exercised by the bankrupt for his own benefit: Bankruptcy Act 1914, S. 38 (2) (b).

I see no reason why the term "property," when applied to the property of the father of a Hindu joint family should not be wide enough to cover the father's power of disposal of the family property for discharge of his antecedent untainted debts. It must be remembered that the father's power of disposal of his own undivided share is no greater than his power of disposing of the entire coparcernary property. His undivided share only belongs to him in the sense that it would fall to his share in the event of a partition. I doubt whether his undivided share can properly be said to be "vested" in him. The share is indefinite and fluctuating in extent. The ownership of the coparcenary property is vested in the whole body of coparcerners. No individual member can claim that he has a definite share. The father's power of disposal of his undivided share is conspicuous by its absence. He cannot dispose of it by gift or by will. On his death intestate it does not pass to his heirs. He cannot even alienate it for value without the consent of his coparcerners. In short, his power of dealing with his undivided share is no greater than his power of dealing with the coparcenary property as a whole. Considering that the father can only be said to "own" his undivided share in a very limited sense, and that he has no special power of disposing of that share, I think it would be very anomalous if only his undivided share vests in the receiver while his very valuable right and power of disposing of the joint family property for discharging his personal debts, does not so vest. I think we are fully justified in holding that his "property" includes his power of disposal of the joint family property and that power therefore vests in the receiver under S. 28 (2). Several rulings support this view and I would follow and endorse the reasoning in *Subramania Aiyar* v. *T. V. Krishna Aiyar*, *A. I. R.* 1927 *Mad.* 701.

On the other grounds too I think this must have been the intention of the legislature. The receiver represents the insolvent. Any valuable right which the insolvent could have exercised for discharging his debts should be exercisable by the receiver as the insolvent's representative.

Then again the receiver represents the interests of the creditors and stands in much the same position as a judgment-creditor. Now the holder of a simple money decree against the father, for an untainted debt, can (apart from insolvency) attach and sell the joint family property so as to bind the sons. The receiver should not be in a worse position than a decree-holder of a money decree; and it would be unjust if the creditors were deprived, by the operation of the law of insolvency, of recourse to the family property which would otherwise have been available for the satisfaction of their claims.

Owing to the absence of anything corresponding to S. 52 (2) (b), Presidency Towns Act, it is argued that the legislature did not intend that the father's power of disposal should under the Provincial Insolvency Act be included in the property divisible amongst the creditors. I must frankly confess that I do not understand why that provision should be considered necessary in Presidency towns and not in the provinces, but I cannot believe that the legislature intended that the Official Assignee might sell the joint family property in Presidency towns, while the receiver could not do so in the provinces. It may be that any provision corresponding to S. 52 (2) (b) was considered superfluous as the term "property" was sufficiently wide to include such a power of disposal.

Putting the case at its very lowest there is at least a doubt whether the term "property" in S. 28 (2) does not include the father's power of disposal of the joint family property. If there is a doubt we are entitled to act upon the maxim stare decisis and follow the long-established current of decisions which lay down that the receiver is entitled to sell the joint family property for discharging the insolvent father's debts. I answer the second question in the affirmative. In view my of answer to the second question, the third question does not arise.

Kendall, J.—I agree.

R.M./R.K. *Reference answered.*

⁂ A. I. R. 1931 Allahabad 183

Full Bench

MEARS, C. J., AND MUKERJI AND YOUNG, JJ.

Nazir Khan and *another*—Plaintiffs—Applicants.

v.

Ram Mohan Lal and *another*—Defendants—Opposite Party.

Civil Revn. No. 154 of 1927, Decided on 3rd July 1930, against decree of Small Cause Court Judge, Allahabad, D/- 7th June 1927.

⁂ **(a) Evidence Act (1892), S. 91—Money lent on terms contained in promissory note given at time of loan—Promissory note inadmissible in evidence for want of proper stamp or other reasons—Lender cannot prove terms of contract by oral evidence :** 34 *All.*

158=13 *I. C.* 138 6 *I. C.* 126; and 28 *All.* 293, *Overruled.*

Where money is lent on terms contained in a promissory note given at the time of loan, both the promissory note and the lending being part and parcel of the same transaction, the lender suing to recover money so lent must prove those terms of the promissory note. If for any reason such as the absence of a proper stamp, the promissory note is not admissible in evidence, the plaintiff is not entitled to set up a case independent of the note in view of the provisions of S. 91. He cannot recover the money by proving orally the terms of the contract : 26 *All.* 178, *Foll* ; 7 *Cal.* 256, *Disc.* ; *A. I. R* 1924 *P. C.* 50, *Ref.* ; **6 I. C. 126; 13 I. C. 138=34 All. 158** and **28 All. 293 Overruled** ; *A.I.R.* 1928 *All.* 371, *Dist.* ; *A. I. R.* 1922 *Lah.* 307, *Appr.* ; *A. I. R.* 1928 *Pat.* 426, *Expl.* and *not Foll* ; (*Case law discussed*). [P 186 C 2]

(b) Paper Currency Act (1923), S. 25—Act does not forbid admissibility of promissory note, in form condemned by S. 25.

There is no provision in the Paper Currency Act which forbids the admissibility into evidence of a promissory note which has been drawn up in a form condemned by S. 25 of the Act. [P 188 C 2]

*** (c) Evidence Act (1892), S. 91—Verbal negotiations leading to express contract in writing cannot be set up as independent contract.**

Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not admissible in evidence as provided by S. 91. Moreover where there is an express promise, an implied promise will not be inferred : *A. I. R* 1924 *Cal.* 452, *Foll.* [P 189 C 1]

Iqbal Ahmad and *S. B. Johari*—for Applicants.

N. C. Vaish, *K. C. Mital* and *P. M. L. Verma*—for Opposite Party.

Order of Reference.—This revision arises out of a suit for recovery of money on foot of a promissory note instituted in the Court of the Judge, Small Cause Court at Allahabad. The promissory note is alleged to have been executed by the defendants for a sum of Rs. 500 and provides for the repayment of the loan, on demand, with interest at 4 per cent per mensem. The defence was that the execution of the promissory note was admitted by the defendant not subject to additional pleas. The further pleas were to the effect that defendant 2 never borrowed any money, nor did she execute any promissory note, that the promissory note was inadmissible in evidence, for want of proper stamp duty, that defendant 1 borrowed Rs. 50 only and that that was the only consideration that passed.

The learned Judge, Small Cause Court, tried only one issue, namely the one as to the admissibility of the document in suit in evidence and holding that it was inadmissible, dismissed the suit.

It appears that the suit was once heard and decreed ex parte. At the defendants' instance the ex parte decree was set aside and the suit was restored to its original number in the register and was tried de novo. When the suit was heard ex parte, the then learned Judge, overlooking the fact that the promissory note in suit required a stamp duty of two annas admitted the document into evidence. It bore a stamp duty of one anna only. It was contended on behalf of the plaintiff that as the document had once been admitted into evidence, it was not open to either party to question the sufficiency of the stamp duty at subsequent stages of the suit, in view of the provisions of S. 36, Stamp Act. On this point, the learned Judge, Small Cause Court held and in our opinion rightly, that with the setting aside of the ex parte decree, the order admitting the document into evidence, on the basis of the ex parte evidence, also fell and the Court had to adjudicate on the case, including the question of the admissibility or otherwise of the document as if it had never been admitted into evidence at all. The view of the learned Judge is in agreement with the case of *Webster* v. *Bosanquet* (1).

The main question however in the case is whether the promissory note being inadmissible in evidence, the plaintiff could rely on the factum of the loan and prove the loan, independently of the document in suit.

On this point there is a number of conflicting cases decided by different High Courts. It appears that while all the Courts are agreed that where a plaintiff has a cause of action, independently of a promissory note, which is found inadmissible in evidence, he can sue on the cause of action which he had before the promissory note was given and recover. Opinion is divided as to what should be the case where there was no loan, independently of the promissory note, that is to say, where the entire contract between the parties is embodied in the promissory note. As at present advised, we are of opinion, that S. 91, Evidence Act, would prevent the admission of any oral evidence to prove the loan, the promissory note being inadmissible in evidence

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(1) [1912] A. C. 394=81 L. J. P. C. 205=106 L.T. 357=28 T.L.R. 271.

Some of the cases, whether decided in this Court or in other Courts, do not, in our opinion, with all respect, take sufficient note of the provisions of S. 91, Evidence Act, and follow the English authorities : see *Farr* v. *Price* (2). Our law being codified, in our opinion, it is not open to the Courts in India to ignore the enacted law and follow the English law, simply because in certain cases the enforcement of the law might appear to create a hard case.

Being in disagreement with the cases decided in this Court. we are of opinion that the case should be referred to a larger Bench. We do not propose to discuss the case law in our order. It will be sufficient to say that the case of *Miyan Bux* v. *Mt. Bodhiya* (3) has no bearing on the case. The latest case of this Court is that of *Ram Sarup* v. *Jasodha Kunwar* (4). The earlier case of *Parsotam Narain* v. *Taley Singh* (5) seems to us as laying down the right law. In Madras, the case of *Muthu Sastrigal* v. *Vishvanatha* (6) and in Lahore, the case of *Chandra Singh* v. *Amritsar Banking Co.* (7) appear to support our view. We would especially draw the attention of the learned Judges before whom this case may go to the opinion of the Madras Judges to be found reported at p. 663 of the case in *Muthu Sastrigal* v. *Vishvanatha* (6).

In order to settle the law for this Court we direct that the record of this case be submitted to the Hon'ble the Chief Justice for the constitution of a larger Bench for the decision of the question indicated above, namely :

> " Whether it is open to the party, who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money, by proving orally the terms of the contract, in the teeth of the provisions of S. 91, Evidence Act."

Opinion

Mukerji, J.—The following point of law has been referred to a Full Bench, namely :

> " Whether it is open to the party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract in the teeth of the provisions of S. 91, Evidence Act."

The facts which have led to the reference are these. The applicants, Nazir Khan and Ismail Shah Khan, brought a suit for recovery of money in the Court of Small Causes at Allahabad, alleging that on foot of a promissory note filed with the plaint, they lent to the two defendants to the suit, who were husband and wife, namely Ram Mohan Lal and Mt. Girindra Kuari a sum of Rs. 500 which was to be repaid with interest at 4 per cent per mensem, on demand. The promissory note bears a stamp duty of one anna only, while under the law for the time being in force, it ought to have borne a stamp duty of two annas.

The defence of defendant 1, who alone appeared was that his wife never executed the promissory note, that he borrowed a sum of Rs. 50 only and that being under pressure for money he executed the promissory note relying on the assurance of the plaintiffs that they would not claim more than Rs. 50 and interest thereon. He further pleaded that he had repaid the money which he had borrowed with interest.

When it was discovered that the promissory note bore insufficient stamp duty the plaintiff sought to prove by oral evidence that he had lent a sum of Rs 500.

The learned Judge of the Small Cause Court held that to establish the loan alleged by the plaintiffs, the promissory note was the only evidence that could be adduced to prove the transaction, having regard to the provisions of S. 91, Evidence Act. In the result, the learned Judge dismissed the suit in its entirety.

The plaintiffs filed an application in revision under S. 25, Provincial Small Cause Courts Act and the contention of learned counsel for the applicants was that the applicants were entitled to prove the factum of the loan. This point was not specifically taken among the grounds of revision but as the point was supported by cases decided in this Court, the point was allowed to be argued and considered.

The Bench before which the revision application came were not satisfied that some of the cases decided in this Court were good law and as none of these cases were decisions of a Full Bench, they referred the matter to a larger Bench.

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(2) 1 East 55=5 R. R. 515.

(3) A.I.R. 1928 All. 371=50 All. 839 (S.B.).

(4) [1912] 34 All. 158 =13 I.C. 138.

(5) [1903] 26 All. 178=(1903) A.W.N. 217.

(6) [1914] 38 Mad. 660=21 I.C. 864.

(7) A.I.R. 1922 Lah. 307=66 I.C. 201=2 Lah. 830.

Before we proceed to consider authorities, it would be desirable to consider the state of the statutory law. As already stated the plaintiffs lent money in consideration of the promissory note and the note alone. Gul Mohammad Khan who appeared as a witness for the plaintiffs and is their relation said:

> "I lent Rs. 500 to the defendant and not Rs. 50. . . . . I would not have lent money without the pro-note."

It is clear therefore that this is not a case in which there was already a completed cause of action for recovery of money on foot of a distinct and separate transaction and a promissory note was given as a collateral security. To illustrate what we mean, we would give an example: Suppose a trader sells a motor bicycle to a purchaser on credit. Later to secure the payment, the purchaser gives a promissory note. The trader and the purchaser have a completed transaction, namely the sale of a motor bicycle, as soon as the delivery is made, with the stipulation that the price would be paid later on, by the purchaser. On this transaction, the trader is entitled to sue for the price of the article sold by him. The promissory note here is only a collateral security. In these circumstances, it is agreed on all hands, that the trader will be entitled to sue for the price of the motor bicycle, even if, for some flaw in the promissory note, the promissory note itself may not be sued upon, being inadmissible in evidence under the law. In the case before us there is no such completed transaction as we have described above. On the other hand, the promissory note and the handing over of the money are part and parcel of the same transaction and the terms of the loan are the very terms of the promissory note. There is no room for the argument that there was a completed loan and by way of collateral security a promissory note was given. To quote again the words of the witness Gul Mohammad, the plaintiffs would not have lent the money without the promissory note. The making and handing over of the note and the payment of the money are "concurrent conditions."

The question then is:

> "Whether the promissory note contains the entire terms of the transaction between the parties; and if so can any oral evidence be adduced where the document itself is not admissible into evidence."

Our clear answer is that oral evidence is not admissible, S. 91, Evidence Act, being a bar to such a procedure. S. 91 reads as follows:

> "When the terms of a contract . . . . . have been reduced to the form of a document . . . . no evidence shall be given in proof of the terms of such contract, ... except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible. . . . . ."

The question which we have to decide is whether it is or is not the case that the terms of the contract between the parties have been reduced to the form of a document. If they have been reduced to the form of a document then, by the express language of the law, the document itself is the only proof admissible into evidence, it being common ground that there is no case made out for admission of secondary evidence. Oral evidence is in the nature of secondary evidence, where the terms of a contract have been reduced to the form of a document. On the statute therefore there seems to be no reason to doubt that oral evidence was not admissible into evidence.

Now we propose to consider some of the important cases decided in this and other Courts. In *Parasotam Narain* v. *Taley Singh* (5), the facts were very similar to the facts of this case. The headnote runs as follows:

> "When money is lent on terms contained in a promissory note given at the time of the loan, the lender suing to recover money so lent must prove those terms of the promissory note. If for any reason, such as the absence of a proper stamp, the promissory note is not admissible in evidence, the plaintiff is not entitled to set up a case independent of the note."

The case was heard by a learned single Judge of this Court, Aikman, J., and he following certain cases decided in the Calcutta High Court disallowed the plaintiff's contention to prove his case independently of the promissory note. The learned Judge quoted S. 91, Evidence Act and said:

> "It appears to me that the decision which have held otherwise ignore the provisions of Ss. 91, 65 and 22, Evidence Act; and I do not think that it can be denied that these decisions condone and encourage evasions of the Stamp Act."

We are of the same opinion as the learned Judge.

This case of *Pursotam Narain* (5) was not considered in the case of *Banarsi*

Prasad v. *Fazl Ahmad* (8) and a contrary decision was given by a Bench of two Judges. It is rather significant that the learned Judges professed to follow the very case of *Sheikh Akbar* v. *Sheikh Khan* (9), on which Aikman, J. had founded his decision in *Pursotam Narain's* case (5). In the Calcutta case Garth, C. J., said at p. 259 of the report, as follows:

> "When a cause of action for money is once complete in itself whether for goods sold or for money lent or for any other claim and the debtor *then* gives a bill or note to the creditor for payment of the money at a future time the creditor, if the bill or note is not paid at maturity, may always as a rule sue for the original consideration provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person."

The learned Judges of this Court in *Banarsi Prasad* v. *Fazl Ahmad* (8) quoted the language quoted above and said:

> "Now here the plaintiff did state the consideration for the note, namely money borrowed from him by the defendant."

The facts of the case show that the loan and the promissory note were part and parcel of the same transaction. The learned Subordinate Judge, who heard the appeal from the Court of the Munsif said:

> "The defendant took a loan of Rs. 572 and executed a promissory note."

This finding was binding in second appeal to the High Court, but the learned Judges of this Court said after quoting from the judgment of the Subordinate Judge the sentence quoted above:

> "It seems to us therefore that the Court of first instance ought not to have summarily dismissed the plaint, but ought to have given the plaintiff an opportunity of proving the consideration of the note if there was such consideration. The law on the subject is clearly stated by Garth, C. J. in the case of *Sheikh Akbar v. Sheikh Khan* (9)."

In our opinion the learned Judges of this Court overlooked the use of the word "then" by Garth, C. J., which we have underlined (Italicized) above. The whole point of Garth, C. J., was that evidence aliunde could be given only if the transaction of the promissory note could be separated from a previously completed transaction.

We are of opinion therefore that this case of *Banarsi Prasad* (8) which is based on the authority of the Calcutta cases was decided on a misreading of that case.

Referring to the opinion of Garth, C.J. quoted from the case of *Sheikh Akbar* v. *Sheikh Khan* (9), Mr. Iqbal Ahmad argued that it would always be difficult to determine in the case of a loan whether the loan was a previous transaction or whether it was a transaction which occurred simultaneously with the execution of the promissory note. He said:

> "If the loan was advanced five minutes before the execution of the promissory note will the plaintiff be entitled to prove the loan if the promissory note is ruled out of evidence."

This argument is entirely based on a misapprehension. It would always be a question of fact whether there was or was not a completed transaction between the parties whether in the shape of a sale or other transaction or whether it be in the shape of a loan. As an illustration, we can cite the case of an "antecedent debt" of the father under the Hindu law. Under that law a father is entitled to transfer joint family property belonging to himself and his sons to pay his "antecedent debt." In the case of a mortgage executed by the father it was urged before the Privy Council that the money advanced might be taken as an "antecedent debt" and the mortgage might be treated as one given in consideration of the "antecedent debt." Their Lordships of the Privy Council, in the case of *Brij Narain* v. *Mangal Prasad* (10) at p. 103 (of 46 *All.*) remarked as follows:

> ". . . . . the incurring of the debt was the creation of the mortgage itself and there was no antecedency either in time or in fact."

Again, in laying down the several propositions of Hindu law, where their Lordships dealt with the question of antecedent debts, they said (at p. 104 of 46 *All.*):

> "Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and no part of the transaction impeached."

In the language of their Lordships of the Privy Council, we may say:

> "The transaction of sale of goods or loan must be a matter antecedent in fact as well as in time, that is to say, the transaction must be truly independent and not a part of the transaction of the promissory note."

The next case in this Court is *Srinath Das* v. *Angul Singh* (11). It was a Letters Patent appeal against the judgment of a learned single Judge of this Court who had dismissed the suit of the plaintiff. The learned Judges who heard the appeal professed to follow the dictum of Garth, C. J., in *Sheikh Akbar* v. *Sheikh Khan* (9) and the case in this Court in *Banarsi Prasad* v. *Fazl Ahmad* (8), which itself professed to be based on *Sheikh Akbar* v. *Sheikh Khan* (9). We have shown that the actual decision of *Sheikh Akbar* v. *Sheikh Khan* (9), was just the other way. But this was again overlooked and on the basis of a previously decided case, the judgment of the learned single Judge was set aside and the plaintiff's suit was decreed. In this judgment there is no discussion whatsoever of S. 91, Evidence Act.

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(8) [1906] 28 All. 293=3 A. L. J. 25=(1906) A. W. N. 9.

(9) [1882] 7 Cal. 256=8 C. L. R. 528.

(10) A. I. R. 1924 P. C. 50 = 77 I. C. 689 = 51 I. A. 129=46 All. 95 (P.C.).

(11) [1910] 6 I. C. 125.

The next case in this Court is *Ram Sarup* v. *Jasoda Kunwar* (4). In this case, their Lordships definitely pronounced their opinion against the case of *Sheikh Akbar* v. *Sheikh Khan* (9), decided by Garth, C. J., and basing their judgment on the dictum of Lord Kenyon in the well known case of *Farr* v. *Price* (2) held in effect that even where the debt is inseparable from the promissory note, the debt could be proved although the promissory note was not admissible in evidence. It is interesting to note that Garth, C. J., himself had referred to the case of *Farr* v. *Price* (2) and had distinguished the dictum of Lord Kenyon (at p. 260). In the last mentioned Allahabad case *Ram Sarup* v. *Jasoda Kunwar* (4), which corresponds to *Ram Sarup* v. *Jasodha Kunwar* (4) there is no consideration of S. 91, Evidence Act.

Mr. Iqbal Ahmad places his reliance on the case of *Mia Bakhsh* v *Mt. Bodhia* (3). That case has no relevance whatsoever to the case before us. The question that had been referred there to the High Court by a learned Munsif was whether a certain promissory note which purported to be in favour of the bearer was void and inadmissible in evidence and could not be the basis of a claim in any Court of law. Two of the learned Judges (Boys and Kendall, JJ.,) held that the promissory note was in a form forbidden by law, that the promissory note could not form the basis of a suit. They however further went on to state that the plaintiff could sue on the basis of any obligation whether antecedent to or arising simultaneously with the execution of the promissory note, independently of the execution of the promissory note. Sen, J., refused to express any opinion and said (at p. 745 of 26 *A.L.J.*):

> "It is outside the scope of the present reference to determine whether the plaintiff can maintain a claim against the debtor founded upon an obligation independent of a promissory note. He further held that although the promissory note was in a form forbidden by law, it was admissible in evidence under S. 91, Evidence Act: see the same page :"

It will be noticed in connexion with this case that there is no provision in the Paper Currency Act, which forbids the admissibility into evidence of a promissory note which has been drawn up in a form condemned by S. 25 of the Act. In the circumstances, the very document itself could prove the obligation created by it.

The answer of the two learned Judges Boys and Kendall, namely the plaintiff could sue on the basis of an obligation whether antecedent to or arising simultaneously with the execution of the promissory note etc., was not called for. The case was decided without any counsel appearing on either side. These circumstances entirely differentiate the case in *Mia Bakhsh* v. *Bodhia* (3) from the present case.

This exhausts the cases decided in the Allahabad High Court. We need not examine at length the cases decided in other High Courts. We may however make one remark, that in Calcutta there is a conflict of opinion. The case in *Sheikh Akbar* v. *Sheikh Khan* (9) was followed by *Radha Kant Shaha* v. *Abhay Charan Mitter* (12). But the case in *Sheikh Akbar* v. *Sheikh Khan* (9) was sought to be explained away in a later case in the same Court in *Promotho Nath* v. *Dwarka Nath* (13). In this case of *Promotho Nath* v. *Dwarka Nath* (13), there is no consideration of S. 91, Evidence Act. In Madras it appears that the view has been consistently taken that where there is no independent and separate cause of action, the suit based on a promissory note which is not admissible in evidence should fail. This was held following the case in *Sheikh Akbar* v. *Sheikh Khan* (9). In *Yarlagadda* v. *Gorantala* (14) and in *Muthu* v. *Vishwanatha* (6), S. 91, Evidence Act was relied upon and it was held that in circumstances similar to this case before us, oral evidence could not be given in proof of the loan. At p. 663 in *Muthu* v. *Vishwanatha* (6), the learned Judge Sadasiva Iyer observes as follows:

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(12) [1882] 8 Cal. 721=11 C. L. R. 310.
(13) [1896] 23 Cal. 851.
(14) [1906] 29 Mad. 111=15 M. L. J. 484.

> " To import the doctrines laid down in English cases about vague obligations to repay arising out of equity and not out of contract or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received concealing the real contract of loan which had been reduced to the form of a document is, it seems to me, merely trying to nullify S. 91, Evidence Act."

The learned Judges who heard this case differed from certain Bombay cases and followed the cases decided in their own Court.

In Lahore the same view has been taken as we are disposed to take in the case before us. In *Chandra Singh* v. *Amritsar Banking Co.* (7), S. 91, Evidence Act was applied, as we are disposed to apply it.

We asked the learned counsel for the applicant to cite a case decided by any High Court that may have been decided in his favour in spite of a consideration of S. 91, Evidence Act. He cited the case of *Dhaneshar Sahu* v. *Ram Rupgir* (15). In that case one of the learned Judges did consider the applicability or otherwise of S. 91, Evidence Act, but his learned colleague expressed his doubts.

Lastly it was argued by Iqbal Ahmad, the learned counsel for the applicant, that the plaintiffs were not precluded from proving an oral agreement to pay. On this point we cannot do better than quote the following remarks made by Rankin, C. J., of the Calcutta High Court. In *Dula Meah* v. *Abdul Rahman* (17) at p. 72 (of 28 *C. W. N.*) his Lordship observed as follows:

> " Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not admissible in evidence (Evidence Act, S. 91). Moreover where there is an express promise an implied promise will not be inferred."

We entirely agree with these observations.

In the result our answer to the question referred to us by the Division Bench is in the negative, namely in the circumstances set forth in the question referred to us, the plaintiff cannot recover. We direct that the record with our answer and a copy of this judgment be sent to the Bench making the reference.

R.M./R.K. *Order accordingly.*

* A. I. R. 1931 Allahabad 189 Full Bench

KENDALL, YOUNG AND KING, JJ.

Stamp Reference (Jangilal), In re

Misc. Ref. No. 160 of 1929, Decided on 20th March 1929, made by Junior Secretary Board of Revenue, Allahabad, on 8th February 1929.

*** (a) Stamp Act (1899), Arts. 40 and 57 —Security bond under O. 41, R. 5, Civil P. C., executed by surety for judgment debtor hypothecating property as security for loss decree-holder may sustain due to default on judgment-debtor's part, is chargeable under Art. 40 and not under Stamp Act, Art. 57.**

A surety bond executed under O. 41, R. 5, by a surety for the judgment-debtor hypothecating his property in favour of the Court executing the decree for the benefit of the decree-holder as security for the loss that the latter might sustain up to a certain amount owing to any default or misconduct on the part of the judgment-debtor, is chargeable with duty under Art. 40 and not Art. 57, it being not executed to secure the due performance of a contract: *A. I. R.* 1928 *Oudh* 143, *Diss. from.* [P 192 C 1]

(b) Stamp Act (1899), Art. 57 — "Contract," meaning explained

The word "contract" in Art. 57 is used in the sense of contract as defined in S. 2 (h), Contract Act. [P 191 C-2]

(c) Contract—Subordinate Judge is "person" and can enter into contract.

A Subordinate Judge can be regarded as a "person" and is capable of entering into a contract. [P 191 C 1]

(d) Judicial Officers Protection Act (1850), Scope — Language of Act is wide enough to grant protection from suit for damages for breach of contract.

The Act does not probably contemplate the protection of a Judge from a suit for damages for breach of contract, but the language of the Act is sufficiently wide to grant protection even against a suit of that nature. [P 191 C 2]

(e) Contract—Courts have no power to enter into contracts—Judicial Officer.

There is no provision in the Civil Procedure Code or any other statute empowering a Judge to enter into a contract on behalf of the Secretary of State. The Courts are given statutory power to pass decrees and orders and to perform certain acts but not to enter into contracts. [P 192 C 1]

U. S. Bajpai—for the Crown.

Order.—This is a reference made to the High Court by the Board of Revenue under S. 57, Stamp Act 1899, asking for a decision as to the duty chargeable on a security bond given under O. 41, R. 5, Civil P. C.

It appears that proceedings for the execution of a decree for the recovery of possession of immovable property were pending in the Court of the Subordinate Judge of Muttra. The judgment-debtor applied for stay of execution pending decision of an appeal to the High Court. The Subordinate Judge ordered the execution to be stayed under O. 41, R. 5, sub-R. 2, upon the condition that the judgment-debtor should furnish security for the due performance of such decree or order as might ultimately be binding upon him. The judgment-debtor accordingly produced a surety who executed the instrument in question, hypothecating his property in favour of the Subordinate Judge of Muttra, for the benefit of the decree-holder, as security for any loss that the latter might sustain, up to a limit of Rs. 4,000 owing to any default or misconduct on the part of the judgment-debtor.

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(15) A. I. R. 1928 Pat. 426=111 I. C. 482=7 Pat. 845.

(16) A. I. R. 1924 Cal. 452=81 I. C. 641.

The question is what stamp duty is chargeable on this instrument.

As the instrument is clearly a "mortgage-deed" as defined in S. 2, Cl. (17), Stamp Act, it must be chargeable either under Art. 40, Sch. 1, as a "mortgage-deed" or else under Art. 57 as a

> "mortgage-deed executed by a surety to secure the due performance of a contract."

No other article has been suggested as possibly applicable.

The Board of Revenue are of opinion that Art. 40 is applicable, but three learned Judges of the Chief Court of Oudh have recently held that a similar security bond furnished under O. 41, R. 6, was chargeable under Art. 57: *Harihar Partab v. Bisheshar Bakhsh* (1). So far as liability to stamp duty is concerned there seems to be no distinction between a bond under O. 41, R. 5 and a bond under O. 41, R. 6.

The instrument in question is no doubt a mortgage-deed executed by a surety and it was no doubt executed to discharge the liability of a third person in case of his default, but the question is whether it can be held to have been executed "to secure the due performance of a contract" within the meaning of Art. 57.

The "contract" mentioned in Art. 57 obviously cannot mean the contract of surety himself, but must refer to the contract of some other person. The learned Judges of the Chief Court held (in the case mentioned above) that the instrument was executed to secure the due performance of a contract between the Court, which passed the order under O. 41, R. 6. and the decree-holder. On that view the contract, to secure the due performance of which the instrument was executed in the present case, was a contract between the Subordinate Judge of Muttra and the judgment-debtor. With due deference to the learned Judges of the Chief Court of Oudh we are unable to accept their view.

In the first place, we are unable to hold that there was any such agreement between the Subordinate Judge and the judgment-debtor as could amount to a contract. No agreement was expressed. The Subordinate Judge merely passed an order that execution be stayed upon security being furnished. The transaction purported to be an order, and not an agreement or contract. In the Oudh case Wazir Hasan, J., admitted that "there was no contract floating on the surface" but held that

> "there is always an implied contract in cases of this nature."

He considered that as the decree-holder requested the Court to deliver possession, and the Court agreed to deliver possession, provided that the decree-holder agreed to do certain things in certain events, and provided further that he furnished security for the due performance of the same, and as the decree-holder accepted the conditions and did what was required of him, therefore there was an implied contract between the Court and the decree-holder.

It may be conceded that there was in substance, although not in form, an agreement in the present case between the Subordinate Judge and the judgment-debtor or that execution should be stayed upon security being furnished but in our opinion the agreement does not amount to a contract. An agreement amounting to a contract must be entered into by the parties with the object of creating a contractual relation between themselves. In the present case we think it can safely be held that neither the Subordinate Judge nor the judgment-debtor contemplated that their negotiations should result in a contract between themselves. The object which the judgment-debtor had in view was to secure an order from the Court staying execution of the decree. The Court in the exercise of its discretion though fit to grant the application for stay upon being satisfied that the interests of the decree-holder would be adequately safeguarded by the instrument of security. The parties certainly did not purport to enter into a contract with each other and in our opinion they never contemplated the creation of any contractual relation between themselves. Moreover in our opinion they did not in fact enter into any contract either express or implied.

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(1) A.I.R. 1928 Oudh 143=107 I.C. 553=3 Luck 298.

It has been argued by the learned Government Advocate that there could be no contract between the Court and the judgment-debtor on the ground that contracts can only be entered into between two or more "persons," and the Court is not a juridical "person" and cannot be sued and is therefore incapable of entering into a contract. He relies upon certain observations of their Lordships of the Privy Council in the case of *Raj Raghbar Singh* v. *Jai Indra Bahadur Singh* (2) (at p. 167 of 42 *All*). This argument does not appeal to us; in the present case the Court passing the order was the Subordinate Judge of Muttra. There would no doubt be obstacle to suing him upon the alleged contract but we see no reason to suppose that the Subordinate Judge of Muttra would be incapable of entering into a contract on the ground that he is not a "person". If he is not a "person" then we would be observe, in passing, that the instrument which forms the subject-matter of the present reference would be inoperative because it purports to hypothecate property in favour of the Subordinate Judge of Muttra. Property can only be transferred to a "person"; so if the Subordinate Judge of Muttra is not a person the instrument would be inoperative. We see nothing in the ruling referred to which lays down the proposition that a Subordinate Judge is not a "person" since their Lordships of the Privy Council do not suggest that a security bond hypothecating property in favour of a specified officer of the Court would be invalid.

The main ground upon which we hold that the transaction between the Subordinate Judge and the judgment-debtor did not amount to a contract is that an agreement is not a contract unless it is enforceable by law. We presume that the word "contract" in Art. 57 is used in the sense of a contract as defined in S. 2 (h), Contract Act, 1872. We think it is clear that the alleged agreement between the Subordinate Judge and the judgment-debtor would not be enforceable by law.

Supposing the Court passes an order for stay of execution upon furnishing security under O. 41, R. 5, ex parte and supposing the judgment-debtor furnishes the security required; if the decree-holder subsequently appears and induces the Court to set aside its ex parte order, and to refuse stay of execution after hearing the decree-holder's objections, would it then be possible for the judgment-debtor to institute a suit against the Subordinate Judge claming specific performance of the "contract" entered into between the Subordinate Judge and himself or claiming damages for breach of the said contract? In our opinion such a suggestion would be preposterous.

Then again it is open to a Court which has passed an order for stay of execution under O. 41, R. 5, to set aside or modify its own order by way of review. This is another indication that the Court is not bound by any contract since a contracting party cannot rescind or modify a contract at his own discretion and without the consent of the other contracting party.

Even assuming that there was a contract between the Subordinate Judge and the judgment-debtor the question arises in what manner and against whom the judgment-debtor could enforce the contract by law.

No suit would be maintainable for breach of contract against the Subordinate Judge personally. He would be protected by the Judicial Officers' Protection Act, 1850, which enacts that no Judge shall be liable to be sued in any civil Court for any act done, or ordered to be done, by him in the discharge of his judicial duty. This Act probably does not contemplate the protection of a Judge from a suit for damages for breach of contract but the language of the Act appears to us sufficiently wide to grant protection even against a suit of that nature.

If the judgment-debtor instituted his suit against the Secretary of State in Council on the ground that the Subordinate Judge contracted on behalf of the

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(2) A.I.R. 1919 P.C. 55=55 I.C. 550=46 I.A. 228=22 O.C. 212=42 All. 158 (P.C.).

Secretary of State in Council, he would be met with the objection not merely that the Subordinate Judge did not purport to enter into any contract on behalf of the Secretary of State, but also with the objection that a Judge acting judicially has not authority to enter into a contract enforceable against the Secretary of State. The powers and duties conferred or imposed upon civil Courts are set forth in great detail in the Code of Civil Procedure. We find no provision in that Code, or in any other Statute, empowering a Judge to enter into a contract with a litigant on behalf of the Secretary of State. The Courts are given statutory powers to pass decrees and orders and to perform certain acts but not to enter into contracts.

The Subordinate Judge on his part can no doubt enforce his order against the judgment-debtor as an order but he could not enforce performance against the judgment-debtor in the manner prescribed by law for enforcing a contractual obligation.

We conclude therefore that the Subordinate Judge and the judgment-debtor did not in fact enter into any contract and did not purport to enter into any contract. Even if it be assumed that they entered into an implied agreement it was not such an agreement as would be enforceable by law therefore it would not amount to a contract.

We hold that the instrument in question was not executed "to secure the due performance of a contract' and therefore Art. 57 will not apply. It follows that duty will be chargeable under Art 40 which is the only other article that could be applicable.

No rulings on the question at issue have been referred to us, other than the ruling of the Chief Court of Oudh mentioned above, but the learned Government Advocate has referred to the opinion of two learned Judges of the Bombay High Court, Mulla and Pratt, JJ., in their Commentary on the Indian Stamp Act (1924 edition at p. 376). They submit their opinion that mortgage deeds executed by way of security under O. 41, Rr. 5, 6 and 10, Civil P. C., being by persons not parties to the suit would not be liable to court-fee but would be liable to stamp duty under Art. 40. This expression of opinion is, of course, (as has been observed in the Oudh ruling) in no sense authoritative, but as expressing the opinion of two learned Judges of a High Court it is entitled to some consideration and it supports the view which we have taken.

Let a copy of this judgment be submitted to the Board of Revenue.

R.M./R.K. *Order accordingly.*

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MUKERJI AND BENNET, JJ.

Bhup Singh—Applicant.

v.

Fateh Singh and *others* — Opposite Parties.

Civil Revn. No. 271 of 1929, Decided on 14th November 1930, from decree of Dist. Judge, Agra, D/- 27th June 1929.

Civil P. C. (1908), O. 34, R. 6 — Jurisdiction—O. 34, R. 6, applies only to personal covenant ,arising from mortgage and hence existence of charge on mortgaged property at some other place does not give jurisdiction to Court at that place.

Where the mortgage suit and the mortgage come within the jurisdiction of the Court at A and not within the jurisdiction of the Court at F, the existence of a charge on the property at F does not give the Court at F jurisdiction to entertain an application under O. 34, R. 6. beacuse that rule only applies to a personal covenant arising from a mortgage. [P 192 C 2 ; P 193 C 1]

(b Civil P. C. (1908), O. 34, R. 6—Appeal—Application under O. 34, R. 6, is not plaint and hence returning same is not appealable.

An application for a decree under O. 34, R. 6, cannot be considered to come under "plaint" and consequently an appeal does not lie under O. 43, R. 1 (1), from order returning such application to be presented to the proper Court. [P 193 C 1]

N P. Asthana and *Baij Nath Sahai* —for Applicant.

Bennet, J.—This is an application in revision against an order of the learned District Judge of Agra refusing to entertain an appeal against an order of the Munsif of Fatehabad returning an application for presentation to the proper Court. The application in question was under O. 34, R. 6, to recover the balance due from the defendant to the plaintiff under a certain mortgage bond. That mortgage bond had formed the subject matter in a suit before the Subordinate Judge of Agra. Subsequently, the plaintiff had brought a suit in the Court of the Munsif of Fatehabad on the basis of a charge which he alleged came into existence and obtained a decree in that Court against certain property. But the existence of a charge on the property in Fatehabad does not give the

Munsif of Fatehabad jurisdiction to entertain an application under O. 34, R. 6, because that rule only applied to a personal covenant arising from a mortgage. The mortgage suit and the mortgage came within the jurisdiction of the Subordinate Judge of Agra and were not within the jurisdiction of the Munsif of Fatehabad. The order therefore of the Munsif was a perfectly right order.

A further objection was made that the District Judge was wrong in not entertaining an appeal because it is said that under S. 43 (1) (a) an appeal lies against an order under O. 7, R. 10, returning a plaint to be presented to the proper Court, and it is argued that the application is to be considered as a plaint. O. 7 deals definitely in R. 1 with plaints meaning regular plaints in regular suits.

We consider that an application for a decree under O. 34, R. 6, cannot be considered to come under "plaint." The order of the District Judge was correct and we see no ground for revision. We therefore dismiss this appeal with costs. No one appearing for the respondents, we make no order as to costs.

P.N./R.K. *Appeal dismissed.*

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SEN AND NIAMATULLAH, JJ.

Qazi Shamim Ahmad and *others* — Plaintiffs—Appellants.

v.

Sheikh Hesamul Haq and *others*— Defendants—Respondents.

Second Appeal No. 2013 of 1927, Decided on 8th May 1930, against decree of Sub-Judge, Ghazipur, D/- 6th May 1927.

(a) Mahomedan Law—Co-heirs—Possession by one co-heir does not become adverse in absence of clear denial of title or ouster—Mere hostile feeling or granting of lease by heir in possession does not amount to denial of title or ouster.

Where a Mahomedan dies leaving a number of co-heirs, and only one of the heirs remains in possession of the property, his possession is not adverse to the other co-heirs in the absence of a clear denial of title, and an overt act amounting to ouster. Mere hostile feeling between the heir in possession and other co-heirs does not amount to adverse possession or to ouster. So also the mere granting of a lease of the property by the heir in possession for the purposes of management and more careful husbandry cannot in any way amount to denial of title or ouster. [P 194 C 2; P 195 C 1, 2]

(b) Mahomedan Law—Co-heirs—Adverse possession.

Where the title of the heirs of a deceased Mahomedan relates to a number of properties, any assertion of adverse title, with reference to any one of the properties whether they are included in the plaint or not, might have some bearing upon the question of adverse possession. [P 195 C 1]

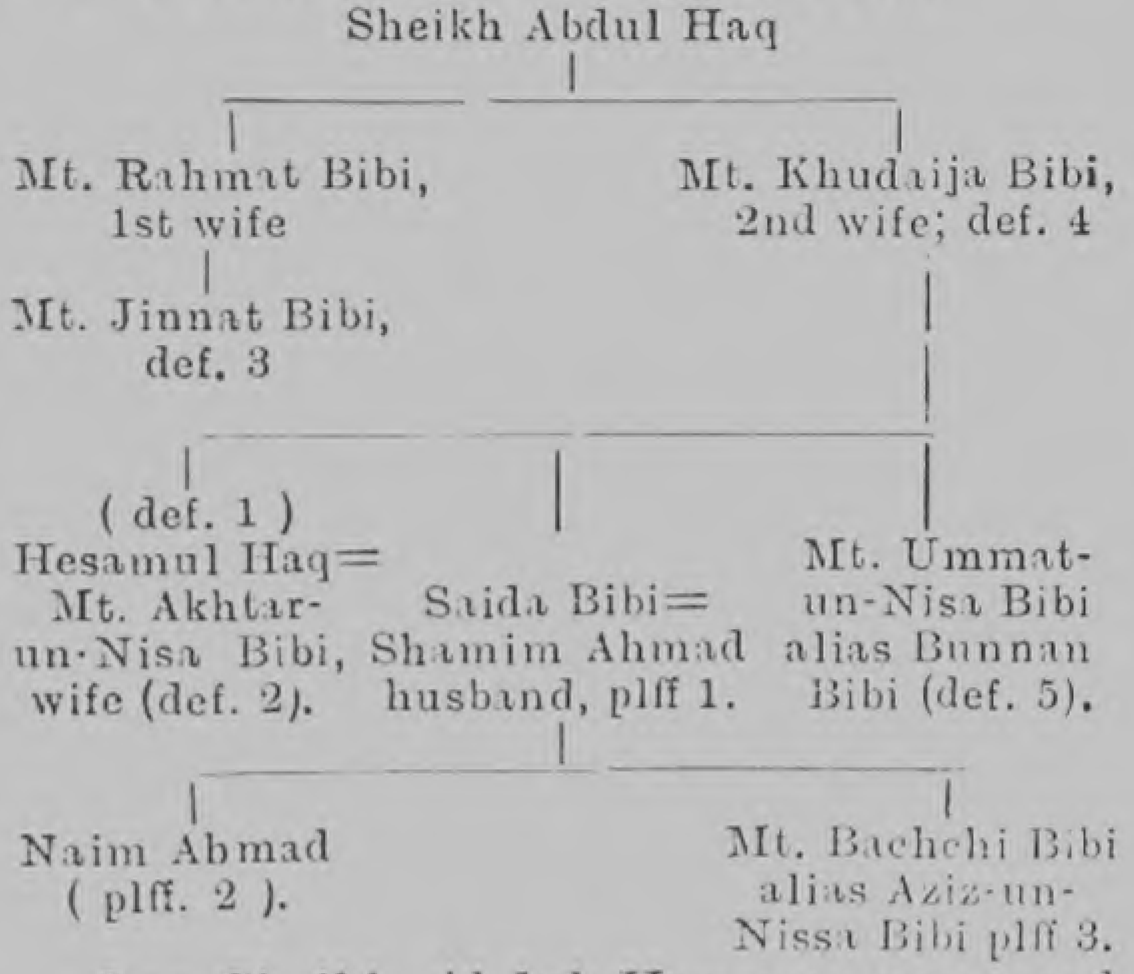
(c) Transfer of Property Act, S. 3—Scope.

Registration per se does not amount to notice to all the world. [P 195 C 1]

M. Waliullah, *Mukhtar Ahmad* and *K. Verma*—for Appellants.

A. M. Khwaja—for Respondents.

Sen, J.—For the elucidation of the facts of the case it is necessary to refer to the following genealogical table:


Sheikh Abdul Haq
Mt. Rahmat Bibi, 1st wife
Mt. Khudaija Bibi, 2nd wife; def. 4
Mt. Jinnat Bibi, def. 3
(def. 1) Hesamul Haq= Mt. Akhtar-un-Nisa Bibi, wife (def. 2).
Saida Bibi= Shamim Ahmad husband, plff 1.
Mt. Ummat-un-Nisa Bibi alias Bunnan Bibi (def. 5).
Naim Ahmad (plff. 2).
Mt. Bachchi Bibi alias Aziz-un-Nissa Bibi plff 3.

One Sheikh Abdul Haq was possessed of an eight anna zamindari share in Taluqa Bhadeon *asli* together with the dakhli villages of Salarpur and Chak Daud, an eight anna share in Mauza Basahi and 12 bighas held in Bigha dam tenure in Mauza Makhdumpur. He died in 1901 leaving Mt. Jinnat Bibi, who was the daughter of a predeceased wife, Mt. Khudaija Bibi, his widow (his second wife), Hesamul Haq, defendant 1, who is his son, and two daughters Saida Bibi and Mt. Ummatunnissa alias Bunnan Bibi. The Quranic share of Saida Bibi in the estate of her father was 250 sihams out of 1440 Sihams. Mt. Saida Bibi died on 8th July 1920, leaving as her heirs her husband Shamim Ahmad, a son Naim Ahmad, a daughter Mt. Bachchi Bibi alias Azizunnissa Bibi, and her mother Mt. Khudaija Bibi.

Upon the death of Abdul Haq the entire property was mutated in the name of Hesamul Haq, his only son, who was then a minor. Saida Bibi does not appear to have claimed her share of the property during her lifetime. Upon her death the present suit was instituted on 30th June 1926, by her husband, her son and daughter for recovery of their shares in the property, which amounted to 210 sihams out of 252 sihams, which had devolved upon Saida Bibi upon the death of her father. Mt. Khudaija Bibi, the mother, did not join in the suit, but she was impleaded as defendant 4 in the action.

The suit was for recovery of 210 sihams and for Rs. 295 principal and interest on account of mesne profits for the years 1332 and 1333 FF. The suit was resisted upon the ground that Hesamul Haq was in adverse proprietary possession over the share in dispute for a period of more than 12 years before suit and that the claim was time barred. It was also contended that the suit was barred by S. 41, T. P. Act. The Court of first instance held that Hesamul Haq, defendant 1, had remained in adverse possession of this property for a period of more than 12 years before suit and that his possession had matured into title. Upon this ground the plaintiffs' claim was dismissed. The trial Court did not try the issue as regards the applicability of S. 41, T. P. Act.

The lower appellate Court held that the claim of the plaintiffs was barred with reference to a portion of the property, namely, her share in eight annas of Taluqa Bhadeon, together with the dakhli villages of Salarpur and Chak Daud. It held however that the defendants had failed to sustain the plea of adverse possession with reference to the shares in Mauzas Basahi and Makhdumpur. In the result, the lower appellate Court modified the decree of the trial Court, granted the plaintiffs a decree for her share in the last two mentioned villages together with Rs. 50 as mesne profits, and dismissed her claim with reference to Mouza Bhadeon and the dakhli villages.

Plaintiffs appeal from the decree of the lower appellate Court against the portion of the decree of the lower appellate Court which disallowed her claim. It appears that, on 6th April 1918, Hesamul Haq had sold a four anna share out of the eight anna share of Taluqa Bhadeon to Mt. Mujtaba Bibi, his maternal aunt. On 18th June 1918, he had executed a sale deed of the remaining property in dispute in favour of his wife, Mt. Akhtarunnissa Bibi, in lieu of her dower debt. Mt. Akhtarunnissa Bibi has filed a cross-objection, and she pleads that the plaintiff's claim with reference to the villages Basahi and Makhdumpur was time barred, and was obnoxious to the provisions of S. 41, T. P. Act.

We are concerned in this case with the nature of the possession of Hesamul Haq upon the death of his father. The property devolved upon a number of heirs. It is settled law that where a Mahomedan dies leaving a number of co heirs and only one of the heirs remains in possession of the property, his possession is not adverse to the other co-heirs in the absence of a clear denial of title and an overt act amounting to ouster.

In the normal conditions of things, the possession of one of the heirs is the virtual possession of all. The onus of proving adverse possession lies upon the party which urges that plea. The Court of first instance appears to have put itself upon the wrong track in dealing with the question of adverse possession by certain erroneous assumptions about the law relating to adverse possession and notice. In dealing with the question of adverse possession it has virtually cast the onus of proof upon the plaintiffs. It has further opined that registration was to be construed as notice to all the world. This proposition is clearly untenable and the Court of first instance appears to have pushed the doctrine of notice by registration to limits for which there is absolutely no justification. The Court observes:

> "Registration is construed to be notice to all the world, and we must hold that plaintiff's ancestor, Mt. Saida Bibi, along with the other heirs of Sheikh Abdul Haq, got notice of the registered documents executed by Hesamul Haq which are totally hostile to their interest, and which in clear and unambiguous terms disclaims the right and title of the other heirs to the property, and in which Hesamul Haq calls himself as the sole owner and transfers the property as he likes."

We have examined these documents and we have not been able to find any trace of the disclaimer set up by the trial Court in any of them. The case has been elaborately argued before us by Mr. Khwaja for the respondents, and he has not been able to point out a single document in which an adverse claim to the property, or a denial of the title of Saida Bibi was put forward by Hesamul Haq, *nec vi, nec clam, nec precario.* A number of documents could very conveniently have been ruled out of the case. The defendant-respondents had to put the commencement of an adverse title 12 years before the suit. So far as any documents were executed within the limitation period they cannot have any real value for the determination of the question of adverse possession excepting as evidence of a corroborative character. We do not therefore feel disposed to attach much importance to the lease executed by Hesamul Haq in favour of Qazi Mahmud on 26th January 1915, to the usufructuary mortgage in favour of Ganesh Tewari dated 25th October 1915, to the simple mortgage in favour of Mahip Narain dated 12th February 1917, and to the simple mortgage deed in favour of Ganesh on 25th November 1917.

On 19th March 1912, Hesamul Haq executed a simple mortgage of the share in Mauza Basahi in favour of Hasan Zaid. The finding of the Court below with reference to this village is that the plaintiff's claim is not time barred. On 20th November 1920, Hesamul Haq appears to have sold a certain share in Taraf Bhitri which is outside the claim. This sale deed has no direct bearing upon the question in issue. It may however be conceded that where the title of the heirs relates to a number of properties, any assertion of adverse title with reference to any one of the properties whether they are included in the plaint or not might have some bearing upon the question of adverse possession.

Registration per se does not amount to notice to all the world. With reference to the several documents executed by Hesamul Haq no duty was cast upon Mt. Saida Bibi or upon her heirs to seek the registration records. These documents could not therefore be construed to amount to notice. It is worthy of remark that the usufructuary mortgage in favour of Ganesh Tewari was executed within 12 years of the suit.

The finding of the lower appellate Court which is adverse to the appellants rests upon a number of circumstances. It is said that years back there had been hostile relations between Hesamul Haq and his mother and there were some strained feelings between Saida Bibi and her brother. Mere hostile feeling does not amount either to adverse possession or to ouster. Hesamal Haq might well have harboured secret feelings of animosity against his mother or his sister in the innermost recess, of his heart. But there does not appear to have happened any exchange of bitter words or any use of violence; and it is patent that this animosity of feeling did not give rise to any denial of title on the part of Hesamul Haq. Reliance has chiefly been placed upon a lease of an entire eight anna share of Taluqa Bhadeon, which was granted by Hesamul Haq to Mohammad Ali on 7th January 1914. Hesamul Haq was the person in possession. He had the management and control of the property. His was the only name which was recorded in the Government papers. He was the owner of the property jointly with the other cosharers. He recites the facts in the lease that he is the owner of the property and is in possession thereof but he does not deny the title of Saida Bibi or of the other cosharers. This is a point which has been unfortunately missed by either of the Courts below. The document therefore does not amount to a denial of title on the part of Hesamul Haq.

On the other hand, it is perfectly consistent with his position as managing cosharer of the property. The granting of a lease is no more than the finding of a tenant. Hesamul Haq was not in a position to manage the property for himself and for purposes of management and careful husbandry he executed this lease in favour of Mohammad Ali. This does not in any way amount to a denial of title or ouster. Considerable stress has been laid upon a petition of Mt. Saida Bibi in the mutation department. This petition was lodged on 10th February 1914. In this petition Mt. Saida Bibi opposed the application made by the lessee for mutation in his favour. We are at a loss to understand how the statements contained in this petition can be construed to be any evidence of notice about a denial of title on the part of Hesamul Haq or of an ouster by him. The petition means no more than this that it was not open to only one of the cosharers to grant a lease of the entire property without the consent and cooperation of the other cosharers. We are clearly of opinion that the finding of the Court below proceeds upon insufficient data and upon a misconception of the law relating to adverse possession. Upon an analysis of the documentary evidence in this case we come to the conclusion that neither a denial of title nor any overt act of ouster has been made out in this case. The plaintiffs therefore were entitled to a decree with reference to their share in Mauza Bhadeon together with the shares in the dakhli village of Salarpur and Chak Daud. We accept the finding of the lower appellate Court that

> "there is no reliable evidence that Hesamul Haq had denied the title of Saida Bibi regarding the bisahi share and the haqiat in Makhdumpur."

We accept the reasoning upon which this finding proceeds. The learned counsel for the respondent has failed to satisfy us that this finding is vitiated by any misapplication of law or of any rule of procedure.

As the last resort it has been argued for the respondents that the plaintiffs' claim with reference to Bhadeon and the dakhli villages offends against the provisions of S. 41, T. P. Act. The plea has been put forward by Mt. Akhtarunnisa Bibi who is the wife of the principal defendant Hesamul Haq. She is a member of the family. It was impossible for her not to know that there were other claimants of the property by right of succession to the estate of Abdul Haq. She must be taken to have known about the pre-existing title of Saida Bibi to the property by right of succession to her father. The plea under this section is therefore not available to her.

We allow the appeal and grant a decree to the plaintiffs for possession of 210 sihams out of 1440 sihams in the eight anna share in Taluqa Bhadeon together with the dakhli villages of Salarpur and Chak Daud. Having regard to the materials before us we cannot determine the amount of mesne profits which the plaintiffs are entitled to with reference to this portion of the claim. Under O. 20, R. 12, Civil P. C., we direct that an enquiry be held by the trial Court into the amount of mesne profits as may be due to the plaintiffs and a final decree be passed in their favour for such amount and as they may be entitled to. We disallow the cross-objection with costs. Plaintiffs are entitled to their costs throughout which will include fees in this Court on the higher scale.

S.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 196

MUKERJI AND BENNET, JJ.

Mt. Mumtaz Begam—Plaintiff—Appellants.

v.

Mt. Lachhmi and *others*—Defendants—Respondents.

Letters Patent Appeal No. 119 of 1929, Decided on 10th April 1930, against judgment of Boys, J., D/- 18th December 1928, reported in *A. I. R.* 1929 *All.* 174.

Transfer of Property Act (1882), S. 58(c)—Mortgagor executing sale deed in favour of simple mortgagee in consideration of loan due on mortgage with reservation to obtain release of property within limited period of time—Transaction held to be mortgage under S. 58 (c).

Where a mortgagor, in a transaction which purports to be a simple mortgage, executes a document subsequently to such mortgagee, which ostensibly purports to be a sale of the property mortgaged to the mortgagee for the loan due from the mortgagor with a condition that in case the mortgagor paid the money within a certain specified limit the mortgagee would release the property, the transaction does not amount to an out and out sale but is a mortgage within the meaning of S. 58 (c): **A.I.R. 1929 All. 174, Reversed.** [P 197 P 2]

N. P. Asthana and *B. N. Sahai*—for Appellant.

G. Agarwala—for Respondents.

Mukerji, J.—The only question in this Letters Patent Appeal is whether the document in question dated 14th February 1910, evidences an out and out sale or whether a mortgage by conditional sale.

It appears that the appellant Mt. Mumtaz Begam borrowed a sum of rupees 400 on 2nd October 1905 from two persons Narwar Mal and Kishan Lal. The mortgage was a simple one and carried interest. Five years later the appellant executed the document in question and purported to sell the property in consideration of the loan that was owing by her. It was agreed that if Mumtaz Begam paid the money within three years the property would be "released" (*wa guzasht kara lengen*). The plaintiff's suit has been dismissed by the Courts below and a learned single Judge of this Court. The first two Courts came to the conclusion that on the true interpretation of the document it was an out and out sale and the condition as to the "release" of the property on payment within three years did not bring the transaction down to one of a mortgage by conditional sale. In second appeal the learned single Judge of this Court did not consider the document itself, on the ground that no transaction of the document had been placed before him. The learned Judge however considered the law on the point, and after a careful consideration of the law came to the conclusion that he had no reason to differ from the finding of the Courts below.

The document has been read out to us, and we have carefully gone into the language of the document ourselves. The whole question before the learned single Judge was whether the document expressed a transaction of sale or a transaction of a mortgage. The answer to the question can properly be given by a consideration of the language alone and possibly in conjunction with certain circumstances. But if the document was not to be looked into, the only consequence that should have followed was a dismissal of the appeal on the sole ground that the transaction of the document had not been placed before the learned single Judge; but as the learned single Judge has gone into the case, we feel that we are justified in looking at the document itself. If the learned Judge had dismissed the appeal on the sole ground that a translation of the document had not been placed before him, as required by the rule, probably we would not have been in a position to say that the learned Judge was wrong and that we should be prepared to hear an appeal against his judgment. But, as already stated, the case has been heard on the merits, we feel we are bound to look into the document itself.

We find that the vendor and the vendee were already in the position of a borrower and a lender. A mortgage was created on the security of the property itself, and at the date of the ostensible sale deed there was a loan due from Mumtaz Begam to the vendee Nawar Mal and Kishan Lal. This was a circumstance which strongly pointed to a further mortgage being made on the property, to secure the interest payable to the lenders on the one hand, and a right of redemption on the other. The fact that Narwar Mal and Kishan Lal agreed to allow a release (*wa guzasht*) if they were paid within three years, would go to indicate that the transaction was meant to be a security for the money due to Narwar Mal and Kishan Lal. The use of the word "release" indicates that the property was regarded as being under a sort of restraint that is to say was a security. The transaction falls within the language S. 58 (c) T. P. Act. The new amendment which has come into force since 1st April 1930 does not stand in the way of the appellants' success. The term of "re-sale" or "release" is to be found in the document itself, and therefore the right of redemption, if there be any, is not lost. On a consideration of the entire document we are of opinion that it was a case of mortgage and not of an out and out sale.

In the result, we allow the appeal, set aside the judgment of this Court and the decrees of the Courts below and make a decree for redemption in favour of the appellant on condition of payment of Rs. 500 within six months of this date. A decree under O. 34, R. 7, Civil P. C., will be prepared with six months' time for redemption. In the circumstances of the case we direct that the parties shall pay their own costs throughout.

V.B /R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 197

YOUNG, J.

Kanhaya Lal—Plaintiff—Appellant.

v.

Tulsi Pershad—Defendant — Respondent.

Second Appeal No. 681 of 1929, Decided on 28th November 1930, from decision of Addl. Dist. Judge, Aligarh, D/- 23rd January 1929.

Transfer of Property Act (1882), S. 61—Consolidation of mortgages—Simple mortgage can be tacked on usufructuary mortgage.

Where the words used in a second mortgage deed are that the amount due on it would be paid along with the sum of the first mortgage, and further the document provided that the second mortgage is tacked on the first, the parties having chosen these terms must be bound by them, and so the first mortgage could not be redeemed without redeeming the second mortgage. It is possible to tack a simple mortgage upon a usufructuary mortgage: *A. I. R. 1926 All.* 171 and 37 *All.* 634, *Dist.* [P 198 C 2]

Panna Lal—for Appellant.

G. Agarwala and *Kartar Narain Agarwala*—for Respondent.

Judgment.—This is a second appeal from the decision of the learned Additional District Judge of Aligarh. The facts of the case are complicated. They deal with the transfer between a large number of parties of the rights arising out of a mortgage, the date of which is unknown, but which mortgage is admitted by the parties. It is unnecessary for me to detail at length the various dealings in this matter. Eventually however one Kanhaya, the plaintiff, became sole possessor of the mortgagor rights in this old mortgage and he became the owner of three-fourths of the mortgagee rights as well.

The one-fourth of the mortgagee rights outstanding was held by one Tulsi Ram, who is the defendant. Kanhaya Lal brought a suit for redemption of the one-fourth share held by Tulsi Ram. The plaintiff was met with the defence that he could not redeem this one-fourth share without redeeming also one-fourth share of a mortgage dated 1874 entered into between the same parties. The defendant produced the second mortgage, and the learned Judge of the trial Court came to the conclusion that the defence must succeed, and that the plaintiff must redeem both the mortgages. The learned additional District Judge dismissed the appeal with a slight variation. The second mortgage included a small portion of extra land as security, and he therefore ordered that the plaintiff should pay somewhat less, basing the amount upon a rateable value of the two properties mortgaged. Mr. Panna Lal, on behalf of the appellant, says that a wrong construction has been placed upon the mortgage deed of 1874. He says there is no tacking of the one mortgage upon the other, nor is it correct to read the contract as being an undertaking by the mortgagor to repay both the sums of money at one and the same time. Mr. Panna Lal has directed my attention to the case of *Kesar Kunwar* v. *Kashi Ram* (1). He says that that case is in his favour and that according to it he ought to be allowed to redeem the first mortgage without redeeming the second. In my view however that case is distinguishable, for nowhere in that case was there a contract between the parties that the mortgage money on both mortgages should be paid at one and the same time. It only provided that the amount of the second mortgage should be paid first, and it would have been open to the mortgagor to redeem the first mortgage at any time he liked thereafter. In this case the words used in the contract are these: "We shall repay this money along with the amount of the (previous) mortgage." Further, the document goes on to say that the second mortgage is tacked upon the first. It expressly uses the appropriate words to constitute tacking. Mr. Girdhari Lal Agarwala, on behalf of the respondent, relies upon S. 61, T. P. Act, and a decision of this High Court reported in *A. I. R.* 1926 *All.* 171. As regards S. 61, T. P. Act, it enacts that a mortgagor may redeem any one mortgage without paying money due under a separate mortgage in the absence of a contract to the contrary. Here, in my opinion, there is a clear contract to the contrary. As regards the case quoted by Mr. Agarwala, I do not think that it is in point. Mr. Panna Lal argued that it was impossible to tack a simple mortgage on to a usufructuary mortgage. In this case the first mortgage was a usufructuary one, and there is no doubt that the second loan was advanced, not on the basis of a usufructuary mortgage, but as a simple mortgage. Mr. Panna Lal however is unable to show me any authority to support his view, and apart from authority I can see no reason to assent to his contention that it is impossible to tack a simple mortgage upon a usufructuary mortgage. If the parties wish so to contract, I do not see any reason why they should not do so. I am satisfied that it was an absolute condition of the contract that the two principal amounts should be paid together, and that one should not be paid without payment of the other. The parties having chosen to enter into that contract they ought to be bound by its terms. I agree with the judgment of the learned Judge of the Court below and dismiss this appeal with costs.

Leave to take this matter to Letters Patent appeal is refused.

K.N./R.K. *Appeal dismissed.*

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(1) [1915] 37 All. 634=30 I. C. 777.

A. I. R. 1931 Allahabad 198

Dalal, J.

Khaderu Chamar—Defendant—Appellant.

v.

Sri Nath Pande and *others*—Plaintiffs—Respondents.

Second Appeal No. 35 of 1929, Decided on 3rd December 1930, from decision of Dist. Judge, Gorakhpur, D/- 17th September 1928.

(a) Gorakhpur Goraits Act (1919), S. 4 (3) —Meaning of the section explained.

The meaning of the section is that the non-occupancy tenant was to be treated as a lessee and would not acquire occupancy rights by the flux of the time of seven years. [P 199 C 2]

(b) Agra Tenancy Act (1901), Ss. 77, 35 and 273—A tenant does not automatically become a trespasser on the day when the period of his lease expires.

When once a tenancy has commenced the tenant cannot be ejected otherwise than in accordance with the provisions of S. 77. A tenant does not automatically become a trespasser on the day when the period of his lease expires.

Where under the Local Act 1 of 1919 the defendant was admitted to the tenancy as a non-occupancy tenant, for the period of seven years, for which he was to hold the land at the same rent and during which he could not acquire occupancy rights:

Held: that on the expiry of the said period of seven years the defendant could not lose the character of a non-occupancy tenant with which he was invested at the commencement of his occupation of the land, on payment of rent and that he was a tenant of the land and hence the civil Court had no jurisdiction to entertain suit for his ejectment: 10 *All.* 13, *Ref.* [P 200 C 1]

(c) Agra Tenancy Act (1901), S. 273—Civil Court should only see that its jurisdiction is barred, when the defendant is a tenant in suit for his ejectment—Class of tenancy is to be determined by revenue Court.

Under S. 273 the only question that should be referred to the revenue Court by the civil Court is that of tenancy and not of the class of tenancy to which the defendant in a suit for his ejectment belongs. It is sufficient for the purposes of the civil Court to discover that a defendant is a tenant of an agricultural land and that the jurisdiction of the civil Court does not exist. It may be left to future litigation in revenue Court to determine the class of tenancy. [P 200 C 1]

Haribans Sahai—for Appellant.

A. M. Khwaja—for Respondents.

Judgment.—Both parties appear to have come to Court with wrong allegations. The defendant was holding the post of a Gorait in the Gorakhpur District. The landholders of that district were at a certain period not required to maintain Goraits, so an Act, No. 1 of 1919, Local, was passed by the Local Government to make provision for the rent-free holdings possessed at the time by Goraits in lieu of service. Under the provisions of S. 4 (3) of that Act the defendant was declared to be a non-occupancy tenant on a certain rent for a period of seven years from 1327 Fasli. The period expired in 1333 Fasli corresponding to April 1926. The case of the plaintiff zamindar was that in April 1926 he took possession of the land and subsequently the defendant forcibly ejected him and trespassed on the land. On this allegation the plaintiff came to the civil Court to eject the defendant. The defence was that on the expiry of the period of seven years all the zamindars gave a fresh tenancy to the defendant and that therefore the defendant was a tenant.

The land in suit being agricultural land and the defence being one of tenancy of that land the civil Court remitted an issue to the revenue Court which decided that the defendant was the tenant of the plaintiff. That Court went further and held that the defendant was a statutory tenant under S. 19 of the present Tenancy Act. The learned Munsif dismissed the suit. The lower appellate Court reconsidered the question of tenancy. He held that the details given by both parties were incorrect and that the defendant was holding over at the expiry of his term of seven years. It is laid down in S. 4 (3) of the Local Act referred to above that the non-occupancy tenant whose rent has been fixed shall be entitled to hold the land at that rate for a period of seven years and an order under sub-S. 1 shall have the same force and effect as a registered lease under the provisions of S. 11, Agra Tenancy Act, 1901. The meaning of this is that the non occupancy tenant will be treated as a lessee and would not acquire occupancy rights by the flux of the time of seven years. The case is therefore treated by the lower appellate Court as one of a lessee holding over on the expiry of his lease. The question is whether such a person is a tenant or a trespasser. Under the old Act of 1881 (Rent Act 12 of 1881) the tenancy of a lessee did not cease upon the determination of the term of the lease without his ejectment under S. 36, Rent Act, 1881: *Shitab Dei* v. *Ajudhia Prasad* (1). In the subsequent Tenancy Act there was no provision to discount the reasoning of this decision. When once a tenancy has commenced the tenant cannot be ejected otherwise than in accordance with the provisions of the Tenancy Act as laid down in S. 77 of the present Act. The same provision is made in S. 35 which narrates the different conditions under which the interest of a tenant shall be extinguished. The expiry of the period of a lease is not one of those conditions. A tenant does not automatically become a trespasser on the day when the period of his lease expires. The present case is even stronger than the case of an ordinary lessee because under the Local Act the defendant was admitted to the tenancy as a non-occupancy tenant and on the cessation of the period of seven years for which he was to hold the land at the same rent and during which he could not acquire occupancy rights he cannot lose the character of a non-occupancy tenant with which he was invested at the commencement of his occupation of the land on payment of rent. I disagree with the lower appellate Court and hold that the defendant is the tenant of the land, and the civil Court has no jurisdiction to entertain the present suit for ejectment.

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(1) [1887] 10 All. 13=(1887) A. W. N. 269.

I do not think that the order of the Munsif was correct in dismissing the suit. Under S. 273 the only question referred to the revenue Court by the civil Court is that of tenancy and not of the class of tenancy to which the defendant belonged. He was really a tenant. It is sufficient for the purposes of the civil Court to discover that a defendant is a tenant of an agricultural land and that the jurisdiction of the civil Court does not exist. It may be left to future litigation in revenue Court to determine the class of tenancy.

I set aside the decrees of both the subordinate Courts and direct the Munsif to return the plaint to the plaintiff for presentation to the proper Court. Parties shall bear their own costs. The appellant's counsel expressed a fear that my order may be interpreted by a revenue Court as an injunction on them to entertain the suit and to eject the defendant without the necessary procedure of a previous notice. My order does not bear any such interpretation.

B.V./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 200

DALAL, J.

Amir Singh—Defendant—Appellant.

v.

Mohd. Zahiruddin —Plaintiff — Respondent.

Second Appeal No. 2102 of 1928, Decided on 28th November 1930, from decision of Addl. Dist. Judge, Moradabad, D/- 15th September 1928.

Civil P. C. (1908), S. 11 — Heard and decided — Court refusing plaint for want of jurisdiction — After Court vested with jurisdiction suit again filed on same cause of action—There can be no bar of res judicata.

Where a Court refused to take cognizance of a plaint on the ground that it had no jurisdiction to try a suit of that nature and where after the Court was vested with jurisdiction to try suits of that kind, the plaintiff again filed his suit on the same cause of action :

Held : that the matter in issue between the parties had never been heard and finally decided in any suit. Mere dismissal of a suit for want of jurisdiction of a Court cannot be a bar of res judicata in another suit on the same cause of action : 33 *Bom.* 617 and *John Lemm* v. *Thomas Alexander*, (1812) *A. C.* 400, *Dist.* [P 201 C 2]

A. P. Bagchi—for Appellant.

A. M. Khwaja—for Respondent.

Judgment.—I am of opinion that the subordinate Courts were correct in holding that the present suit was not barred by res judicata. The plaintiff, who is obviously a persistent claimant, sued in 1912 in the revenue Court for the ejectment of the defendant from pasture land. The revenue Court refused to take cognizance on the ground that the revenue Court had no jurisdiction. For that reason the plaintiff's suit was dismissed. It is true that the plaint ought to have been returned. This was a defect of procedure, but did not amount to any decision on the matter in issue. There was again litigation in 1922 in the revenue Court, which again denied jurisdiction. Subsequently the present Tenancy Act (3 of 1926) was passed and the revenue Court was definitely given jurisdiction to deal with ejectment suits relating to pasture land. The plaintiff again went to the revenue Court for ejectment of the defendant and succeeded this time. The defence of res judicata was not accepted, and I think rightly.

The learned counsel for the defendant-appellant quoted two rulings, *Lakshmanrao* v. *Balkrishan* (1) and *John Lemm* v. *Thomas Alexander Mitchell* (2). In both those cases the previous litigation had decided the matter on the merits and the Court had not refused jurisdiction. The observations of their Lordships of the Privy Council at p. 405 in Appeal Cases are very pertinent. The contention was raised on behalf of the plaintiff that the previous judgment only decided a preliminary point as to the jurisdiction of the Court. Their Lordships disagreed with this view of the previous proceedings and held that the substance of the matter was decided in the previous litigation. It appears to be apparent from these words that if in the former litigation the Court had denied jurisdiction there would not have been a bar of res judicata. The same was the case in the Bombay ruling, where in the previous litigation the matter was heard and finally decided. According to the provisions of S. 11, Civil P. C., a Court is forbidden from trying any suit or issue if the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties……and has been heard and finally decided by such Court. The matter in issue between the parties here has never been heard and finally decided in any suit.

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(1) [1912] 33 Bom. 617=16 I.C. 1002.

(2) [1912] A.C. 400.

As regards ground of appeal No. 3, the lower appellate Court has duly dealt with the matter and held against the defendant as a finding of fact. I dismiss the appeal with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 201

SEN AND NIAMATULLAH, JJ.

Bechu—Appellant.

v.

Bhabuti Prasad and *others*—Respondents.

Second Appeal No. 1294 of 1927, Decided on 12th March 1930, against decision of Addl. Sub-Judge, Benares, D/- 14th April 1927.

(a) Transfer of Property Act (1882), S. 51—Improvements by mortgagee—S. 51 does not apply.

Section 51 cannot be applied to a case where the party invoking its aid claimed to be in possession as mortgagee and could not have believed "in good faith that he is absolutely entitled thereto." [P 202 C 2]

(b) Contract Act (1872), S. 64—"Benefit received under contract"—Meaning explained.

Benefit received under the voidable contract is what the party rescinding it actually received under the contract. [P 203 C 1]

(c) Contract Act (1872), S. 64 — Voidable transfer—Person seeking to recover possession by avoidance of transfer can be made to do so on equitable terms.

Where a transfer is voidable, although the person seeking to recover possession of property by avoidance of the transfer may be put on terms by the Court whose aid he seeks, the Court can only impose conditions of an equitable nature. [P 202 C 2]

K. N. Katju and *Gadadhar Prasad*—for Appellant.

B. E. O'Conor, *P. L. Banerji*, *H. P. Sen*, and *Kedar Nath Sinha*—for Respondents.

Niamatullah, J.—This is an appeal by defendant 1 from the decree passed by the learned Additional Subordinate Judge of Benares on appeal from that of a Munsif of that district in a suit brought by the plaintiff-respondent for recovery of possession of a bungalow situate in Moghal Sarai, offering to pay any sum of money which defendant 1 may be found equitably entitled to. The defendant-appellant obtained possession of the bungalow in dispute under a mortgage deed, dated 26th March 1912, executed by Mt. Ram Dulari, defendant 3, mother of the plaintiff, who was then a minor, for a sum of Rs. 1,400. It is not disputed that Mt. Ram Dulari was the certificated guardian of the plaintiff's person and property and that she executed the aforesaid usufructuary mortgage-deed without previously obtaining the permission of the District Judge under S. 29, Guardians and Wards Act. The result is that the mortgage is voidable at the option of the plaintiff-respondent : vide S. 30, Guardians and Wards Act.

The defendant-appellant has been in possession ever since the date of the mortgage and has erected a number of new buildings in the compound of the bungalow as it was at the time of the mortgage. The total cost of these constructions is alleged by the defendant to be Rs. 11,621, which he claims over and above the principal sum due under the mortgage deed. He also claims Rs. 13,836 interest on the outlay at the rate of 2 per cent per mensem in terms of a stipulation entered in the mortgage deed which permits the mortgagee to effect repairs of the mortgaged premises and to make such new constructions as he liked at his own expense, and entitles the mortgagee to recover all the sums thus spent by him with interest at that rate at the time of redemption. Another small amount claimed by the mortgagee is a sum of Rs 168·7-0, being the revenue paid in respect of the site. The total sum which according to the defendant, is payable by the plaintiff for recovery of possession of the property in dispute is Rs. 27,025-8-0.

The Court of first instance decreed possession to the plaintiff-respondent on condition of payment by him of the round sum of Rs. 12,000 which represents Rs. 1,138 out of the principal sum of Rs. 1,400 advanced under the mortgage deed, being the amount spent in discharge of a debt due from the plaintiff's father, and Rs. 11,621, the cost of new constructions made by the mortgagee. The view of the trial Court is based on S. 63, T. P. Act, under which a mortgagee is entitled to costs of such improvements as are not separable from the property originally mortgaged. The lower appellate Court has differed from that view and held that the mortgage being voidable at the option of the plaintiff-respondent, the defendant-appellant is entitled to no more than the sum of Rs. 1,138-9-0 out of the consideration of Rs. 1,400, together with Rs. 237 spent by the mortgagee on necessary repairs of the bungalow mortgaged. As regards newly added buildings, the learned Additional Subordinate Judge is of opinion that the mortgagee cannot insist on payment of what he has spent on those constructions under any rule of law. Accordingly he passed a decree in favour of the plaintiff-respondent on payment of Rs. 1,375-9-0 giving liberty to the defendant-appellant to remove the materials of the buildings made by him in the compound of the bungalow in dispute.

It has been argued by the learned advocate for the appellant that he is entitled to recover what he has spent on erecting new buildings in the compound of the bungalow, which has been considerably improved by that outlay and the plaintiff-respondent will have the benefit of such new buildings. Various sections were referred to in course of the argument which, according to the appellant's contention, entitled him to that relief. We are however of opinion that none of those sections is in terms applicable. Ss. 63 and 72, T. P. Act, were rightly held by the lower appellate Court to be inapplicable, and reliance has not been placed on them before us for the obvious reason that the plaintiff-respondent being absolutely entitled to avoid the mortgage deed in question and the deed having been declared to be void as against him, the case cannot be approached on the supposition that the relationship of mortgagor and mortgagee ever existed between the parties. S. 51 of the same Act has been founded on in support of the argument that the improvements have been made by the defendant-appellant in good faith, and that he is entitled to compensation for such improvements before he is evicted from the property in dispute. We are clearly of opinion that that section cannot be applied to a case where the party invoking its aid claimed to be in possession as mortgagee and could not have believed " in good faith that he is absolutely entitled thereto." This requirement of the section having been pointed out to the learned advocate for the appellant he rested his contention on the ground that that section is only illustrative and is not exhaustive. On that supposition he pressed for the extension of the principle underlying that section to the case of a mortgagee. We are unable to give effect to this contention. It is true a plaintiff seeking to recover possession of property by avoidance of a transfer may be put on terms by the Court whose aid he seeks ; but the Court can only impose conditions of an equitable nature.

We are not satisfied that in making valuable constructions, which the defendant-appellant did, he was actuated by good faith. The terms of the mortgage deed which he obtained from the plaintiff's guardian, who is a pardanashin lady, are of a very onerous character. The value of the bungalow is estimated to be Rs. 1,659, and having regard to the means of the plaintiff he could not have expected him to be able to pay on redemption all that he chose to spend on it. The rate of interest to which he obtained the assent of the plaintiff's guardian, viz. 2 per cent per mensem, payable on the outlay at the time of redemption, clearly indicates his desire to make redemption absolutely prohibitive. It was in furtherance of the desire to make redemption impossible that he erected buildings at an expense quite beyond the means of the plaintiff-respondent. Under these circumstances it will be wholly inequitable to compel the plaintiff-respondent to pay the newly added buildings as a condition precedent to his recovering possession of the bungalow which unquestionably belongs to him. The order of the lower appellate Court with regard to the sum of Rs. 237

spent by the defendant on necessary improvements is equitable and limits the extent to which the plaintiff-respondent should be put on terms besides being made liable for the sum of Rs. 1,138-9-0 spent to satisfy his father's debt.

Section 64, Contract Act, was relied on to support the argument that the plaintiff-respondent should restore such benefits as he received under the voidable contract, viz., the mortgage in question. It is said the extent of benefit derived by the plaintiff-respondent is the present value of the buildings in the compound of the bungalow originally mortgaged. We do not think this contention can be supported by the language of S. 64. It provides that the

> "party rescinding a voidable contract shall, if he received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

Benefit received under the voidable contract is what the party rescinding it actually received under the contract. The sum of Rs. 138-9-0 may be considered to be such benefit. The plaintiff-respondent cannot be said to have received any benefit with reference to the newly added buildings. In fact, the appellant now offers the benefit of improvements made by him, claiming from the defendant the cost of such improvements. The plaintiff has so far received no benefit under the contract, but will receive it if he accepts the defendant's offer. We have no hesitation in holding that S. 64, Contract Act, does not support the contention sought to be based on it.

The result is that we uphold the decree of the lower appellate Court and dismiss this appeal with costs. It has been represented to us on behalf of the appellant that the three months time granted by the lower appellate Court for the removal of the new constructions expired but that an order of stay of execution was granted by this Court pending this appeal. It is prayed that we may grant six months further time for removal of the materials. We grant three months time, which we think is ample, from today, to the appellant to arrange for the demolition and removal of the materials of his buildings.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 203

MUKERJI AND BENNET, JJ.

Ram Dayal and *others*—Defendants—Appellants.

v.

Aminuddin and *another* — Plaintiffs —Respondents.

First Appeal No. 550 of 1926, Decided on 14th May 1930, from decision of Sub-Judge, Mainpuri, D/- 17th May 1926.

(a) Limitation Act (1908), Art. 132—Bond hypothecating properties stipulating repayment of money within a year — Interest to be paid every six months and on default amount due with compound interest to be realized—Cause of action held to arise after one year from date of bond—Suit for sale of properties within 12 years from that date held not barred.

The bond in suit hypothecating immovable properties stipulated that the money was to be repaid in the course of one year. The mortgagors agreed that they would pay interest every six months and on default at the end of six months, interest would be added to the principal. Interest was to be paid for the principal and also added interest. There was a default in payment of interest at the end of the first six months. Suit for sale of properties was filed by mortgagees within 13 years from date of bond.

Held: that cause of action arose after one year from date of bond and the suit was not time barred: *A. I. R.* 1929 *All.* 908, *Rel. on.* [P 204 C 2]

(b) Hindu Law—Alienasion—Legal necessity—Onus of proving legal necessity for borrowing money and legal necessity for borrowing money at stipulated rate of interest lies on creditor.

The burden of proof that there was not only legal necessity for borrowing money but there also existed legal necessity for borrowing the money at the stipulated rate of interest lies on the creditor. [P 205 C 1]

U. S. Bajpai and *Raj Bahadur Pandey* —for Appellants.

M. A. Aziz—for Respondents.

Mukerji J.—This appeal arises out of a suit for sale instituted by the respondents against the appellants and several others.

So far back as on 17th May 1912 two persons Manohar and Mt. Chandan Kunwar, since deceased, executed the bond in suit hypothecating immovable property for the sum of Rs. 300. Manohar is alive and was a party to the suit in the Court below. As regards Mt. Chan dan Kunwar the plaintiffs' case was that defendant 1 was her daughter but as it was contested by certain people that she was not Mt. Chandan Kunwar's daughter the plaintiffs impleaded the defendants other than defendants 1 and 2 as reversioners to the estate of Mt. Chandan Kunwar's husband Bechi Lal.

Several issues were raised in the case including whether Manohar had any interest in the property mortgaged. The reversioners denied that there was any legal necessity for the loan. They pleaded that the suit was barred by limitation and they also pleaded that the interest was excessive.

The learned Subordinate Judge found that Manohar was not entitled to the property and was not really a member of the family to which Mt. Chandan Kunwar's husband belonged, that there was legal necessity only to the extent of Rs. 112-4-0 and that the rate of interest stipulated for was payable. He also held that the suit was not time barred. In the result, the claim was decreed for recovery of Rs. 112-4-0 with the stipulated rate of interest.

In appeal which is on behalf of the defendants, who were impleaded as reversioners to the estate of Bechi Lal, three points have been urged, namely, the suit was really time barred, that there was no evidence of legal necessity for the loan and that there is no sufficient justification for allowing the interest stipulated as it was not supported by legal necessity.

The point of limitation arises in this way. The bond in suit which will be found printed at p. 49, stipulates that the money was to be repaid in the course of one year, then the mortgagors agreed that they would pay interest every six months, and if they failed to pay interest at the end of six months the interest would be added to the principal and interest should be paid not only for the principal but also the added interest. The actual words used in the bond on this point are as follows:

"*Iqrar yeh hai ki mablighan mazkur mai sud fishadi Rs. 2 mahwari ke arsa ek sal men ada wa bebaq kar denge. Aur and mubliyan mazkur ka shashmahiwar dete rahenge. Agar sud shashmahiwar ada na karan tau wuh sud usi shashmahi par shamil zar asil ke hokar uspar bhi sud besarah adar ta yom bebaqui hai rawan rahega. Basurat wada khilafi dayiman ko ikhtiar hai ki kul rupaya apna mai sud darsud zat wa jaidad makhfula . . . kasb zabta wasul kar lenge.*"

It is argued that the stipulation meant that although the stipulated period for payment was one year, that stipulated period would be cut short to six months if there was a default in payment of interest at the end of the first six months. We find it difficult to read the document as meaning what the learned counsel for the appellants contends for. The document provides that in case of default the creditor shall have power to realize the amount due not only with interest but also with compound interest. The compound interest could not be due at the end of the first six months. It would be due, at the earliest at the end of one year from the date of the execution of the bond. In this view the language does not support the learned counsel's contention. We were referred to two unreported decisions by the learned counsel, namely decisions in *S. A. No.* 316 *of* 1925 decided on 21st April 1927, and *S. A. No,* 1178 *of* 1921 decided on 6th June 1922. In none of these cases it was considered what was the effect of the words "and compound interest." On the other hand, there is a decision in *Ramadhar* v. *Raj Narain* (1) in which these words were examined, and it was held that the words "with interest and compound interest" necessarily meant that the money could not be realized till at least two six months had expired. This was the view taken by one of the learned Judges. The other learned Judge was of opinion that as the defendants had failed to show that there was a clear stipulation that money would be paid earlier under certain circumstances than the clearly stipulated period, it had not been shown that the suit was time barred. Whichever view we take of this case, the arguments advanced by the learned Judges in that judgment equally apply. We are therefore of opinion that the suit is governed more by the case of *Ramadhar* v. *Raj Narain* (1) with which we agree than by the two unreported cases in which the language used was not considered in all its bearing. We hold therefore that the suit is not time barred.

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(1) A. I. R. 1929 All. 903=120 I. C. 552.

The second point is the legal necessity for the loan itself. It appears that Thakur Das and Sukhlal were two brothers. Sukhlal's son, it was said, was defendant 2 Manohar. It has been found that Manohar, defendant 2, was not the son of Sukhlal. Thakur Dass' son was Beche Lal, and Beche Lal's widow was Mt. Chandan Kunwar. Thakur Dass and Sukhlal, it was alleged borrowed money from Khubchand on 4th February 1923 by execution of a mortgage by conditional sale printed at p. 25. When Khubchand wanted to enforce this document, a suit was instituted by Sukhlal and Thakur Das to have it declared that the mortgage deed was a forgery, and no money had been borrowed on foot of it by the plaintiffs. That suit was decreed by the Munsif on 24th May 1874, and that judgment was upheld on appeal. It appears however that in spite of that decree a suit was instituted later on by a successor-in-title of Khubchand against one Manohar as the heir of Sukhlal and against Mt. Chandan .Kunwar alias Mt. Gomti. It appears that advantage was taken of the enlargement of the law of limitation in 1908, and a suit was brought to enforce an old bond which had been declared to be a forgery by Courts. The defendants were in ignorance of the true facts and a decree was actually passed for foreclosure. The decree having been passed was no doubt a binding decree, and Mt. Chandan Kunwar stood in danger of losing her property. She had accordingly to borrow money from plaintiff 1 and the predecessor of plaintiff 2. It must therefore be taken that the loan was justified to the extent it was required to pay the decree obtained by Dwarka Parsad on 20th February 1912 : (vide p. 37). The tender of deposit at p. 39 shows that the money was actually deposited in Court. We agree therefore with the Court below that to this extent the mortgage was supported by legal necessity.

The third point is one of interest. The burden of proof was on the creditor to show that not only was there a legal necessity for borrowing the money but there also existed legal necessity for borrowing the money at the stipulated rate of interest. The only evidence on that point is that of Baldeo Sahai a witness for the plaintiff. His evidence has not been printed, but we have been referred to the original record for his evidence. All that he says is that the usual rate of interest was between 8 annas per cent to Rs. 2 per cent per mensem. He does not say that compound interest at Rs. 2 per annum was also the usual rate of interest. No doubt, taken by itself a stipulation as regards compound interest is a fair transaction, but when the evidence is simply this that from 8 annas to 2 pet cent is the usual rate of interest, we cannot read it meaning that 2 per cent per annum compoundable every six months was also a fair rate of interest. We accordingly think that on the evidence we must reduce the rate of interest 2 to per cent per annum simple interest.

In the result the appeal succeeds only to the reduction of interest as indicated above. The rest of the appeal is dismissed. Parties will receive and pay costs in proportion to their respective success and failure.

The respondents owe Rs. 43 to the office as arrears of translation and printing charges. Mr. Aziz, the learned counsel for the respondents, has agreed to pay it up quickly, but if the money remains unpaid, no copy of the decree will be issued to the respondents, and the decree will not be executable by the respondents till the money has been paid. The non-payment will be endorsed on the decree, and information to that effect will be given to the Court below.

A fresh decree under O. 34, R. 4, Civil P. C., will be prepared, Six months are allowed to pay up.

G.P./R.K. *Order accordingly.*

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* A. I. R. 1931 Allahabad 205

DALAL, J.

Mt. Rajwanta Kuer—Defendant—Applicant.

v.

Mahabir Rai — Plaintiff — Opposite Party.

Civil Revn. No. 348 of 1930, Decided on 19th November 1930, from decree of Addl. Munsif, Azamgarh, D/- 14th June 1930.

*** Specific Relief Act, (1877), S. 9—" Due course of law," meaning explained.**

The phrase " due course of law " means the regular normal process and effect of the law operating on a matter which has been laid before it for adjudication. Where a man is before it for adjudication.

dispossessed through a law Court, that Court having jurisdiction to adjudicate upon the matter, such a dispossession would be in due course of law, even if the process employed was one that ought not to have been followed : 29 *Bom.* 213; 18 *I. C.* 727, *Rel. on.* ; 30 *All.* 331 and 33 *All.* 647, *Dist.* [P 206 C 2]

Ambika Prasad—for Applicant.

A. P. Pandey—for Opposite Party.

Judgment. — An objection was raised by Mr. Pandey on behalf of the opposite party that no revision lay. This was a suit brought by the plaintiff Mahabir Rai under S. 9, Specific Relief Act, for recovery of possession on the ground that he was dispossessed without his consent from immovable property within the period of limitation permitted under that section. The plaintiff's suit was decreed. No appeal can lie from a decree in such a suit and therefore the defendant applied by way of revision. Two rulings were cited by learned counsel : *Jwala* v. *Ganga Prasad* (1) and *Ram Kishan Das* v. *Jai Kishan Das* (2). In neither case the question of jurisdiction was raised. Both cases were decided on the ground that it was open to the defendant to sue to establish his title to such property and to recover possession thereof. In the present case there is no such remedy open to the defendant. The plaintiffs alleged that he was the mortgagee of occupancy land. The mortgages were subsequent to 1901 and so prohibited by law. The defendant alleged that the plaintiff was a sub-tenant. On the basis of this allegation she sued in the revenue Court for the ejectment of the plaintiff, and it was in pursuance of a decree obtained in that suit that the plaintiff was ejected. The title of the defendant to be a tenant as against the plaintiff sub-tenant has already been established by a proper suit in the revenue Court, and there is no further remedy open to her in pursuance of the present decree of the trial Court of civil jurisdiction. In my opinion this application does lie.

The second question is whether the civil Court has jurisdiction. The civil Court has jurisdiction to try a suit where any person is dispossessed without his consent from immovable property otherwise than in due course of law. The contention of the defendant is that the plaintiff was not dispossessed otherwise than in due course of law, but that he was dispossessed in due course of law by a revenue Court which held as that Court had jurisdiction to do as regards agricultural land, that the plaintiff was the defendants' sub-tenant. The learned Judge of the trial Court has quoted certain rulings: *Rudrappa* v. *Narsingrao* (3) and *Roshanullah* v. *Hajir Mahomed* (4). What he has said on the authority of these two rulings is :

> "The phrase means the regular normal process and effect of the law operating on a matter which has been laid before it for adjudication. Thus it appears that even if a man is dispossessed through a law Court, still that dispossession would not be in due course of law if the process employed was one that ought not to have been followed."

Following up these observations the ejectment of the plaintiff must be held to have been in due course of law. The process employed by the defendant was a correct one of suing in the revenue Court for the ejectment of a sub-tenant. It was a regular normal process of a revenue Court to order the ejectment of a sub-tenant from agricultural land. The revenue Court had jurisdiction to adjudicate upon the matter. It was pointed out that when both the defendant and the plaintiff equally broke the law forbidding mortgage of an occupancy holding the defendant could not obtain possession without paying the mortgage charges of the plaintiff. That however is a point for the consideration of the revenue Court. The authority of the revenue Court thereby is not shaken in ejecting a sub-tenant. It is not as if the mortgages were valid ones and the revenue Court would have no authority to brush aside valid mortgage transactions.

In the result I am of opinion that no suit under S. 9, Specific Relief Act, lay to the Munsif's Court, and he had exercised jurisdiction not vested in him. The application is decreed with costs and the plaintiff's suit is dismissed with costs in all Courts.

B.V./R.K. *Application accepted.*

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(1) [1908] 30 All. 331=5 A. L. J. 297=(1908) A. W. N. 142.

(2) [1911] 33 All. 647=11 I. C. 814.

(3) [1905] 29 Bom. 213=7 Bom. L. R. 12.

(4) [1915] 18 I. C. 727.

A. I. R. 1931 Allahabad 207

DALAL, J.

Brij Mohan Das—Defendant— Appellant.

v.

Bhikhuji—Plaintiff—Respondent.

Second Appeal No. 27 of 1929, Decided on 4th December 1930, from decision of Addl. Sub-Judge, Benares, D/- 29th November 1928.

(a) **Practice—Appeal — Second appellate Court constituted by single Judge — Matter difficult for decision — Yet reference to Bench of two Judges is not necessary — Letters Patent (Allahabad), Cl. 27.**

Where in a second appeal the appellate Court is constituted by a single Judge and the matter is of some difficulty for decision, yet it is not necessary that it should be referred to a Bench of two Judges, the decision of a single Judge, if so permitted, is open to appeal to such a Bench, and unless there is a special reason, the ordinary rule of procedure should be followed in every case. [P 207 C 1]

(b) **Easements Act (1882), S. 4 — Right of "lagan" attached to ghat is easement.**

The right of "lagan" attached to the ownership of the front part of the "ghat" to use the back part under certain conditions is a right of easement. [P 208 C 1]

K. N. Katju and *M. N. Kaul*—for Appellant.

P. L. Banerji, B. Malik, Ram Narain Prasad and *H. P. Sen*—for Respondent.

Judgment.—It was suggested by Dr. Katju who appeared on behalf of the appellant that the appeal may be referred to a Bench of two Judges. I am not in agreement with such a request. If a matter is of some difficulty for decision it does not necessarily follow that it should be referred to a Bench of two Judges. The decision of a single Judge, if so permitted, is open to appeal to such a Bench and no reason is apparent why the ordinary rule of procedure should not be followed in every case.

The dispute in this case relates to a right of what is known as "lagan." It is a right peculiar to religious places situated on the banks of a river. A river in India which in its course is generally as unstable as a maiden often leaves its course or overlaps the neighbouring land. Priests provide for religious necessities of Hindus, sitting on the bank of the river over a certain plot of land known as "ghat." The proprietorship rests with certain men of substance who are non-resident and they allot this "ghat" to Brahmins. This allotment is sometimes sold. When the front portion of the allotment is sold a situation arises that may be expected by the rising of the water and the priest carrying on his trade very close to the river finds his allotment covered by water. In such a situation he arranges for a right to occupy the back portion of the "ghat." At the time of purchase he makes an arrangement with the vendor who is in possession of the rest of the "ghat" to permit him to carry on his business further back. No difficulty arises so long as the original holder of the allotment continues in possession of the back portion of the "ghat" because whatever the nature of the right may be, the vendor is contractually bound to accommodate the purchaser of the front portion of the "ghat." Trouble arises when the back portion is also sold, and the question for decision then would be whether the purchaser of the back portion would be bound to accommodate the purchaser of the front portion on the rising of the river in any case or only if he had notice of the previous contract between the purchaser of the front portion of the "ghat" and the original owner. Such a dispute arises here.

The plaintiff Bhikhuji when washed out of his front portion claimed to carry on his business in the back portion purchased by the minor Brijmohan Das defendant and not being permitted to do so brought this suit for a declaration that he was entitled to a right of "lagan" on the northern half of the "ghat" during the rainy season when he is washed out of the western portion of his two "ghats." The defence was that the right claimed by the plaintiff was of the nature of a right enunciated in para. 2, S. 40, T. P. Act, and that the plaintiff cannot enforce it as against the defendant without proving notice of this contract to Brijmohan Das at the time the latter made his purchase. This defence was not accepted by either of the two subordinate Courts The defendant has therefore come here in second appeal. Neither Court however has considered the case in its broad outline because, as is usual with litigants other false defences were included and an attempt was made to prove that the transfer in favour of the plaintiff was fraudulent.

On behalf of the defence a Bench decision of this Court dated 11th July 1921 was produced. Presumably it is unreported. The learned Judges held therein that there can be no prescriptive right of "lagan." In that case however, as pointed out by the trial Court, no specific plot was marked out on which the right of "lagan" may be exercised. In the present case the matter was left vague in the sale-deed itself in favour of the plaintiff, but subsequently a correction was made by a second document which was also registered. The matter which was left vague in the map attached to the first sale-deed was specified accurately in the second deed. Mr. Malik argued on behalf of the plaintiff-respondent that this "lagan" amounted to an interest in land or an easement thereon. He referred to the definition of easement in S. 4. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. To me the right of "lagan" attached to the ownership of the front part of the "ghat" to use the back part under certain conditions appears to be a right of easement. In S. 5 it is provided that an easement may be discontinuous and non-apparent. Further, S. 8 lays down that an easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

I think that the trial Court was right in pointing out that the original owner had the power to divest himself of a certain portion of his absolute right and create an easement on the back portion of the "ghat" in favour of the person to whom the front portion was sold. A proper inquiry has not been made in the registration office, so I am not prepared to quote in support of my argument Mr. Mallik's submission that the "ghat" is all one "ghat" entered as one in the registration books, and the defendant when purchasing his portion could easily have obtained notice of this right attached to the back portion under the sale-deed in favour of the plaintiff. Possibly this is true, but there is no evidence on the subject ; nor have I any personal information as to how the index to registration books is prepared with respect to a "ghat," whether the entire "ghat" is treated as one and a portion thereof shown in the index as sold, or the different portions entered in separate places in the index so that the purchaser of one portion may not know what has happened as regards the previous transfers of another portion.

In my opinion the provisions of S. 40, T. P. Act, do not apply. The appeal fails and is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 208

SEN, J.

Sheotahal Dube—Appellant.

v.

Lal Narain Prasad Chand and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1019 of 1928, Decided on 27th January 1930, from decree of Addl. Dist. Judge, Gorakhpur, D/- 9th March 1928.

Co-owner — Ejectment suit — Other co-sharers need not be joined as co-plaintiffs to suit.

Where property is held in co-ownership it is open to a co-owner to maintain a suit for ejectment against a trespasser. It is not necessary that the other cosharers should be joined with him as co-plaintiffs in the suit. [P 208 C 2]

Haribans Sahai—for Appellant.

K. N. Katju and *S. P. Sinha*—for Respondents.

Judgment.—The facts of the case which have given rise to this appeal are set out in the judgment of the connected[*] appeal and need not be recapitulated. The points raised in this appeal do not call for any separate treatment. They have been disposed of in the connected appeal.

Plaintiff claimed for possession of the plots in dispute from the defendant. The plaintiff was one out of three cosharers. The position of the defendant was merely that of a trespasser. Where property is held in co-ownership, it is open to a co-owner to maintain a suit for ejectment against a trespasser. It is not necessary that the other cosharers should be joined with him as co-plaintiffs in the suit. The right of the plaintiff is coextensive with the right of the other co-owners. The object of the suit is to recover the property for the benefit of himself and the other co-owners. The lower appellate Court was therefore right in granting the plaintiff a decree for the entire claim.

This appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

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[*] See A. I. R. 1930 All. 422—Ed.

A. I. R. 1931 Allahabad 209

DALAL, J.

Brijiwan Das—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 590 of 1930, Decided on 17th November 1930, from order of Addl. Sess. Judge, Benares, D/- 8th July 1930.

Criminal P. C., Ss. 222 (2) and 233—Criminal breach of trust—Previous acquittal in respect of gross sum between specified dates does not bar second trial—Criminal P. C., S. 403.

A trial in respect of a gross sum for which a breach of trust was alleged to have been committed between two specified dates does not bar a second trial in respect of an offence alleged to have been committed on intermediate days but not included in the gross sum. The charge of a gross sum embezzled between two dates is only one charge and there may be a separate trial under the provisions of S. 233 of embezzlement of another item not included in the gross sum for which an earlier charge was framed under S. 222 (2) : *A.I.R.* 1923 *Cal.* 654 ; 5 *I. C.* 970, *Ref* ; 32 *I.C.* 158, *not Foll.* [P 209 C 2]

Kumuda Prasad—for Applicant.

M. Waliullah—for the Crown.

R. K. Malaviya for Opposite Party.

Order.—Brijiwan Das was a treasurer of a zamindar of Benares and was convicted in 1929 of an offence under S. 408, I. P. C., of embezzlement with respect to a sum of Rs. 446-8-3 received by him in his capacity of servant of Babu Shiva Prasad Gupta and misappropriated by him between the dates 1st February 1928 and 26th September 1928. He was sentenced to a day's imprisonment and a fine of Rs. 600. In the month of December last year the applicant's master, through another servant, instituted a fresh complaint for the prosecution of Brijiwan Das on three charges of embezzling three sums of money on 21st June, 2nd August and 21st August 1928. It will be noticed that these dates fell within the dates of the previous charge, 1st February and 26th September, but I have satisfied myself that these three items were not included in the gross sum for which the applicant was prosecuted, charged and convicted at the former trial. There is a certain divergence of judicial opinion as to whether after a trial in respect of a gross sum for which a breach of trust was alleged to have been committed between two specified dates, a second trial in respect of an offence alleged to have been committed on intermediate days but not included in the gross sum is permissible or not. Dr. Waliulla has placed before me the case law on the subject with great clearness. In *In re Appadurai Ayyar* (1) the Madras High Court held that under such circumstances the charges in the first trial must be taken to have included all the items embezzled during the period entered in the charge. In *Nagendra Nath Bose* v. *Emperor* (2) there was a difference of opinion between three learned Judges. The view of one of them was in conformity with the view taken by the Madras High Court. The majority of the Judges took a view contrary to that of the Madras High Court. The view of the Bombay High Court in *Emperor* v. *Kashinath Bagaji Sali* (3). was followed by the majority of the learned Judges in the Calcutta case. Looking at the provisions of S. 403, Criminal P. C., there is nothing in those provisions to bar a trial on the present complaint. The first three subsections deal with offences falling within Ss. 236, 237 and 235 (1) of the Code and do not deal with separate and distinct offences. The provisions of S. 233 of a separate trial of every offence are in no way modified by the new provisions of S. 222 (2). The provisions of S. 222 (2) are enabling and enable a Court to have a joint trial of what may apparently be several offences of breach of trust. The charge of a gross sum embezzled between two dates is only one charge and there may be a separate trial under the provisions of S. 233 of embezzlement of another item not included in the gross sum for which an earlier charge was framed under S. 222 (2). It cannot be denied that two of the present offences could have been tried jointly with the former offence for embezzling a gross sum, and there is no reason why there could not be a separate trial because S. 235 is only permissive and permits the trial of three offences of the same kind within a year by one trial, but does not bar three separate trials for those offences.

In certain cases the High Court can exercise its power under S. 439, Criminal P. C., and prevent a second trial for the ends of justice. Such a view was taken in the case of *Sidh Nath Awasthi* v. *Em-*

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(1) [1916] 17 Cr.L.J. 30=32 I.C. 158.

(2) A.I.R. 1923 Cal. 654=76 I.C. 300=25 Cr. L.J. 156=50 Cal. 632.

(3) [1910] 11 Cr. L.J. 337=5 I.C. 970.

peror (4) on the analogy of a case of this Court, *Inamulla* v. *Emperor* (5). This Court in 1916 exercised its revisional jurisdiction in countermanding a trial in the case of *T.N. Chaddha* v. *Emperor* (6). In the present case I am not prepared to exercise that power. At the former trial the applicant was sentenced only to a day's imprisonment and fine. If he is really guilty of the embezzlement as alleged by his master he certainly deserves a heavier sentence.

I dismiss this application.

K.N./R.K. *Application dismissed.*

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(4) A.I.R. 1929 Cal. 457=1929 Cr.C. 91=57 Cal. 17.

(5) [1905] 2 A L.J. 673=(1905) A.W.N. 238=2 Cr.L.J. 790.

(6) [1916] 18 Cr.L.J. 46=36 I.C. 878.

A. I. R. 1931 Allahabad 210

MEARS, C. J. AND SEN, J.

Abdul Qadir—Defendant—Appellant.

v.

Narendra Mohan Ghose Chowdhry and *another*—Plaintiffs—Opposite Parties.

Civil Revn. No. 290 of 1929, Decided on 9th December 1930, from decision of Small Cause Court Judge, D/- 6th April 1929.

(a) Civil P. C. (1908), O. 20, R. 4—Judge is not bound to refer in his judgment to each and every item of evidence relied on by parties.

It cannot be assumed from the mere fact that the Court below has not referred in detail to all the items of the documentary evidence produced by the parties, that the said evidence has been ignored or discarded. If the defendant did not, during the progress of the suit, bring certain documents to the notice of the Court, the blame rests with him. If any document is referred to the Court, it can be said that the Court must have considered the nature and scope of the document before forming a conclusion on the questions in issue. A Judge is not bound to refer in his judgment to each and every item of evidence, which is relied on by the parties. [P 210 C 2]

(b) Provincial Small Cause Courts Act (1887), S. 25—Clear finding of Small Cause Court cannot be reversed or modified by High Court on sole ground that balance of evidence was in favour of applicant.

An application under S. 25 has a much larger scope than one under S. 115, Civil P. C., but it cannot be said that therefore a clear finding of the Small Cause Court can be reversed or modified by the High Court upon the sole ground that the balance of evidence was in favour of the applicant. It is not within the province of the High Court to make an appraisement of the value or weight of the finding of the Court below. [P 211 C 1]

M. Mohmudullah—for Appellant.

Mears, C. J.—The aim of the applicant in this case has been that this Court should treat an application for revision under S. 25, Provincial Small Cause Courts Act, on the same footing as a regular first appeal. We do not approve of this. The applicant was a defendant in the action. A suit was instituted against him for recovery of Rs. 645 together with interest on the allegation that the plaintiff had paid that sum of money to the defendant on the understanding that the amount represented the price of certain python skins to be supplied by the defendant to the plaintiff. The transaction was by the plaintiff on his own account and not on account of any third party. The defendant received the money, refused to deliver the python skins and also refused to refund the amount received by him. Hence the suit for the recovery of the principal sum together with interest. The suit was resisted upon the ground that the plaintiff owed the defendant a certain sum of money and that the defendant was, under the circumstances, entitled to retain the money which was paid before handing over to him any python skins. The Court below considered that the case of the plaintiff was proved and that the case of the defendant was not established. It therefore gave the plaintiff a decree.

It has been contended on behalf of the applicant that the finding of the Court below is bad in law because the Court below has ignored very material evidence produced by the defendant. It cannot be asumed from the mere fact that the Court below has not referred in detail to all the items of documentary evidence produced by the parties, that the said evidence has been ignored or discarded. If the defendant did not, during the progress of the suit, bring certain documents to the notice of the Court the blame rests with the defendant. If any documents were referred to the Court we are entitled to hold that the Court must have considered the nature and scope of these documents before forming a conclusion on the questions in issue. A Judge is not bound to refer in his judgment to each and every item of evidence which is relied on by the parties. The finding which is now assailed does not appear to us to be open to challenge upon any legal ground. It cannot be doubted that an application for revision under S. 25, Small Cause Courts Act, has a much larger scope than one under S. 115, Civil P. C., but we are unable to accept the contention that a clear finding of the Small Cause Court can be reversed or modified by this Court upon the sole ground that the balance of evidence was in favour of the applicant. It is not within the province of this Court to make an appraisement of the value or weight of the finding of the Court below. We accordingly refuse to entertain the submission. The result is that the application fails and is dismissed with costs.

B.V./R.K. *Revision disallowed.*

A. I. R. 1931 Allahabad 211 (1)

BANERJI, J.

Pashpati Vizia Nand Bahadur—Plaintiff—Appellant.

v.

Hargovind Rai and *another*—Defendant and Plaintiff—Respondents.

Second Appeal No. 1091 of 1928, Decided on 19th December 1929, from decree of Sub-Judge, Ghazipur, D/- 20th April 1928.

Agra Tenancy Act (3 of 1926), S. 273—Suit for possession—Defendant pleading that he is occupancy tenant—Question raised is one within purview of S. 273 and civil Court should submit record to revenue Court for decision.

Where in a suit for possession of certain plots of land the defendant pleads that he is an occupancy tenant thereof under the plaintiff who is only a zamindar of the village, that the plots have been generation after generation in the possession of his ancestors and after them in his possession the question so raised is clearly within the purview of S. 273 and the civil Court should frame an issue on the plea of tenancy and submit the record for decision to the proper revenue Court. [P 211 C 2]

A. P. Pandey—for Appellant.

Janaki Prasad—for Respondents.

Judgment.—This is a plaintiff's appeal in a suit for possession over certain plots of land. The defence was that the plot was the ancestral holding of the defendant. The question which appears clearly from the judgment of the lower appellate Court according to it was "whether the appellant is or is not a tenant of the land in suit." How the learned Subordinate Judge in appeal went on to discuss the question whether the defendant was an occupancy tenant or not in a suit relating to an agricultural holding, I am unable to understand. S. 273, Act 3 of 1926, clearly lays down that if in a civil Court the defendant pleads that he holds such land as the tenant of the plaintiff . . . . the civil Court shall frame an issue on the plea of tenancy and submit the record to the proper revenue Court for the decision of the issue. Para. 6 of the written statement "additional pleas" is as follows:

> "The land in dispute is the occupancy holding of this defendant which has been generation after generation in the possession of his ancestor and after them in this defendant's possession. Plaintiff 1 is only a zamindar of the village and the land in dispute is situate within his zamindari."

This in my opinion clearly is a question within the purview of S. 273, Agra Tenancy Act, 1926. I therefore set aside the decrees of both the lower Courts and send the case back to the first Court, namely the Munsif of Ballia under O. 41, R. 23 and direct that he should proceed to decide the case according to law. Costs so far will abide the result.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 211 (2)

SULAIMAN AND KENDALL, JJ.

Ram Ugrah Rai and *others*—Defendants—Appellants.

v.

Ram Sama Rai and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 276 of 1928, Decided on 29th March 1930, from decree of 2nd Addl. Sub Judge, Gorakhpur, D/- 9th January 1928.

Agra Pre-emption Act (1922), S. 20—Deed of exchange executed by manager is defeasible only in special circumstances.

Every deed of exchange executed by a manager of a joint Hindu family is not necessarily defeasible. Whether it can or cannot be avoided by the other members of the family will depend on its special circumstances, and even if the other members of the family are not parties to the suit, it is open to the defendant vendees to lead evidence in order to satisfy the Court that circumstances exist which make their document binding on the family and therefore confers an indefeasible interest on them and thus show that the plaintiff has no preferential right as against them. [P 212 C 1]

P. L. Banerji—for Appellants.

Waliullah—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for pre-emption. On the date when the defendants filed their written statement they filed the original deed of exchange under which they had become cosharers in both the khatas Nos. 2 and 5 in which the property sold was situate. The plea taken in the written statement was that the plaintiff had not a preferential right of pre-emption as against the defendants. One of the issues framed by the first Court also was:

"Whether the plaintiff has a preferential right of purchase."

The Munsif held that the plaintiff was a cosharer in khata No. 5, but not in khata No. 2. He decreed the claim as regards khata No. 5 and dismissed it as regards khata No. 2. Both parties appealed. The lower appellate Court has decreed the claim in respect of both these khatas. One of the grounds of appeal taken before the lower appellate Court by the defendants was that the plaintiff had no preferential right in khata No. 5 and could not pre-empt the defendants-appellants. When the counsel for the defendants wanted to rely upon the deed of exchange, the learned Judge did not allow him to urge that plea on the ground that no such plea had been raised in the Court below or in the memorandum of appeal before him. We think that the learned Judge took a too strict and technical view of the pleadings. The deed of exchange was not only filed by the defendants, but was formally proved and was accepted by the trial Court. There is no reason to imagine that the plea based on it was not included within the scope of the issue and the grounds of appeal mentioned above. We therefore think that the lower appellate Court ought to have allowed the defendants to urge **this plea.**

The learned advocate for the respondents however urges that this deed of exchange is of joint family property executed by only a few members of a joint Hindu family and therefore does not confer an indefeasible right on the defendants.

It seems to us that it is impossible to say that every deed of exchange executed by a manager of a joint Hindu family is necessarily defeasible. Whether it can or cannot be avoided by the other members of the family will depend on its special circumstances. Even if the other members of the family are not parties to the suit, it is open to the defendant vendees to lead evidence in order to satisfy the Court that circumstances exist which make this document binding on the family, and it therefore confers an indefeasible interest on them. That finding would bind the parties to the suit and would be sufficient for the purpose of disposing of this appeal. We accordingly send down the following three issues for determination by the Court below:

1. Whether the property transferred under the deed of exchange was the joint or separate property of Kamta Rai.

2. If the property is joint family property, whether Kamta Rao has other members of his joint family alive who have not consented to this transfer.

3. Whether in view of all the circumstances this deed of exchange is binding on the family?

As the case has not been approached from the right standpoint we would allow the parties to produce further evidence on the issues remitted.

We allow two months time for the return of the findings and the usual ten days will be allowed for objections.

V.B./R.K. *Case remanded.*

A. I. R. 1931 Allahabad 212

MUKERJI AND BENNET, JJ.

In the matter of *The Estate of Indrani*.

First Appeal No. 155 of 1930, Decided on 20th November 1930, from order of Dist. Judge, Allahabad, D/- 31st May 1930.

(a) Succession Act (1925), S. 307 (2) (ii)—Object of S. 307 (2) (ii) is to enable District Judge as Court of testamentary jurisdiction to see that transfer applied for is necessary in the interests of administration of estate—Society to whom property is bequeathed if desirous of converting it into money, proper course is not under S. 307 but a suit under Civil P. C., S. 92.

The object of S. 307 (2) (ii) is to enable the District Judge as the Court of testamentary jurisdiction to see that the transfer applied for is necessary in the interests of the administration of the estate. Where a person bequeaths certain property to a society and the estate is without any encumbrance and no other legatee is also to be paid, there is nothing to administer and the property in the hand of the administrator should be handed over to the legatee and the administration should end. If the society thinks that it is in the interests of the society that the property should be converted into money and invested in Government Promissory Notes, it may institute a suit under S. 92, Civil P. C., or take such other steps as they might be advised. But an application to the District Judge in his testamentary jurisdiction for permission to sell the property bequeathed is entirely a wrong method, and the Judge has no jurisdiction to pass orders for sale: 3 *C. W. N.* 635, *Rel. on.* [P 214 C 2]

(b) Practice—Duty of Court—Order passed by Judge without jurisdiction—His successor may undo it so far as it may lie in his power.

Where a Judge for the time being discovers that an order has been passed without jurisdiction either by himself or by his predecessor-in-office, it is his duty to undo that order so far as it may lie in his power. [P 214 C 2]

N. Upadhaya—for Appellants.

U. S. Bajpai—for Respondents.

Mukerji, J.—The principal appeal is Appeal No. 155 of 1930 and is on behalf of an association formed for the purpose of imparting education to a community of Sarjuparin Barhmans and known as Sarjuparin Pathashala Samiti. Strictly speaking the appeal should have been on behalf of Pandit Manni Lal Pandey, the administrator to the estate of a certain lady, Mt. Indrani, but we overlook this defect in the form of the appeal as Pandit Manni Lal's name is also shown among the appellants.

It appears that a lady charitably disposed, Mt. Indrani, executed a document on 2nd September 1916, which was treated as her last will and testament. By this document she bequeathed her entire property to the society described above. The Secretary of the Society, Pandit Manni Lal, applied for and obtained letters of administration with a copy of the will annexed by the order dated 23rd August 1921. The estate was without any encumbrances. No debts had to be paid. There was no other legatee either to be paid. Indeed for the administrator it was a simple affair and involved no onerous duties.

It appears that the members of the samiti or society found that it would be more to the convenience of themselves and to the benefit of the school they were running to have the property bequeathed in the form of cash invested in Government Promissory Notes. The idea suggested itself to them that they should make an application to the learned District Judge, who had granted the letters of administration, for permission to sell the property bequeathed. The administrator accordingly made such applications from time to time, and with the permission of the District Judge then presiding over the Court sold moveable properties and then immovable properties, the sale proceeds being invested in Government Promissory Notes through the Imperial Bank of India.

Now come some important facts. On 23rd May 1929 Pandit Manni Lal made an application to the District Judge for permission to sell the entire immovable property then remaining in his hands as the administrator. His application will be found at p. 1 of the typed paper book before us. He said:

> "The general committee of the said . . . . samiti Allahabad passed a resolution No. 6 in the meeting held on 21st April 1928 authorizing the secretary of the said samiti to seek permission of this Court to sell the remaining immovable property as per details given in the enclosed two statements . . . . and to invest the sale proceeds of this property along with the sum of Rs. 7,904-13-6 already deposited in the Imperial Bank of India with the Treasurer of Charitable Endowments."

Then the applicant proceeded to state the reasons for the sale. Briefly the reasons given were that it was very desirable to avoid repairing of houses and to avoid litigation and that it was necessary that there should be cash income available for the benefit of the institution. When the application was put up before the learned District Judge he ordered that a notice should be published so that the people who might be interested should come before him and prefer objections if they had any. On 23rd August 1929 the learned Judge stated in his order the following:

> "No objection has been received to the proposed sale of the properties in response to the notification published in the U. P. Gazette of 29th June 1929 and the Leader newspaper of 1st July 1929."

Then the learned Judge directed the Honorary Secretary to notify in the public press the fact that the properties were to be sold and further directed him to call for offers. The offers, the learned Judge further directed, were to be submitted to him for necessary orders. In pursuance of this order certain offers were received and ultimately the learned District Judge decided that the properties should be sold through a commissioner who was to get a certain amount of remuneration. The Official Receiver of Allahabad was chosen for the purpose, and he held some sales. Almost all the immovable properties were sold but in respect of the property of Asadullahpur, the learned Judge was not prepared to accept the highest offer. He confirmed the sales of all other properties and gave the administrator two months time to procure further offers for the property of Asadullahpur.

The learned Judge who had made these orders left the place and was succeeded by another officer. Before the successor, several applications were made. Some tenants of the village Asadullahpur proposed that isolated plots of land described by them might be sold to them on some high price offered by them, and Zulfiqarullah, the man who had made the highest offer at the public auction for Asadullahpur, applied to have the sale confirmed in his favour. Thereupon the learned District Judge, who had succeeded the former Judge. passed an order on 31st May 1930, and this order is the subject-matter of appeal in both the appeals.

The order passed is a long one, but the upshot of the whole judgment is this, that it was wrong on the part of the society and its secretary, the administrator, to try to sell the property with the sanction of the District Judge under the guise of applying S. 307, Succession Act of 1925. He held that the District Judge had no jurisdiction to pass orders for sale and that the responsibility of selling properties must rest with the samiti or its members. He accordingly concluded his judgment by saying as follows:

> "This being the nature of the transfer, so far as I can see, and the jurisdiction and want of jurisdiction of the Court in the matter, I think that the wisest thing to do is to drop the whole proceeding and to leave the applicant and those who have purchased the property to settle it between themselves as to how to get out of the possible trouble which the applicant has laid in store for them."

In this Court it has been argued that the learned District Judge had the jurisdiction to order the sale of the property, and that at any rate the sales which have been confirmed by the late District Judge Mr. Kisch should not have been set aside, as it were, by Mr. Rup Krishna Agha who was responsible for the judgment of 31st May 1930.

We have considered the whole matter and are of opinion that S. 307, sub-S. 2, Cl. (ii) has been misapplied to this case. That subsection reads as follows:

> "An administrator may not, without the previous permission of the Court by which the letters of administration were granted, mortgage, charge or transfer by sale any immovable property for the time being vested in him under S. 211."

The object of this rule is to enable the District Judge, as the Court of testamentary jurisdiction to see that the transfer applied for is necessary in the interests of the administration of the estate. In this case, there was nothing to adminster and the property in the hands of the administrator should have been handed over to the legatee and the administration should have ended. This is the view which was taken in the case, *In re Nursingh Chunder Bysack* (1). We found ourselves in entire agreement with what was said by Sale, J., in the case quoted. If the society believed, as they indeed do, that it was in the interests of the society and the school that the property should be converted into money and invested in Government Promissory Notes, it was their duty to institute a suit under S. 92 Civil P. C., or to take such other steps as they might be advised. But certainly the method that was adopted namely an application to the Judge in his testamentary jurisdiction under S. 307, sub-S. 2, Cl. (ii), Succession Act of 1925, was an entirely wrong method. We must therefore hold that all that was done by the learned District Judge was without jurisdiction.

This being our conclusion, we must hold that the order appealed against was a right order to pass. Appeal No. 155 sought the relief that the sales which had been confirmed should not be set aside, because the Judge in the Court below had no jurisdiction to revise the orders of his predecessor. It is wrong to regard Mr. Agha as sitting as a Court of appeal over Mr. Kisch. The Court is the same whosoever may preside over it. Where a Judge for the time being discovers that an order has been passed without jurisdiction either by himself or by his predecessor-in-office, it is his duty to undo that order so far as it may lie in his power. Mr. Agha has done this, and no question of want of jurisdiction arises. Then the second point was that S. 307 of Act 39 of 1925 gave sufficient jurisdiction and legality to the proceedings. We have held that it did not. The third ground of appeal was that the learned Judge was not justified in casting certain aspersions on the members of the society and the whole proceedings on their part were bona fide. We have no doubt, at least we have got no materials before us to lead us to doubt, that the proceedings on the part of the secretary or the society were anything but bona fide. It might have been well for the learned District Judge to have refrained from making any strictures, having sufficient materials before him. So far as we can see, no cunning or anxiety to take undue advantage of any rule of law was involved in the proceedings. We dismiss Appeal No. 155 of 1930 and in the circumstances direct that the parties shall pay their own costs.

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(1) [1899] 3 C.W.N. 635.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 215

MUKERJI AND BENNET, JJ.

Jangi—Defendant—Appellant.

v.

Mewa Lal and *another*—Plaintiffs—Respondents.

Letters Patent Appeal No. 181 of 1928, Decided on 11th April 1930, against judgment of Sen, J., D/- 5th November 1928.

(a) Landlord and Tenant—Custom—Proof—Custom as to payment by tenant to landlord certain dues—Dues must be calculated on fixed basis.

A custom to pay zamindar certain dues, in order to be enforceable should be a custom to pay an amount calculated on some fixed basis. It may vary in the case of different tenants: all that is necessary is it should be calculated on some fixed basis. [P 216 C 1]

(b) Landlord and Tenant — Custom — Alleged customary payment of dues by tenant origin in voluntary subscription—Cessation of voluntary nature must be proved — Custom.

Where the origin of a customary payment to zamindar is voluntary subscription, it is necessary before such payment can be enforced to prove that at some period of time the payment ceased to be voluntary and the zamindar began to enforce the subscription. [P 216 C 1]

Zahur Ahmad, S. Z. A. Nagin and *M. A. Aziz*—for Appellant.

B. E. O'Conor, Ram Nama Prasad and *Kanhaiya Lal*—for Respondents.

Judgment.—These are five Letters Patent appeals by various Mahomedan Julahas, defendants, residing in the village of Sheopur alias Saidraja in the district of Benares against the judgment of a learned single Judge of this Court in favour of the claim of the plaintiff zamindars of that village to enforce against the defendants certain payments alleged to be customary. The plaint sets forth that from of old it has been a custom in the said village that zamindari dues at Marwana, Holi, Dasehra, etc. have all along been paid by the inhabitants of particular castes on whom the dues were imposed according to their means; and that for example the defendant Jangi is liable to pay to the zamindars Re. 1 at Holi and one-fourth of a seer of supari nuts of the value of four annas at Dasehra and other dues on marriages. The suit was brought to enforce the dues at Holi and Dasehra. The written statement pleaded that there was no such custom in the village in question and that the claim of the plaintiffs was not a legal claim which the plaintiffs could enforce. Both parties gave evidence, and the defendants alleged that they had not made any payment to the zamindars, and they stated that in the time of their forefathers they were excused from making subscriptions. The plaintiffs on the other hand, brought a considerable amount of oral evidence to the effect that the plaintiff did receive payments from both Hindus and Mahomedans at the time of Holi and Dasehra. The Court of first instance found that the custom was proved, although it came to a finding to the following effect:

> "It may be a fact that in its inception the Holi cess would have commenced in the shape of subscription, but now it is ripened into a custom."

The lower appellate Court found:

> "I agree with the conclusion of the lower Court that the custom originated in ordinary subscription;"

and that Court went on to state that

> "it would thus appear that the Holi due is an arbitrary one depending on the whim of the zamindar. His karinda admits that he does not know how much each Naddaf pays. Again with regard to the Dasehra the amount of supari demanded varies from half a pao to two paos."

It then went on to state that a custom must be certain and definite as laid down in *Lachhman Rai* v. *Akbar Khan* (1) and that the evidence in the present case failed to satisfy that criterion, and therefore the suit of the plaintiffs failed. In second appeal the learned single Judge of this Court has reversed the finding of the District Judge on the ground that his finding was one which it was not open to him to make, because he made a new case for the defence on the pleadings, and that the District Judge had entirely failed to appreciate the true character of the custom set up and proved. The learned single Judge considered that it was open to the zamindars to assess the amount of customary dues according to the means of the tenants, and this would not mean that the custom was uncertain. We consider that this view is not correct, because a custom, although it might vary in the case of different tenants, should be a custom to pay an amount calculated on some fixed basis, that is it should be a payment of so much in proportion to the produce of these weavers or on some other fixed basis. But there is nothing on the record which shows that the amounts are fixed on any other basis except what the zamindars think they can extract from the inhabitants of the village.

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(1) [1876] 1 All. 440.

Further, as it has been found by the lower appellate Court that the origin of these payments was voluntary subscription, it follows that it is necessary for the plaintiffs to prove that at some period of time the plaintiffs began to enforce this subscription and that it became no longer voluntary. There does not appear to be any evidence of enforcement of these payments prior to the year 1916 eight years before the present suit. In the year the zamindars brought two suits for the enforcement of these payments and the suits were not decided on the issue whether there was a custom in existence. The only other documentary evidence of an earlier date to which reference has been made is the wajibularz of the year 1847 and the wajibularz of the year 1883. There is a clause in each of these wajibularaiz to the effect that whatever custom or usages such as shadiana. etc., have been prevalent for a long time would continue. There is no reference at all to payments at Holi or payments at Dasehra. Accordingly it cannot be said that these wajibularaiz afford evidence of the existence of customs alleged in the plaint at the dates in question. We consider that the finding of the lower appellate Court was one which was justified by the evidence on the record and accordingly we allow these five Letters Patent appeals and dismiss the suits of the plaintiffs with costs in all Courts.

V.P./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 216

SULAIMAN AND YOUNG, JJ.

Suraj Prasad —Defendant —Appellant.

v.

Oudh Behari and *others* — Plaintiffs and Defendants —Respondents.

Second Appeal No. 1483 of 1928, Decided on 19th December 1930, from decision of Addl, Dist. Judge, Cawnpore, D/- 15th June 1928.

(a) Pre-emption—Refusal of manager of joint Hindu family to buy property binds coparceners — Hindu Law—Joint family — Manager.

The refusal of the karta of joint Hindu family to purchase the property sought to be pre-empted binds the coparceners as well and they cannot then claim right of pre-emption. [P 217 C 2]

(b) Agra Pre-emption Act (1922), Ss. 15 and 21— Co-pre-emptor's acquiescence in sale before pre-emption suit estops him but not other pre-emptor — Estoppel bars suit, but does not extinguish right of pre-emption —Evidence Act (1872), S. 115.

The mere fact that a co-pre-emptor is found to have acquiesced in a sale before the pre-emption suit and is consequently estopped from pre-empting does not disqualify the other pre-emptor who has not acquiesced in the same way. Such an estoppel under S. 115. Evidence Act, merely operates as a bar to the suit and does not necessarily extinguish the right. The right of pre-emption exists but the remedy is barred: *A. I. R.* 1925 *All.* 722, *Rel. on.* [P 217 C 2]

(c) Agra Pre-emption Act (1922), Ss. 15 and 21—"Persons having right to pre-empt" —Significance explained.

The expression "Persons having a right to pre-empt" applies to that class of proprietors who are referred to in Ss. 11 and 12 as being entitled to exercise the right of pre-emption and would not necessarily include a person who could not enforce his right on account of the principle of estoppel: *A. I. R.* 1925 *All.* 722, *Foll.* [P 217 C 2]

K. N. Katju—for Appellant.

S. K. Dar and *Krishna Murari Lal*—for Respondents.

Sulaiman, J.—This is a defendant-vendee's appeal arising out of a suit for pre-emption brought by three plaintiffs, Oudh Behari Lal, Tapeshri Prasad and Mahadeo Prasad. The first two are own brothers and presumably members of a joint Hindu family. According to the allegations in the plaint plaintiff 3 is a cosharer with a distinct and separate share of his own. The sale deed was executed on 6th March 1925. The connected appeal arises out of a suit to pre-empt a transaction which according to the plaintiffs, was evidenced by a deed of gift of 19th December 1925 and a sale-deed of 21st December 1925, both of which were registered on the same day. The claim was resisted on the ground that the defendant had become a cosharer by virtue of this deed of gift and also on the ground that the plaintiffs had refused to purchase the property. The lower appellate Court has overruled both these objections and decreed the claim.

It has held that the two deeds of December 1925 were part and parcel of one transaction viz., of sale and that one single consideration was paid for both these transfers. This in our opinion is a finding of fact which must be accepted in second appeal.

In order to prove the refusal on the part of the plaintiffs the defendants produced oral evidence, as also a letter (Ex. D) written by Oudh Behari Lal, plaintiff 1, to the vendee Suraj Prasad. As to the oral evidence the lower appellate Court has found it unsatisfactory and has agreed with the Court of first instance that it should be rejected. As to Ex. D it is of the opinion that it did not amount to a final refusal to purchase the property on the part of the plaintiff. This finding is challenged in appeal before us.

The letter makes it quite clear that previously the vendor had offered to sell his share to the plaintiff. Oudh Behari Lal at Rs. 4 per cent but the plaintiff refused to take it and told him that he would take the property if sold at the rate of Rs. 4-8-0 per cent. He further informed the vendee that it was utterly useless to take the property at any rate higher than Rs. 4-8-0 per cent and that if the vendor sold the property at Rs. 4-8-0 per cent he the plaintiff himself would take it. A perusal of this letter makes it quite clear that there has been a refusal on the part of Oudh Behari Lal to take the property from the vendor at the rate of Rs. 4 per cent and further that he clearly intimated to the vendee that he would not take the property at any price higher than that calculated at the rate of Rs. 4-8-0 per cent.

In the present case the income of the property transferred according to the sole testimony of the vendor comes to Rs. 63-2-7- which works out at an annual rate of less than Rs. 4 which would make the price higher than what was offered by the plaintiff. We are therefore clearly of opinion that Oudh Behari Lal is estopped from pre-empting this sale.

Plaintiff 2 is a member of a joint Hindu family and is his younger brother. Presumably the elder brother was the karta of the family and we think that both these plaintiffs are equally bound by the refusal of the manager to take the property.

The case of plaintiff 3 stands on a different footing as according to the allegation in the plaint he holds a separate and distinct share. The learned advocate for the respondents has relied on the case of *Lal Behari Misra* v. *Eqeen Mohammad Hajjam* (1) for the proposition that the mere fact that a co-pre-emptor is found to have acquiesced in a sale before the suit and is consequently estopped from pre-empting does not disqualify the other pre-emptor who has not acquiesced in the same way. On behalf of the appellant it is urged that on the principle embodied in S. 15, Agra Pre-emption Act, the right to pre-empt was extinguished by virtue of this refusal and that accordingly Oudh Behari Lal had no right of pre-emption at the time when the suit was filed with the result that under S. 21 of the Act plaintiff 3 had also lost his right.

It is not necessary for us to consider the effect of the statutory provision of S. 15 of the Act as to the extinction of the right of pre-emption on failure to reply to a notice served under S. 14. But as to estoppel under S. 115, Evidence Act, it seems to us that such an estoppel merely operates as a bar to the suit and does not necessarily extinguish the right. The right of pre-emption existed but the remedy was barred. In the case quoted above the Bench took the view that the expression "persons having a right to pre-empt" applies to that class of proprietors who are referred to in S. 11 and S. 12 of the Act as being entitled to exercise the right of pre-emption and would not necessarily include a person who could not enforce his right on account of the principle of estoppel.

We see no reason to take a contrary view particularly as this view is in accordance with the rule which was in force previous to the Act. The result therefore is that the suit of the plaintiffs Oudh Behari Lal and Tapeshri Prasad stands dismissed with costs in all Courts in favour of the defendant. But the claim of the plaintiff Mahadeo Prasad for the entire property stands decreed with costs in all Courts. In either event the costs will include fees on the higher scale.

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(1) A. I. R. 1926 All. 722 = 97 I. C. 310.

In case there is any doubt as to any portion of the amount already deposited having belonged to the two plaintiffs whose suit stands dismissed we allow one month's time from this date to Mahadeo Prasad to make the deficiency good by the deposit of the additional amount necessary.

B.V./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 218

MUKERJI AND BENNET, JJ.

Bhukhan Saran—Judgment-debtor—Appellant.

v.

Piare Lal — Decree-holder — Respondent.

Execution First Appeal No. 117 of 1930, Decided on 18th December 1930, from decision of Sub-Judge, Moradabad, D/- 21st December 1929.

(a) Civil P. C., S. 11—Execution—Order regarding nature of property is res judicata between the parties.

Order of the execution Court by which it held that certain property sought to be sold in execution of a mortgage decree was ancestral operates as res judicata between the parties. [P 218 C 2 P 219 C 1]

(b) Civil P. C., O. 47, R. 1—Time for review can be extended only on showing sufficient cause—Application for execution held could not be treated as one for review.

An application for review of judgment must be made within 90 days of the passing of the judgment, and it is only when sufficient cause is shown that the time can be extended under S. 5, Lim. Act.

A decree-holder applied for execution on 27th August 1929 and did not ask the Court that it should review its previous order. dated 11th August 1928, regarding the character of tho property sought to be sold in execution. He however appended to the application certain copies of sale-deeds with the idea of showing that the property had been acquired by the judgment-debtor within recent years and it could not be ancestral property.

Held: that as there was no application for review of judgment before the Court below, much less was there any statement of circumstances under which the application for review could not be made beyond the 90 days allowed by law, the application for execution could not be treated as an application for review and that the previous order must stand. [P 218 C 2, P 219 C 1]

S. N. Seth—for Appellant.

Panna Lal and *Shabd Saran*—for Respondent.

Judgment. — The question under appeal is a very short one and it is whether the order of the execution Court, by which it was held that the property sought to be sold was ancestral, operates as res judicata between the parties or not.

It appears that in execution of a mortgage decree the respondent applied for sale of the property mortgaged. The first question that had to be determined by the executing Court was the nature of the property sought to be sold, under R. 107, O. 21, Civil P. C. The Court had to fix a date for the trial of the question, namely whether the property was ancestral or non-ancestral and to decide the question on that date. To aid itself in deciding the question it was open to the Court to call for a report from the Collector. It appears that a report was sent for from the Collector and he reported that the property was ancestral. In the absence of any evidence to the contrary, the executing Court declared on 11th August 1928 that the property was ancestral and it directed that the decree be sent to the Collector for execution. The execution before the Collector did continue up to 23rd August 1929, i.e., for more than one year. On the last-mentioned date, the decree-holder made an application to the Collector asking him to strike off his execution application and intimated to him that he would get the property sold as non-ancestral. Then the decree-holder made the present application out of which the appeal has arisen. On 28th August 1929 he made the second application for execution and did not ask the Court that it should review its previous order dated 11th August 1928. He however appended to the application certain copies of sale deeds with the idea of showing that the property had been acquired within recent years by the judgment-debtor and it could not be ancestral property. The judgment-debtor objected to the execution saying among other matters that the order of 11th August 1928 operated as res judicata between the parties.

The learned Subordinate Judge in his order dated 21st December 1929 appears to have expressed the idea that the question as to the nature of the property could not be res judicata between the parties. He thought that because the revenue Court made a contrary report on the second application, he was entitled to set his previous judgment at naught. We are of opinion that the previous judgment should stand and must stand till it is set aside on appeal on review of judgment.

It was urged before us by the learned counsel for the respondent that virtually his second application was for a review of judgment of the order dated 11th August 1928. We are however unable to take that view. An application for review of judgment must be made within 90 days of the passing of the judgment and it is only when sufficient cause is shown that the time can be extended under S. 5, Lim. Act. As already mentioned, there was no application for a review of judgment before the Court below, much less was there any statement of circumstances under which the application for review (if there was one) could not be made beyond the 90 days allowed by law.

We allow the appeal, set aside the order appealed against and direct the Court below to treat the property ordered to be sold as ancestral and to have the decree duly executed by the Collector. The appellant will have his costs in this Court and in the Court below from the respondent.

K.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 219

MUKERJI AND BENNET, JJ.

Joti Prasad—Decree-holder — Applicant.

v.

Baru Singh—Judgment-debtor —Opposite Party.

Execution First Appeal No. 286 of 1929, Decided on 17th December 1930, from decision of Second Sub-Judge, Saharanpur, D/- 16th March 1929.

(a) Civil P. C., O. 21, R. 2—No limitation is fixed for decree-holder to certify payments.

There is no period of limitation fixed for a decree-holder to certify payments to him. When a decree-holder has made certification he is entitled to prove the payments even if the payments were made more than 90 days prior to the certification. The certification therefore lets in evidence in proof of the payment: *A. I. R.* **1928** *All.* 629, *Foll.* [P 221 C 1]

(b) Practice—Appeal—Conclusion based on nobody's pleading cannot be accepted in second appeal—Civil P. C., S. 100.

A conclusion of the lower appellate Court which is based on nobody's pleading and on nobody's responsibility for any such pleading cannot be accepted in second appeal. [P 220 C 2]

S. K. Dar, *Panna Lal* and *K. C. Bhatia* —for Appellant.

P. L. Banerji and *H. P. Sen*—for Opposite Party.

Mukerji, J.—This is an execution first appeal and arises under the following circumstances:

One Chidda Singh, father of respondent 1 Baru Singh, mortgaged his property to the decree-holder appellant, Joti Prasad, on 8th July 1910. Six years later, on 31st March 1917, a second mortgage was made in respect of a portion of the property mortgaged in 1910, in favour of the respondents Jagannath and Shambhu Nath. Janeshar Das, another respondent to this appeal, purchased most of the property mortgaged, on 28th March 1919 for a sum of Rs. 10,000. Baru Singh, who had since succeeded his father to the property, had to pay off certain debts including a promissory note executed by himself in favour of Joti Prasad. Accordingly, he left most of the consideration money in the hands of Janeshar Das for payment to his creditors including Joti Prasad and Jagannath and Shambhunath. As no payments were made to Joti Prasad, he brought a suit on foot of the mortgage of 1910 and obtained a final decree on 22nd December 1923. He put the decree into execution and his application was dismissed on 8th May 1924. The second application, namely the present one out of which the appeal has arisen, was made on 20th July 1928, more than three years after the dismissal of his first application. He was met with the plea that the application was time barred, and we have to see whether this plea is correct.

Before we can arrive at the correct conclusion, certain additional facts have to be considered.

Baru Singh brought a suit against Janeshar Das, the purchaser of the mortgaged property in 1923, being Suit No. 176 of that year for recovery of the consideration money of the sale deed and interest and possibly damages. He obtained a decree for a large sum of money exceeding Rs. 17,000 on 11th February

1924. It was declared that the amount decreed was to be a charge on the property sold. In the month of May 1924 Baru Singh certified payment of a sum of Rs. 7,000 odd towards his decree by Janeshar Das, and he also relinquished his rights as exproprietary tenant in the *sir* and khudkasht lands in favour of Janeshar Das. On 23rd April 1927 Baru Singh obtained a final decree for sale against Janeshar Das. Janeshar Das in satisfaction of the decree obtained by Baru Singh against himself resold the property to Baru Singh on 11th Febuary 1928.

In support of his plea that the decree is within time, Joti Prasad relies on certain payments alleged to have been made to him from time to time by Janeshar Das and also on certain acknowledgments said to have been addressed to him by Janeshar Das and Baru Singh. The learned Judge found that as a matter of fact payments were received by Joti Prasad from time to time and his allegation of having received in all the sum of Rs. 1,336 odd was correct. He found that the acknowledgments written by Janeshar Das were fabrications and were made and written after Janeshar Das had transferred the property to Baru Singh. As regards the acknowledgment said to have been written by Baru Singh the learned Judge held that its writing by Baru Singh had not been established. The learned Judge found that the payments which Joti Prasad received did not save limitation.

The learned Judge in the Court below came to the conclusion that Janeshar Das was not a real purchaser of the property of Baru Singh under the sale deed of 28th March 1919, and that the real purchaser was Joti Prasad himself. For this conclusion the learned Judge relied on a statement once made by Joti Prasad himself in the course of a deposition given on a different occasion and under certain other circumstances. This deposition was given on 18th November 1925.

It is important to note that nobody has taken the responsibility of making the allegation that Janeshar Das was not the true purchaser of the property of Baru Singh under the deed of 1919. In this particular case it is a very serious position to take up to plead whether a particular person was or was not the true owner of the property mortgaged. Baru Singh did not take up that responsibility by saying in his petition of objection that Janeshar Das was not the true owner of the property but Joti Prasad was. If Janeshar Das was not the true owner of the property, Baru Singh himself would not get any title from the sale deed executed in his favour by Janeshar Das on 11th February 1928. Baru Singh was likely to be the best person to know who was the real purchaser of the property under the deed of 1919. As neither the decree-holder nor Baru Singh nor even Janeshar Das took up the position that the sale deed of 1919 was *farzi*, and was in reality in favour of Joti Prasad we think it was not within the province of the learned Judge to come to the conclusion that Janeshar Das was a fictitious purchaser, the real purchaser being Joti Prasad. We have already pointed out that this position could not be very well taken up by Baru Singh himself. In the circumstances, we have to brush aside the learned Judge's conclusion as being based on nobody's pleading and on nobody's responsibility for any such pleading.

We need not consider whether the written acknowledgments by Janeshar Das dated respectively 6th May 1924, 27th July 1925 and 12th August 1926 were real or collusive documents having been brought about after the sale by Janeshar Das to Baru Singh. The learned Judge has accepted as a fact that certain payments were received by Joti Prasad. But the learned Judge says that these payments were received by Joti Prasad because he employed his own men to collect the rent of the mortgaged property sold ostensibly in favour of Janeshar Das for his own benefit. We have shown that this position cannot be taken up and has not been taken up by anybody being party to the present litigation. We must treat Janeshar Das for the purpose of the present litigation as the true owner. If Janeshar Das is not the true owner, Baru Singh has no title and he must go out of the case and will not be allowed to object to the sale of the property at the instance of Joti Prasad. If Janeshar Das was the true owner, then if he allowed Joti Prasad to collect the rents and profits of the mortgaged property the amounts recovered from time to time must be taken as having been in the shape of payments made by Janeshar Das to Joti Prasad towards the decretal debt.

In this view the payments which were properly certified on 20th March 1928 would save limitation. In the Full Bench case of *Joti Prasad* v. *Sri Chand* (1), it was held that there is no period of limitation fixed for a decree-holder to certify payments to him. When a decree-holder has made certification he is entitled to prove the payments even if the payments were made more than 90 days prior to the certification. The certification therefore lets in evidence in proof of the payment.

The decree-holder has produced his account-book and he has examined his karinda to prove the payments. We have already stated that collections even if made on behalf of Joti Prasad must be treated as payments made on behalf of Janeshar Das and by and with his consent. These payments which extend over the years 1925 to 1928 save limitation. The finding of the learned Judge in the Court below was materially coloured by his opinion that Janeshar Das was a benamidar for the decree-holder. When that view is negatived on the ground that nobody takes upon himself the responsibility for that payment we must take the decree-holder's word as correct, namely the payments were actually made by Janeshar Das and towards interest as certified by the decree-holder on 20th March 1928. Most of these payments namely the payments other than the payments of 5th January 1928 and 20th February 1928 were made before the passing of Act 1 of 1927.

In the result we allow the appeal against Baru Singh alone and dismiss it as against the other respondents who were made parties after the expiry of the limitation of the appeal. Further as regards the respondents other than Baru Singh the payments do not extend the period of limitation. Janeshar Das who actually made the payments has now no interest left in the property.

We set aside the order of the Court below and send back the execution application to it and direct that it be proceeded with against Baru Singh in accordance with law. The appellant will receive his costs from Baru Singh in this Court and in the Court below. The appellant will pay the costs of the respondents Jagannath, Shambhu Nath and Janeshar Das.

K.N./R.K. *Order accordingly.*

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(1) A. I. R. 1928 All. 629=112 I. C. 73=51 All. 237 (F.B.).

A. I. R. 1931 Allahabad 221

MUKERJI AND BENNET, JJ.

Gobardhan Das—Defendant — Applicant.

v.

Mt. Jai Devi — Plaintiff — Opposite Party.

Civil Revn. No. 161 of 1929, Decided on 28th November 1930, from order of Dist. Judge, Aligarh, D/- 20th February 1929.

Civil P. C. (1908), O. 11, R. 18 (2)—Document not mentioned in pleadings or affidavit —Affidavit has to be filed to satisfy Judge of its relevancy—But if Court is satisfied as to relevancy, affidavit is not necessary — Want of affidavit cannot invalidate order requiring defendant to produce document and non-compliance with it justifies order requiring written statements to be struck off.

Under O. 11, R. 18 (2), an order of inspection can be made not only in respect of document mentioned in the plaint and written statement and the affidavit, of discovery but also in respect of other documents. The difference between the two cases is that in the case of a document not mentioned in the plaint or written statement or the affidavit, an affidavit has to be filed by the applicant to satisfy the Judge that the document is relevant to the case. In the case of a document mentioned in the plaint or written statement, or affidavit of discovery, the relevancy is admitted, while in the other case, the relevancy has to be proved. But where the Judge is satisfied as to the relevancy of the document, it is not necessary that there should be an affidavit. At any rate, the want of affidavit cannot invalidate the order under O. 11, R. 18 (2), requiring the defendant to produce a document and if the defendant does not comply with the order, the Court is justified in ordering that his written statement be struck off : 112 *I. C.* 285 and A. I. R. 1922 *All.* 235, *Dist.* [P 222 C 2]

U. S. Bajpai and *S. B. L. Gaur* — for Applicant.

Panna Lal—for Opposite Party.

Mukerji, J. — This is a petition in revision by Gobardhan Das whose defence was struck off and an ex parte decree against whom was passed by the learned Munsif of Hathras.

A preliminary point is taken that no revision lies. It appears that after the learned Munsif had passed an ex parte decree against the defendant, the defendant took the matter in appeal to the learned District Judge. The learned District Judge considered the merits of the case and was of opinion that the order complained of had been properly passed. The Judge accordingly dismissed the appeal.

The proper remedy of the applicant was to file a second appeal. When this was pointed out, the learned counsel for the appellant asked permission to amend the heading of his petition so that it might be treated as a second appeal from a decree and he offered to pay the court-fees. In order to find out whether we should allow all this to be done, we looked into the merits of the case and having discovered that there were no merits, we refuse to allow the amendment to be made.

As we have heard counsel on the merits, we may just state briefly what are the points involved.

It appears that the plaintiff who is a female of the defendant's family brought a suit for recovery of the arrears of maintenance against the defendant. Her case was that she was getting regularly Rs. 30 per mensem as her allowance. The defendant denied that she ever got such a large sum and one of the questions to be decided was whether she was entitled to the allowance she claimed. On 12th September 1928, the plaintiff made an application to the Court stating that the defendant's account books would show the amount of allowance that had been regularly paid to her and she prayed that the defendant might be ordered to produce his account books for the inspection of the plaintiff. The learned Munsif directed the counsel for the defendant to produce the books on 17th September 1928. The order was not complied with. Thereupon, a second application was made to the Court on 27th October 1928. In this application the plaintiff complained that in spite of the Court's order, the defendant failed to produce the books for her inspection and she asked that the defendant's written statement might be struck off as he was in contempt. Upon this, the learned Munsif passed the following order:

> "The defendant do produce his account books for inspection today, Otherwise his defence shall be struck off."

On the same day, the defendant made an application saying that he had no objection whatsoever to produce the account books but he asked for four days' time on the plea that the books were in the custody of one Damodar Das and he had left the place for Kosi. The learned Munsif dismissed this application on 30th October 1928. Thereupon, on that date, namely 30th October 1928, the defendant produced the account books and asked that the order of the Munsif might be reviewed. The Munsif wrote a long order and showed how he disbelieved the defendant's story and he said that he was not prepared to review his order. In the result, as we have said, the written statement of the defendant was struck off and an ex-parte decree was made against him.

It was contended before us that the order of the learned Munsif was wrong in law. We are not satisfied that such is the case. The two cases that were produced before us as authority for the applicant's contention, namely *Kripa Ram* v. *Jawahir Lal* (1) and *Lyallpur Sugar Mills Co.* v. *Ram Chandra Gur Sahai Cotton Mills Co.*, (2) deal with an order of production of document and do not deal with an order of inspection. Sub-R. 2, R. 18, O. 11, Civil P. C., suggests that an order of inspection could be made not only in respect of documents mentioned in the plaint and written statement and the affidavit of discovery but also in respect of other documents. The difference between the two cases is that in the case of a document not mentioned in the plaint or written statement or the affidavit, an affidavit has to be filed by the applicant to satisfy the Judge that the document is relevant to the case. In the case of a document mentioned in the plaint or written statement or affidavit of discovery, the relevancy is admitted; while in the other case, the relevancy has to be proved. But where the Judge is satisfied as here as to the relevancy of the document, it is not necessary that there should be an affidavit. At any rate, the want of an affidavit cannot invalidate the order passed by the Munsif under R. 18, O. 11, Civil P. C., and non-compliance with the order entailed the penalty of the written statement being struck off. We are therefore satisfied that there was nothing wrong either technically, or on the merits against the order of the Munsif. On the other hand, we find that the order was evidently justified in the circumstances of the case. The defendants had long time within which to produce the account books and if any further delay was allowed it was feared that the books would be tampered with. The Munsif distinctly said so in his order of 30th October 1928. In the result, we dismiss the application with costs.

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(1) [1928] 112 I. C. 285.

(2) A. I. R. 1922 All. 235=67 I. C. 75=44 All. 535.

P.N./R.K. *Revision dismissed.*

A. I. R. 1931 Allahabad 223

MUKERJI AND BENNET, JJ.

Mohan Lal and *another*—Defendants—Appellants.

v.

Ram Charan and *another*—Plaintiffs—Respondents.

First Appeal No. 264 of 1927, Decided on 8th December 1930, from decision of Sub-Judge, Banda, D/- 31st March 1927.

Mortgage—Redemption—Mortgagor can redeem mortgaged property before a decree for foreclosure against him is made absolute —Transfer of Property Act, S. 60.

A mortgagor can redeem the mortgaged property before a decree for foreclosure passed against him is made absolute, the right of redemption not being lost till then: *7 I. C.* 50, *Foll.*; 19 *All.* 180, *not Foll.* [P 223 C 2]

P. L. Banerji and *S. D. Sinha*—for Appellants.

K. N. Katju, S. S. Shastri and *N. P. Singh*—for Respondents.

Bennet, J.—This is an appeal by defendants Mohan Lal and Mt. Parbati against a decree for redemption passed by the learned Subordinate Judge of Banda in a suit brought by Ram Charan major and Ram Dhani minor, plaintiffs-respondents. Various grounds of appeal have been taken both of law and fact. The mortgage in question was dated 7th September 1876 and was executed by one Khubchand in favour of Madho Prasad for Rs. 2,200. The first point which has been argued is that there was also a mortgage by conditional sale of 25th February 1875 for Rs. 215 of the property in suit to the defendants, and that there was a suit for foreclosure on the basis of this mortgage deed of 25th February 1875 which was decreed on 11th April 1888, and therefore defendants pleaded that no further suit could be brought for redemption by persons claiming as heirs of Khubchand. Now it is clear from what evidence has been produced by the defendants that there was only a preliminary decree for foreclosure passed under S. 86, T. P. Act, and that there was not a final decree for foreclosure passed under S. 87, T. P. Act. It was argued by the learned counsel for the appellants that the preliminary decree under S. 76 operated to extinguish the right to redeem possessed by the mortgagor and his heirs. For that proposition reference was made to *Ram Lal* v. *Tulsa Kuar* (1), in which it was held that no extension of the time limited by the decree for the payment of the decretal amount can be made except for good cause shown, whether the order under S 87, in a suit for foreclosure, has been applied for or not. That ruling of the year 1896 was referred to in a subsequent ruling of this Court reported in *Pardao Singh* v. *Dwarka Singh* (2) in the year 1910 and the earlier ruling was not followed. In the ruling of *Pardao Singh* v. *Dwarka Singh* (2) it is laid down that a mortgagor can redeem the mortgaged property before a decree for foreclosure passed against him is made absolute, the right of redemption not being lost till then. We consider that we should follow this later ruling, and accordingly we hold that the right to redeem was not lost to the heirs of Khubchand, the mortgagor, on account of the preliminary decree which was passed for foreclosure in the year 1888.

The next point which was urged before us was that one Abdul Karim was an auction-purchaser of the property in the year 1879 in execution of a decree at an auction sale. The only basis for this assertion is the entry of the name of Abdul Karim as one of the defendants in the suit of 1888. No other evidence has been produced by the appellants to establish their contention on this point. Accordingly we hold that they have failed to show that Abdul Karim was a purchaser of this property at an auction sale. The next point on which argument was made was an ejectment suit brought by the widow of Khubchand to eject the appellants in the year 1906. In this suit it is proved that the appellants did claim to be in possession as owners and not as mortgagees. But the revenue

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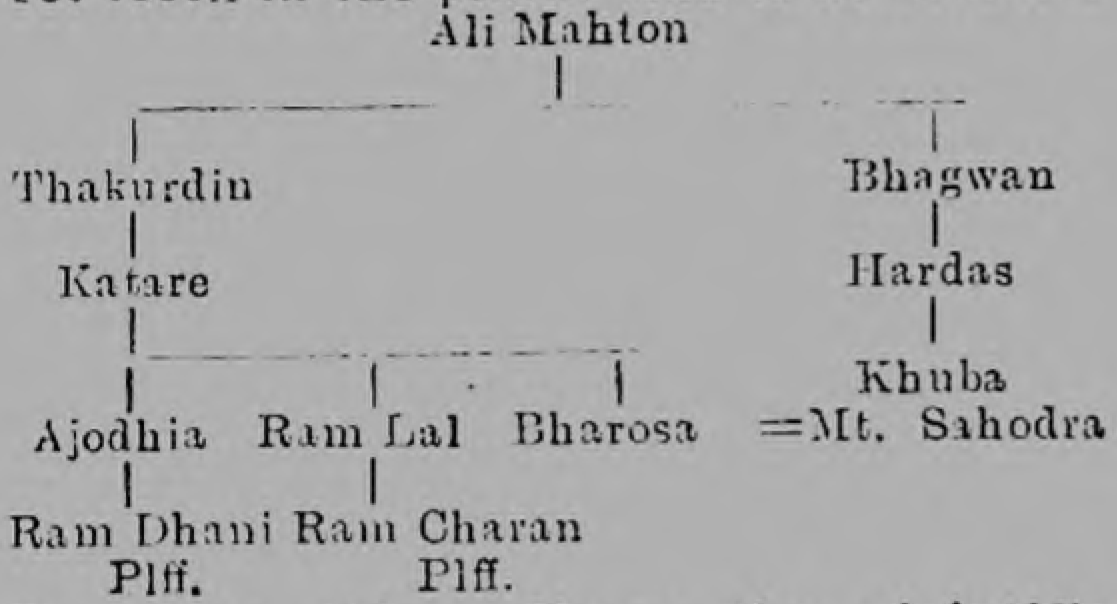
(1) [1897] 19 All. 180=(1897) A. W. N. 11.

(2) [1910] 7 I. C. 50.

Court held that the appellants were mortgagees and could only be ejected on payment. This judgment is not in favour of the contention of the appellants that they had obtained adverse possession as proprietors.

The next ground on which argument was made was that the plaintiffs had failed to prove that they were the heirs of Khubchand, the original mortgagor. The pedigree given by the plaintiffs is set forth in the plaint and is as follows:



To prove this pedigree the plaintiffs have produced four witnesses: Sheo Balak, Mt. Pearia, Ram Dayal and Sheo Dayal Singh. These persons recite the pedigree and claim that they learnt it from their relatives in the case of Sheo Balak and Mt. Pearia, who are members of this family, and in the case of Ram Dayal the claim is that he learnt it as a priest of the family, and in the case of Sheo Dayal he is a resident of the village. It is a fact that Ram Dyal and Sheo Dayal have been persons against whom law proceedings were taken at the instance of the father-in-law of the defendants. On the other side the defendants produced a witness, Sunnar Lal, who claimed to be a member of the family and who gave evidence against the plaintiffs. But this witness made an admission in 1917, which has been proved, and the admission is to the effect that Ajudhia, the father of the plaintiff Ram Dhan, performed the funeral ceremony of Mt. Sahodra, widow of Khubchand. This therefore is an admission that the plaintiffs are members of the family of the late Khubchand. We consider that the finding of the learned Subordinate Judge is correct and that it is proved that the plaintiffs are heirs of Khubhand.

We consider that the decree was correct and we dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 224

MUKERJI AND BENNET, JJ.

Sarbhu Lal—Appellant.

v.

Mahesh Das—Opposite Party.

Second Appeal No. 10 of 1929, Decided on 14th November 1930, from order of Dist. Judge, Saharanpur, D/- 15th April 1929.

(a) Provincial Insolvency Act (1920), Ss. 7 and 9—Secured creditor is not precluded from applying under Ss. 7 and 9.

The secured creditor, who has obtained a decree on the basis of his mortgage, charge or lien on the property of the judgment-debtor is not thereby precluded from making an application under Ss. 7 and 9. [P 225 C 1]

(b) Practice—New plea cannot be allowed in revision

New matters, e. g. that the sale was made without sufficient advertisement, etc., when not alleged in the lower Court, cannot be admitted for the first time in revision. [P 225 C 2]

S. B. Johari—for Appellant.

P. L. Banerji and *H. P. Sen.*— for Opposite Party.

Bennet, J.—These are two appeals which have been brought in this Court. No. 10 of 1929 is brought as a second appeal from order and No. 167 of 1929 is brought as a first appeal from order. In neither case do appeals lie to this Court under the provisions of S. 75, Provl. Insol. Act. We have however examined the records and heard learned counsel for the appellant with a view to seeing whether either of these matters require to be examined as a revision. In regard to No. 10 of 1929, the insolvent Sarbhulal complains of an order adjudicating him an insolvent. This order was passed on the application of a creditor Mahesh Das. Mahesh Das sued on the mortgage executed by Sarbhulal and obtained a preliminary mortgage decree. It was open to Mahesh Das to have a final decree for sale prepared on this preliminary decree. Instead of doing so he made an application to the insolvent Court on 30th August 1928 to have his judgment-debtor Sarbhulal adjudged an insolvent. This was based on an act of insolvency alleged an have taken place on 13th July 1928.

Now the first point which has been taken before us is that because Mahesh Das had obtained a decree on his mortgage therefore he was no longer a secured creditor within the meaning of S. 2 (1) (e), Provl. Insol. Act. That section defines a secured creditor as "a person holding a mortgage charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor." The argument of counsel is that the mortgage security merges in a decree and therefore the decree-holder cannot be considered a secured creditor. No authority has been put before us for this proposition and we consider that the secured creditor who has obtained a decree is not thereby precluded from making an application under Ss. 7 and 9, Provl Insol Act.

The second point which was argued before us was that there was no evidence on which the learned District Judge could come to the conclusion that an act of insolvency had been committed. The particular act alleged against the insolvent was that on 13th July 1928 he had made a gift to the widow of his brother of a house valued at Rs. 8 000. This fact was admitted. There were two mortgages on other portions of the property of Sarbhulal, and it was found as a fact on his own statement that his remaining property, which was not secured and which he had not transferred by the gift, was less than Rs. 1,000 in value. The particular property which was secured to Mahesh Das was valued by Mahesh Das at Rs. 2,500 and eventually sold for Rs 3,750. The decree of Mahesh Das amounts to Rs. 4,613-15-0. There was also another creditor Asaram. It has not been shown that there was no evidence before the learned District Judge on which he could arrive at the finding of fact, that, by the transfer of a house valued at Rs. 8,000 the creditors of Sarbhulal were defeated or delayed. We consider therefore that it is not shown that the order adjudicating the plaintiff insolvent was in any way an order with which we should interfere. Accordingly we dismiss No. 10 of 1929 with costs including counsel's fees on the higher scale in this Court.

The other appeal, No. 167 of 1929, is against a sale of 1st January 1929. No objection was taken definitely that that sale was invalid either to the insolvency Court or to the District Judge. All that we are shown is an application dated 7th January 1929, by which the District Judge is asked to direct the receiver not to execute the sale deed until the decision of the appeal on the question of adjudication. The only matter alleged in that application is that the respondent very hastily caused the receiver to sell the property. In the grounds of appeal to this Court other matters are alleged, such as that the property was sold without sufficient advertisement. New matters of that kind cannot be admitted for the first time in revision. We consider that no case has been made out for interference in revision of the order of the lower Court and we dismiss this appeal also with costs including counsel's fees on the higher scale in this Court.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 225

MUKERJI AND BENNET, JJ.

Mt. Basanti Bibi - Plaintiff — Appellant.

v.

Babulal Poddar and *another* — Defendants — Respondents.

First Appeal No. 469 of 1926, Decided on 9th January 1930, from decree of Sub-Judge, Aligarh D/- 9th August 1926.

(a) Contract Act (1872), S 239 — Partnership is combination of persons and not of firms and firms, or of firms and persons.

Partnership is a relation between persons who have agreed to combine their property, labour or skill in some business and to share the profits thereof between them. According to the definition it is not a relation that subsists between persons and firms or firms and firms.
[P 226 C 2]

(b) Contract Act (1872), S 253 (10) — Factory business by thirty members carried on for long time not treated as dissolved on occasions when any of partners died — Contract that partnership business should not be dissolved by death of one partner was implied

A factory business was carried on for a long time by a partnership of 30 members and it had never been treated as dissolved on each of the occasions on which one of the 30 owners died

Held: that in the above circumstances if the business and partnership relations were held to be ipso facto dissolved on death of every one of the 30 partners, a great deal of practical incovenience would result and therefore there must be presumed to be an implied contract to the effect that the death of one of the partners of the partnership business, would not dissolve it.
[P 227 C 1]

(c) Limitation Act (1908), Arts. 141 and 120 — Suit for share and profits of factory business on death of Hindu female sharer — Art 141 and not Art. 120 is applicable.

Where a person brings a suit for the share and profits of a factory business as an heir of a Hindu female sharer who is dead, and the factory consists of immovable property and though the suit is not one for possession of this immovable property, yet the criterion applicable in such cases being whether the title of the plaintiff is subsisting at the time of suit or not, Art. 141 and not Art. 120, is the correct article applicable. Art. 120 which is only applicable

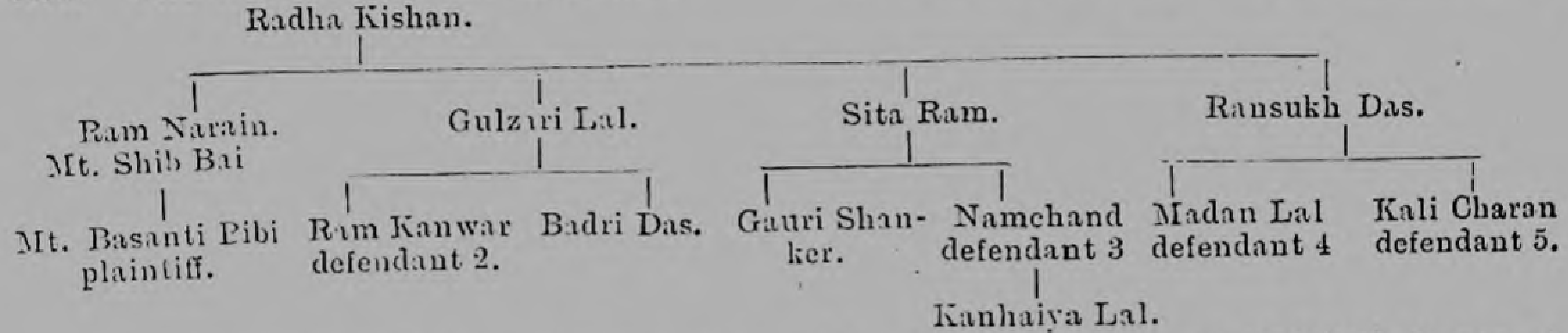
Advocate High Court

when no other article is applicable, is not the proper article. Such a suit is within limitation if the cosharer's title is shown to be subsisting and the title is subsisting if the plaintiff is within the rule of 12 years. [P 227 C 1]

Tej Bahadur Sapru, S. K. Dar, S. C. Das, Krishna Murari Lal and *Janki Prasad Sanyal*—for Appellant.

B. E. O'Conor, K. N. Katju, K. N. Malaviya, Pannalal, K. C. Mittal and *Ram Prasad*—for Respondents.

Judgment.—This is a first appeal brought by the plaintiff Mt. Basanti Bibi whose suit has been dismissed by the trial Court on the sole ground of limitation. The family tree is as follows :



The property in suit is a ginning factory and cotton press situate in the town of Hathras. The plaintiff Mt. Basanti Bibi is a married lady living in Bihar in the District of Monghyr. Her plaint asks for the following reliefs :

That it may be declared that the plaintiff is the sole owner of 1½ annas share which belonged to Lal Ram Narain (her father) out of the five annas share of the firm Radha Kishan-Sita Ram and that defendant 9 (one Seth Chiranni Lal) has right to a five pie share appertaining to the share of Ram Narain which was sold to him by defendants 6 to 8, who had purchased it from defendants 4 and 5.

The plaint further asks for the relief of profits from Sambat in 1967 (1910-11) up to the date of suit. The plaint sets forth that Ram Narain died at some date which is not stated and subsequently his widow Mt. Shib Bai died on 31st June 1916, but Mt. Shib Bai did not receive her share of profits since Sambat 1967. Defendant 1 is the present manager of the factory and his plea in his written statement is that he has a certain number of years' profits with him, and that he is ready to pay to whoever is found by the Court to be entitled. The plaintiff and her mother before her undoubtedly took no action whatever to demand the share of profits which were annually due to them from this factory. It is shown by the learned counsel that in 1915 suits were brought by the different members of the family claiming part of the share of profits as heirs of the deceased Ram Narain and on 18th May 1921, defendants 6 to 8 sold the share which they claimed had come to them on the death of Ram Narain to defendant 9. Two points have been argued in this appeal, one the question of limitation, and, secondly, the question of the rights of defendant 9 Seth Chiraunji Lal as bona fide purchaser of value under S. 41, T. P. Act. We will first deal with the question of limitation.

The trial Court has applied Art. 120, Lim. Act, and also S. 253 (10), Contract Act. In the opinion of the trial Court on the death of Ram Narain the partnership in the firm of Radha Kishan-Sita Ram was dissolved, and the whole of the present claim of the plaintiff is time barred. As regards this alleged dissolution the facts are that the whole of this factory is owned as a partnership by a large number of persons, we are told, about 30 in numer. The five annas share in the factory was owned by the members of the family to whom the father of the plaintiff belonged. The trial Court has assumed that five annas share was a partnership within the partnership which consisted of the factory partners. That is a very peculiar view of law, and we do not consider that such a view is consistent with the definition of partnership in S. 239, Contract Act. The section states :

> "Partnership is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business and to share the profits thereof between them."

Persons who have entered into a partnership with one another are called collectively a firm. If there were to be a partnership then the definition under S. 239 would have to be altered to read that partnership is the relation which subsists between persons, or between persons and a firm, or firms. We consider, therefore, that we cannot regard the owners of the five annas share in the factory as forming a separate partnership.

and we consider that there was only one partnership owning the whole factory.

The next question which we consider is whether S. 253 (10) is applicable to the partnership of the factory. That section states:

> "In the absence of any contract to the contrary, the relations of partners to each other are determined by the following rules."

Now if in the case of this factory business the death of every one of the 30 partners was to ipso facto dissolve the partnership, a great deal of practical inconvenience would result. The business has been going on for a very long time, and there is no evidence whatever on the record that the business has been treated as dissolved on each of the occasions on which one of the 30 owners died. We consider therefore that in the present case there must be presumed to be an implied contract to the effect that the death of one of the partners of this factory will not dissolve the partnership business. Further, it is not alleged in any of the pleadings that there is any dissolution of the partnership on the death of a partner. We consider therefore that the trial Court was not correct in coming to the conclusion that the death of Ram Narain caused a dissolution of the partnership. Now the question is what is the correct article to apply to the present suit under the Limitation Act. We are of opinion that the correct article is Art. 141, which applies to a suit for possession of an immovable property by a Hindu entitled to the possession of the immovable property on the death of a Hindu female. The present plaintiff became entitled to possession on the death of her mother Mt. Shib Bai which we find to have taken place on 21st June 1916. The factory consists of immovable property, and accordingly Art. 141 is the correct article to apply. Art. 120, which is only applicable, when there is no other article which applies, is not the proper article for this case. It was argued that this was not a suit for possession of immovable property. But we consider that the criterion to apply is whether the title of the plaintiff is still subsisting or not. We may draw an analogy from a suit for profits brought by a cosharer in a mahal. Such a suit is within limitation if the title of the cosharer is shown to be still subsisting, and the title is subsisting if the plaintiff is within the rule of 12 years limitation. Accordingly as the present suit was brought within 12 years of the death of Mt. Shib Bai in 1916, the suit is within limitation.

The next question which we have to consider is that urged by the learned counsel for Seth Chiraunji Lal as to whether his client defendant 9, should have the benefit of S. 41, T. P. Act. Defendant 9 did not give evidence as a witness to show under what circumstances he acquired the share in this partnership by the sale-deed of 18th May 1921, and whether he made the enquiry which is necessary under S. 41 before a person can receive the protection of that section. He has only put forward one witness Bhiko Mal, who is his agent, and that witness does not even state that he negotiated the sale-deed. Defendant 9 therefore has failed to prove that he made the necessary enquiry to ascertain that his vendors had power to make the sale-deed to him. Accordingly we hold that Seth Chiraunji Lal is not entitled to the benefit of S. 41, T. P. Act. As a result we set aside the decree of the trial Court and we remand this case for decision on the remaining issues. In regard to limitation it is no doubt possible for these defendants who have received profits which should have come to the heirs of Ram Narain, to plead that Art. 62, Lim. Act, will be a bar to the suit of the plaintiff. That however is a matter for the trial Court to determine. But so far as defendant 1 the manager of the factory is concerned, Art. 62 would not apply to funds in his hands. Costs here and hitherto incurred will be costs in the cause.

B.V./R.K. *Appeal allowed; case remanded.*

A. I. R. 1931 Allahabad 227

MUKERJI AND BENNET, JJ.

Mt. Jamwati and *another*—Defendants—Appellants.

v.

Mt. Maharani—Plaintiff—Respondent.

First Civil Appeal No. 517 of 1926, Decided on 6th May 1930, against decree of Sub-Judge, Shahjahanpur, D - 28th August 1926.

Hindu Law — Maintenance — Decree for arrears—Widow must be in want and there must be wrongful withholding.

Where a Hindu widow sued for maintenance, the question of maintenance does not stand on the same footing at all as the question of arrears of maintenance. The widow must satisfy the

Court that she is in want and a case for arrears must be made out. There must be prima facie evidence of wrongful withholding of arrears before she can obtain a decree for arrears of maintenance: 21 *All.* 183; 47 *I. C.* 623; 87 *I. C.* 210 and 24 *Mad.* 147, *Ref.*; 116 *I. C.* 409, *Dist.* [P 228 C 2, P 229 C 1]

B. Malik and *Harnandan Prasad* for Appellants.

U. S. Bajpai—for Respondent.

Judgment. - This is a first appeal by Mt. Jamwati, a widow, and her lessee Pandit Ram Chandra, against a decree of the Court of first instance awarding maintenance and arrears of maintenance to the plaintiff-respondent Mt. Maharani, Mt. Maharani is a widow aged 60 and her husband Jagannath died in 1912. He left a minor son Sriram who was the husband of Mt. Jamwati, appellant, who was also minor at that time. The entry in the revenue records on the death of Jagannath was half for plaintiff Mt. Maharani and half for her minor son Sriram. Mt. Maharani continued in possession of the estate and to make collections. Her minor son Sriram died about 1922 and Mt. Maharani still continued in possession. Her daughter-in-law Mt. Jamwati, brought a suit No. 56 of 1924, for possession of the whole of the property on the ground that she was the widow of the last male holder. This suit was decreed on 12th December 1924, and in February 1925, on some date not specified, Mt. Jamwati obtained possession of the estate. It is stated that there was a receiver appointed on 1st April 1924, during the pendency of that suit, but this is not shown by the present record, and it is only stated in the judgment that a commissioner was appointed to make a list of property. Mt. Maharani brought the present suit on 7th April 1926 claiming maintenance at the rate of Rs. 1,100 a year and also arrears of maintenance from April 1924 to the date of the decree. The learned Subordinate Judge has held that net income of the estate is Rs. 1,200 per annum and he has allowed Rs 40 per mensem to the respondent-plaintiff Mt. Maharani with arrears of maintenance from April 1924, at the same rate.

The two questions which have been argued on the appeal of Mt. Jamwati are firstly, that the rate of maintenance, Rs. 40, is excessive; and secondly, that arrears of maintenance should not be allowed. In regard to the first question it was pointed out that Mt. Jamwati, in the course of the litigation had to execute a lease of the property for Rs. 900 per annum and therefore it was contended that the finding of the lower Court, that the net profits were Rs. 1,200 per annum, was not correct. But this argument ignores the fact that Mt. Jamwati has only leased the land which is rented by tenants, and that she has retained in her possession the *sir* and khudkasht land which is stated by the plaintiff on p. 9 to amount to 70 or 80 bighas. This is also supported by the evidence of the patwari for the defendant to the effect that Mt Jamwati is looking after the *sir* and khudkasht land also. Accordingly we consider that the finding that the net income of the property is Rs. 1,200 per annum or Rs. 100 per mensem, is correct. As regards the amount which each widow should have for maintenance, we consider that Rs. 60 to the younger widow and Rs. 40 to the elder widow is not an unfair division. We therefore uphold the decree of the lower Court on this point.

The next point is in regard to arrears of maintenance. The learned counsel for the appellant Mt. Jamwati relied on *Raghubans Kunwar* v. *Bhagwant Kunwar* (1) and *Karbasappa* v. *Kallava* (2), from which we deduce the proposition that a widow must satisfy the Court that she was in want before she can obtain a decree for arrears of maintenance. The question of maintenance does not stand on the same footing at all as the question of arrears of maintenance. The learned counsel for the plaintiff, referred to *Ekradeshwari Bahuasin Saheba* v. *Homeshwar Singh* (3). In this ruling the question before their Lordships was from what date arrears of maintenance should be granted to a Hindu widow and their Lordships held that on the facts in the case before them the widow was entitled to arrears of maintenance from the date on which she left her husband's house and went to reside elsewhere. In the present case Mt. Maharani gives her address in the plaint as Mauza Bajhera Bhagwanpur and in the detail of houses attached to the plaint she states that the house in that village is one of the houses of the estate. It is also in para. 6 of the written statement of Mt. Jamwati (additional pleas) that the plaintiff lives in the house at Bajhera. Accordingly the present case stands on a different footing from the case before their Lordships of the Privy Council in *Ekradeshwari Babuasin Saheba* v. *Homeshwar Singh* (3) and must be decided on its own facts. In *Mt. Lakshmamma* v. *M. Venkatasubbiah* (4) and in *Raja Yarlagadda Mallikarjuna Prasada Nayudu* v. *Raja Yarlagadda Durga Prasada Nayudu* ( ), it was held that a case for arrears must be made out and there must be prima facie evidence of wrongful withholding of arrears. The facts in the present case are not as clear as they might be, but we consider that it is not desirable to remand this case for further investigation, because the adoption of such a course would involve the parties in a greater amount of expense than the amount of arrears in question. Taking the facts on the record which we are able to ascertain we consider that equity will be satisfied in the present case by allowing the appeal of Mt. Jamwati to this extent, that the arrears of maintenance will be reduced from Rs. 40 per mensem, decreed by the learned Subordinate Judge from April 1924, to the date of suit, to the sum of Rs. 10 per mensem from the 1st February 1925 up to 7th April 1926, the date of suit, which we now decree for arrears of maintenance. Mt. Jamwati will receive proportional costs of appeal and proportional costs in the lower Court and this would be taken into account in calculating the amount of court-fee which will be paid by the parties. Mt. Maharani is also allowed proportionate costs in proportion to her success.

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(1) [1899] 21 All. 183=(1899) A. W. N. 22.

(2) [1919] 43 Bom. 66=47 I. C. 623.

(3) A. I R. 1929 P. C. 128=116 I. C. 409=56 I. A. 182=8 Pat. 840 (P. C.).

This appeal was also argued on behalf of Pandit Ram Chandar, the lessee from Mt. Jamwati, on different grounds. His ground of appeal was that the lower Court was wrong in decreeing costs against him. His point was that because he was the lessee, he should not have been impleaded; and secondly, his learned counsel argued that the plaintiff had in para. 10 of the plaint alleged that Mt. Jamwati had executed a fictitious lease of all the property in favour of her relation Ram Chandar. The plaintiff, however did not ask for any relief or for a declaration that the lease from Mt. Jamwati was fictitious and there was no issue on this point. If Ram Chandar had confined his written statement to contesting the question of the lease being fictitious, we might have considered the correctness of exempting him from costs; but in his written statement he went much further and alleged "para. 7 of the plaint is quite wrong and is not admitted." This was the paragraph in which the plaintiff asks for maintenance according to the Hindu law. As however Ram Chandar denied that the plaintiff should get maintenance and as the rate has been upheld in this Court we consider that the lower Court was correct in awarding costs against Ram Chandar.

We therefore dismiss the appeal of Ram Chandar. As Ram Chandar and Mt Jamwati filed a joint appeal, the costs of these two persons will be governed by the total proportion of success and failure, and they will be treated as one party for purposes of the decree of this Court.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 229

SULAIMAN AND YOUNG, JJ.

Mukat Lal and *others* —Defendants — Appellants.

v.

Gulab Singh-Pran Mal — Plaintiff — Respondent.

First Appeals Nos. 114 and 115 of 1927, Decided on 25th November 1930, from decision of Addl. Sub-Judge, Meerut, D/- 23rd December 1926.

(a) Limitation Act (9 of 1908), Art. 52—Sale of goods—Liability to pay full price accrues on date of sale and limitation runs from the date.

In a simple transaction of sale of goods, the liability to pay the full price accrues on the date of the sale. The fact that the purchaser, not having all the money in his hands, agrees to pay the balance with interest at a certain rate does not prevent the accruing of the vendor's right to recover the whole price on account of the purchase and time begins to run from the date of the sale. Vendor must sue within three years from that date in order to get a personal decree against the purchaser. [P 231 C 1]

(b) Limitation Act (9 of 1908), Art. 52—Goods sold but in vendor's custody remain as security for unpaid price—Vendor suing vendee not for enforcement of charge on security but for personal decree—Suit is governed by Art. 52 and not by Limitation Act, Art. 120.

Where the goods sold remain in the custody of the vendor as security for the unpaid price of the goods and the vendor sues the vendee for a personal decree against him and not for enforcement of any charge on the security, the suit is not governed by Art. 120, but by the three years' rule of limitation so far as the personal liability of the defendant is concerned : 24 *All.* 251 and 30 *Bom.* 218, *Ref.* [P 231 C 1]

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(4) A. I. R. 1925 Mad. 795=87 I. C. 210.

(5) [1901 24 Mad. 147=27 I. A. 151=7 Sar. 761 (P. C.).

(c) Limitation Act (9 of 1908), Art. 85—Limitation will not run from date of initial purchase if contract between parties shows that account will be settled after several transactions—Limitation Act, Art. 52.

Where the original contract between the parties is that the plaintiffs would purchase goods on behalf of the defendants, retain them and then re-sell them on instructions from the defendants and then only the account would be settled, time would not begin to run from the date of the initial purchase : 15 *I. C.* 336, *Ref.* [P 231 C 2]

(d) Practice—Pleadings—Neither party putting forward case of wagering contract—Court should not base judgment on such hypothesis.

Where neither party to the suit has put forward the case of a wagering contract which is a mixed question of fact and law, it is not proper for the Court to base its judgment on any such hypothesis. [P 232 C 2]

P. L. Banerji—for Appellants.

K. N. Katju and *G. Agarwala*—for Respondent.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for recovery of a principal sum and interest pendente lite and future. The pleadings in this case were so badly drafted that we had to spend a considerable time in trying to understand them. It was after a great deal of difficulty that even the counsel for the parties agreed as to the respective cases of the parties put forward by their clients. It would be convenient to summarize the cases as follows:

According to the plaintiffs the defendants purchased 20 grain pits from the plaintiffs, which are ready for delivery, paying Rs. 500 per pit as margin money, and promising to pay the balance with interest at Rs. 0-12-6 per cent per mensem. Only 18 out of the 20 grain pits were filled up and were actually ready for delivery. They however remained with the plaintiffs. When the price of grain fell the plaintiffs made a demand to the defendants to deposit more money which they failed to do and consequently the plaintiffs sold the goods on 10th November 1922 and realized the price. The last payment of the price was however received on 18th December 1922 and the suit was instituted within three years from that date for the loss. The 18 khattis were divided into 2 khatas, one of 12 and the other of 6.

The plaintiff did not suggest that there was any other parallel contract with the defendants at the time.

The defendants' case is that the 18 grain pits referred to by the plaintiffs were of ready delivery, and shortly after that contract there was a further contract between the parties under which the defendants undertook to supply 17 grain pits of wheat in the month of September 1922, that the defendants instructed the plaintiffs to sell the grain pits in the open market and four pits out of the first khata of 12 grain pits were sold by the plaintiffs; the defendants however then changed their minds and asked the plaintiffs not to sell the grain pits to the third parties in the open market but to appropriate the remaining 14 grain pits towards the account of the forward contract relating to the 17 grain pits; and to make a further purchase of the three grain pits in order to square the account of this forward contract.

When the contract relating to the 17 grain pits was disclosed, the counter-case put forward by the plaintiffs was that there was a practice in the market under which there could be no delivery or purchase after the fixed date and that under the decision of a panchayat of commission agents all business transactions were closed after Asoj Badi first. Up to that no definite instructions were received from the defendants to dispose of the 14 pits which had remained in the custody of the plaintiffs.

The learned Subordinate Judge has thought that the defendants gave instructions for the delivery of only 8 khattis out of the first khata of 12 khattis and not the remaining 6; their instructions with regard to the entire lot of 14 pits were sent on 4th October, but were received by the plaintiffs on 6th October, which was just one day too late. It is on this ground that he has not compelled the plaintiffs to give credit for the entire lot of 14 pits in the forward contract account, but has only given credit for the eight pits of the first khata.

The defendants have appealed and the plaintiffs have filed a cross-appeal.

The first question to decide is the question of limitation. The plaintiffs are suing on the basis of the purchase made by the defendants of 18 grain pits in April 1922 which were admittedly of ready delivery. As a simple transaction of sale by the plaintiffs to the defendants, there can be no doubt that the liability to pay the full price accrued on the date of the sale. No doubt the defendants not having all the money in their hands got an advance made by the plaintiffs on which they agreed to pay a certain rate of interest, but that fact did not prevent the accruing of the plaintiffs' right to recover the whole price on account of this purchase. The plaintiffs are suing to recover the principal amount and interest and it seems to us that if the transactions were to be treated as a simple transaction of sale of goods, part of the price of which had not been paid, the time began to run from the date of the sale by the plaintiffs to the defendants and they had to sue within three years of that date in order to get a personal decree against the defendants.

Even if we assume that it was agreed that the goods would remain in the custody of the plaintiffs as security for the advance made by them, and this appears to have been so, the amount advanced by the plaintiffs would still be a loan on the security of certain goods pledged to them. The present suit is not for the enforcement of any charge on that security but for a decree against the defendants personally. Art. 120, Lim. Act would therefore not apply to the suit, but there would again be the three years rule of limitation so far as the personal liability of the defendants is concerned. This was clearly laid down in the case of *Saiyid Ali Khan* v. *Debi Prasad* (1), in which Art. 57 was applied against a pawnee who was trying to recover the amount due to him and the terminus quo was taken to be the date of the loan.

It may be conceded that the plaintiffs were entitled to retain the goods in their hands so long as full price had not been paid. So long as the goods remained in their possession they could have exercised their lien on it.

They have now disposed of the goods and have realized as much as they could. The present suit is one for recovery of the balance from the defendants personally. The ruling quoted above therefore applies with full force. This view has been accepted by the Bombay High Court in *Yellappa* v. *Desayappa* (2). The learned Subordinate Judge has applied the rule of law laid down in the case of *Sheo Pratap Singh* v. *Brij Kishore* (3). In that case the contract between the parties was for the initial purchase by the defendants of goods from the plaintiffs and then a re-sale of those goods by the plaintiffs, it being understood that the account was to be settled after this composite transaction was completed. It is obvious that if the original contract between the parties had been that the plaintiffs would purchase goods on behalf of the defendants, retain them and then re-sell them on instructions from the defendants and then only the account would be settled, time would not begin to run from the date of the initial purchase. The learned Subordinate Judge in his finding on issue 1 has assumed this to be so, for he says:

> "It is clear that the grain had to be sold through the plaintiff himself and unless it has been sold and its price was ascertained and paid the plaintiff could not sue the defendants for the losses."

No doubt a case of that kind was attempted to be set up in para. 5 of the plaint, but there is no satisfactory evidence to show that the original understanding was that the transaction was not to be completed till the goods had been actually re-sold. Mannu Lal, one of the proprietors of the plaintiffs' firm, stated that it was agreed that in case the defendants failed to pay further sums the plaintiffs were authorized to sell the grain pits. Plaintiffs' witness Ram Richpal also deposes that in case of failure the plaintiffs were entitled to sell the khattis. This was admitted by Mukat Lal, one of the proprietors of the defendants' firm who stated that it was agreed between the parties that the plaintiffs would sell the goods as soon as the losses per khatti amounted to Rs. 500. The right of the seller to sell the goods which remained in his custody on account of the non-payment of the price exists under the law. What the plaintiffs had to establish was that there was an initial understanding between the parties that the goods would be purchased and then sold by the plaintiffs and the account would be settled after both these transactions had been completed. On the evidence on the record we are not satisfied that such a contract has been clearly made out. We are therefore of opinion that the plaintiffs' claim for the recovery of the balance of the price of the 18 grain pits, which were sold by them to the defendants in April and May 1922, corresponding to Baisakh Sudi 1979, is barred by time

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(1) [1902] 24 All. 251=(1902) A. W. N. 43.
(2) [1906] 30 Bom. 218=7 Bom. L. R. 739.
(3) [1912] 15 I. C. 336.

An additional ground for holding that the claim is barred by time is that the goods were actually re-sold by the plaintiffs in November 19 2. The plaintiffs suggest that its re-sale was subject to the goods being passed by the Karachi authorities and that the plaintiffs only received 90 per cent of the price in November and the balance of 10 per cent was received later in December after the goods had been passed. It is however to be noted that the goods had been supplied by the plaintiffs themselves and had been filled in 18 grain pits, which had been sold to the defendants. The re-sale of these goods took place in November at a fixed rate. The amount of the sale proceeds therefore became ascertainable in November although one-tenth of the amount was not received till later. The plaintiffs were in a position to make up an account as soon as the goods were re-sold by them. If there was to be any reduction on account of the inferior quality of the wheat supplied, the plaintiffs were themselves responsible for it because they had procured the grain themselves.

On the merits also we are of opinion that the plaintiffs' claim should fail. We have a feeling in our minds that the transaction in question was in reality a gambling transaction, but in their own interest neither party has thought it prudent to disclose its true nature. The plaintiffs when asked to make a statement were understood by the learned Subordinate Judge to say, p. 8, that as regards the remaining 14 grain pits the defendants directed the plaintiffs to deliver them in connexion with the wagering contract for the month of Asauj. The word used by the plaintiffs in vernacular was "satta" which was capable of another interpretation. The point does not appear to have been pressed any further. The defendants also felt that their claim for a suit on account of the forward contract of 17 grain pits would fail if it were held to be a wagering transaction and therefore did not put forward that case. It is possibly due to the concealment of the true nature of the transaction that the pleadings are so confused and there is so much difficulty in understanding the case of the parties. The statement of Mannu Lal goes to some extent to suggest that the idea was that the contract of purchase by the defendants would remain in force so long as the margin of the security did not fall below certain level and that the defendants need not pay the whole price of the goods but would only be liable for the differences. As however neither party has put forward the case of a wagering contract, which is a mixed question of fact and law, we do not think it safe to base our judgment on any such hypothesis.

Mannu Lal plaintiff in his statement of 22nd March 1926, as well as in his deposition of 16th December 1926, admitted that the defendants had directed the plaintiffs to deliver the remaining 14 pits in connexion with the forward contract, i.e. had given instructions for the appropriation of those pits towards this other contract. But this admission probably related to the first instruction. In para. 23 the defendants admitted that after having directed the plaintiffs to sell all the grain pits they sent a letter to the plaintiffs instructing them not to sell the remaining grain pits in future, though they go on to add that they asked the plaintiffs to deliver the grain pits to the defendants for the month of Asauj. The plaintiffs were not questioned in detail about these instructions, and we do not think that the admissions are so clear as to conclude the matter.

The correspondence which passed between the parties in this connexion is on the record. Ex. 5 (p. 42) is a postcard of 5th September 1922 sent by the defendants to the plaintiffs stating that 4 grain pits out of the khata of 12 grain pits had already been sold, and that the defendants had agreed to supply 17 grain pits in Asauj, and asking the plaintiffs to accept the 8 grain pits of the first contract towards the partial discharge of the second forward contract of 17 grain pits and that the credit and debit entries should be made on Asauj Sadi first. They promised to deliver the remaining 9 pits on Asauj Sudi 15th, that is on the last day of the month fixed for delivery. The learned Subordinate Judge in the Court below construed this letter as amounting to an instruction for the delivery of only 8 grain pits out of the 12 grain pits. We agree with his view. This letter contains no reference to the 6 grain pits of the second khata. Although the defendants alleged in their para. 23 of the written statement that there was a promise to deliver the goods to the defendants they have produced no documentary evidence in support of it. But the letter dated 4th October 1922 (p. 41) does show that on that day the defendants asked the plaintiffs to appropriate the remaining 6 grain pits of the second khata towards the remaining part of the forward contract, namely 9 grain pits, and further instructed them to purchase three more grain pits at the market rate and appropriate the same towards the remaining three pits. If these instructions were received in time and carried out, obviously both the transactions would be squared and the defendants' liability would be confined to any loss that might accrue on the purchase of the last three grain pits. The learned Subordinate Judge in his judgment has conceded that this was the effect of the letter of 4th October 1926.

He has however not given effect to it on a ground which was nowhere put forward by the plaintiffs themselves. The ground is that this letter was received by the plaintiffs on 6th October 1926 instead of on 5th October and was therefore too late by one day. It is on this ground alone that the learned Subordinate Judge has not given the defendants credit for the 6 grain pits. As we are treating the transactions between the parties as bona fide transactions of sale and purchase and not a mere wagering contract, we must examine the legal consequences of the delay of one day in sending instructions to the plaintiff. On 5th October 1926 the plaintiffs had in their possession 6 grain pits belonging to the defendants, which they were bound to deliver to them on demand or to re-sell to third parties on instruction. By that date the defendants had to supply to the plaintiffs 9 grain pits. The due date having approached the defendants sent the letter of 4th October which however did not reach the plaintiffs on 5th October. But on 6th October the plaintiffs still had in their possession 6 grain pits belonging to the defendants and there was the default on the part of the defendants to deliver the goods on 5th October. If the 9 grain pits belonging to the defendants had been sold to the third parties in the market or had been purchased by the plaintiffs themselves the liability of the defendants was to make good the loss on account of the breach of contract in not supplying the goods on the due date. In our opinion the default only made the defendants liable for the difference in the prices which might have prevailed on 5th October and 6th October and no more. What the plaintiffs have done is to hold on the grain pits belonging to the defendants till November, whereas they ought to have squared the transactions on 6th October by selling the 6 grain pits of the first contract against 6 grain pits out of the second contract. They have not led any evidence to show that there was any differences in prices prevailing in the market on 5th October and 6th October. In the absence of any proof of any variation in the rate during the interval of twenty-four hours their claim for damages cannot succeed if they had one.

We may further note that the Court below has found that, after crossing a few transactions, the plaintiffs themselves were left as purchasers and had themselves to take delivery of some of the defendants' khattis. As a matter of fact the plaintiffs have utterly failed to earmark the goods. The sale of Messrs. Louis & Co. was of a large stock of wheat, without showing that any particular bag of that stock came out of the grain pits belonging to the defendants. The plaintiffs have not been able to earmark these grain pits as they were mixed up with their own goods and the plaintiffs had in their possession the goods belonging to the defendants. This is an additional reason for not allowing their claim when they failed to give credit for the 6 grain pits subject to the instructions which were sent by the defendants on 4th October. In our opinion therefore the suit ought to be dismissed. But having regard to the fact that the pleadings were not clear we would direct that both parties should bear their own costs in both Courts.

The result therefore is that appeal No. 114 of 1927 is allowed and appeal No. 115 of 1927 is dismissed, but both parties should bear their own costs in both the Courts.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 234

DALAL, J.

Niranjan Lal—Plaintiff—Appellant.

v.

Jhamman Lal and *others*—Defendants —Respondents.

Second Appeal No. 1574 of 1928, Decided on 18th February 1930, against decree of Addl. Dist. Judge, Aligarh, D/- 1st August 1928.

Limitation Act, Art. 142—Delivery of formal possession gives fresh start for limitation but does not confer ownership and decree holder must demand partition within 12 years of date of formal possession.

Delivery of formal possession gives to the person who obtained formal possession a fresh start for the computation of limitation, but does not make the person who obtained such formal possession owner in possession. From the date of formal possession a fresh period of limitation will start and the decree-holder must obtain partition within 12 years of the date of the formal possession or establishment of his right in some other manner. If he does not demand partition within 12 years or does not in any other manner enforce his possession, he would not be entitled after 12 years to seek possession: *A.I.R.* 1928 *All.* 412; 39 *All.* 460 and *A.I.R.* 1921 *All.* 9, *Ref.* [P 235 C 1]

Panna Lal—for Appellant.

S. P. Sinha—for Respondents.

Judgment—Mr. Panna Lal, on behalf of the plaintiff-appellant has distinguished this case from the ruling quoted by the lower appellate Court of a Bench of this Court, *Sita Ram Dube* v. *Ram Sunder Prasad* (1), but, in my opinion, the principles of that ruling will apply. In the present case the house was purchased by the father of the defendants in 1907, whereupon in the following year the sons of one of the vendors sued for the setting aside of the sale deed and for possession, and the suit was decreed on 18th March 1909, for joint possession to the extent of one-third. Possession was taken by Niranjan Lal on 26th November 1910, in the manner laid down in O. 21, R. 96, Civil P. C. Subsequently, Niranjan Lal did not sue for partition; nor did he receive any rent from the defendants who continued in possession of the entire house. It is argued here that the defendants were not trespassers because by reason of the house not being partitioned they were entitled rightly to remain in possession of the entire house. In my opinion this argument was repelled by the Bench ruling quoted above and such appears to me to be the basis of the decisions in *Lal Rajendra Kishore* v. *Bhagwan Singh* (2) and *Jang Bahadur Singh* v. *Hanwant Singh* (3).

It was conceded in all those cases that the delivery of formal possession gave to the person who obtained formal possession a fresh start for the computation of limitation but did not make the person who obtained such formal possession owner in possession. From the date of formal possession a fresh period of limitation will start and the decree-holder must obtain partition within 12 years of the date of the formal possession or establishment of his right in some other manner. Mr. Panna Lal, on behalf of the appellant, drew the Court's attention to the observations of Lindsay, J., at p. 576 (*of* 26 *A.L.J.*) of the report in the case quoted above. Those observations however were merely an additional argument in that particular case. The Judge's point of view was that the question of adverse possession did not arise in a case like the present because it did not lie on the defendant to prove adverse possession, but it lay on the plaintiff to prove his possession and dispossession within the period of limitation when he came to Court to seek possession. The paragraph begins with the words:

> "As we have said, the question of adverse possession did not at all arise."

The learned Judge then proceeds to inquire how the particular facts of the case would be viewed if the question of adverse possession did arise, and he went on to say that as the judgment-debtor was not entitled to occupation of any portion of the house, he could not have remained in possession except on the basis of adverse possession. This second ground for allowing the appeal did not take away the force of the first ground on which the plaintiff's suit was held to be liable to dismissal because he had not proved his possession within 12 years of the institution of the suit.

The learned Judge who delivered the judgment of the Court specifically quoted the two cases of *Lal Rajendra Kishore* v. *Bhagwan Singh* (2) and *Jang Bahadur Singh* v. *Hanwant Singh* (3) referred to by me above. In those cases it appears to have been taken for granted that in a case like the present if the decree-holder did not come to Court within 12 years of obtaining formal possession under O. 21, R. 96, Civil P. C., he would not be able to maintain a suit for possession. Mr. Panna Lal quoted a single Judge ruling in the case of *Ram Parson Upadhia* v. *Kalab Husain* (4). There the question of joint possession was considered in the abstract apart from any circumstances like those in the present case and in the suits referred to above, where a plaintiff had obtained formal possession and subsequently after 12 years had come to Court to obtain a partition. The principle applied by Lindsay, J., appears to me to be that by formal possession the decree-holder merely started a fresh period of limitation and became entitled to seek actual possession of his share by demanding partition. If he did not demand a partition within 12 years or did not in any other manner enforce his possession he would not be entitled after 12 years to seek possession. It is quite true that the facts of the case may be differentiated on the ground that the defendants in the present case were cosharers of the plaintiff and entitled to remain in possession by reason of their holding a share in the house. So far the facts are not the same as those of the case in which Lindsay, J., delivered the judgment because in that case the judgment-debtor had no right to remain in possession after the decree-holder had obtained his decree and obtained formal possession. The principles however as I have pointed out, apply equally strongly to the present case.

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(1) A.I.R. 1928 All. 412=115 I.C. 791=50 All. 813.

(2) [1917] 39 All. 460=39 I.C. 745.

(3) A.I.R. 1921 All. 9=63 I.C. 212=43 All. 520 (F.B.).

I dismiss this appeal with costs.

Permission to file an appeal under the Letters Patent is granted.

K.N./R.K. *Appeal dismissed.*

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(4) [1916] 36 I.C. 100.

A. I. R. 1931 Allahabad 235

BANERJI AND KING, JJ.

Haibat Shah—Defendant—Appellant.

v.

Bohra Tarachand and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 261 of 1928, Decided on 11th December 1930, from decision of Dist. Judge, Agra, D/- 9th July 1927.

Transfer of Property Act (1882), S. 67—Suit for sale of mortgaged property—One of mortgagors dying while suit pending—Legal representative not brought on record within limitation—Suit abates against deceased mortgagor but whole suit does not abate—Mortgagee is entitled to decree for sale of remaining mortgaged property—Civil P. C. (1908), O. 22, R. 4

Where a mortgagee sues for the recovery of his mortgage money, and while the suit is pending one of the mortgagors dies and no legal representatives of the deceased mortgagor are brought on record by the mortgagee within limitation, though the suit may have abated as against the deceased mortgagor, the whole suit does not abate. The mortgagee is entitled to a decree for sale of the remaining mortgaged property, i. e., the mortgaged property excluding the share of the deceased mortgagor, and is entitled to sell the remaining portion of the mortgaged property to recover a proportionate amount of the mortgage money : 35 *All.* 247, *Rel. on* ; 33 *Cal.* 613, *Ref.* [P 236 C 2]

S. K. Dar and *Mukhtar Ahmad*—for Appellant.

N. P. Asthana—for Respondents.

King, J.—This appeal arises out of a suit for sale upon the basis of a mortgage dated 26th August 1912, executed by Jamaiat Shah, Safdar Shah and Saadat Shah alias Nabban, in favour of Tara Chand the plaintiff, to secure a loan of Rs. 500. The mortgagee brought a suit on 25th August 1924 impleading Saadat Shah, one of the mortgagors, and impleading defendants 2-4 as being the heirs of their father Jamait Shah deceased, and also as being heirs of their uncle Safdar Shah deceased.

The suit was resisted upon various grounds with which we are not concerned in this appeal. During the pendency of the suit aadat Shah alias Nabban died. He is said to have died on 13th April 1926. No application was made for bringing his legal representative upon the record until 26th January 1927, when the plaintiff made an application stating that Saadat Shah had died and asking for time to ascertain the names of his heirs. On 3rd February 1927 the plaintiff made a fresh application stating that Saadat Shah had no heirs other than defendants 2-4 his brothers, who were already upon the record, and asking that a note should be made that defendants 2-4 are his legal representatives. Saadat Shah left a widow Mt. Jamila Begam, but the plaintiff did not admit that she was the legally married wife of Saadat Shah and therefore made no application for impleading her as one of his heirs. An issue was framed on the question whether Jamila Begam was the widow of Saadat Shah and the trial Court on taking the evidence decided the issue in the affirmative. The question then arose whether the suit had not abated wholly or partly in consequence of the fact that Saadat Shah's widow had not been impleaded. The trial Court found that from the terms of the mortgage deed itself it appeared that Saadat Shah had no interest in the hypothecated property and therefore it was unnecessary to implead Jamila Begam his widow. The trial Court accordingly decreed the claim with costs. Defendant 2, Haibat Shah appealed to the Court below contending that the suit had abated on the expiry of three months from the death of Saadat Shah, as his widow had not been impleaded, and that the trial Court had wrongly held that Saadat Shah had no interest in the property in suit.

The Court below agreed with the trial Court in finding that Saadat Shah had no interest in the property hypothecated. In our opinion this finding was clearly erroneous and based upon a misapprehension. Although Saadat Shah had no interest in the hypothecated property at the date of the execution of the mortgage deed in suit, he was undoubtedly one of the heirs of his father, Jamiat Shah, who was one of the mortgagors, and he must have been one of the heirs of his uncle Safdar Shah to the same extent as his brothers, defendants 2—4, who were admittedly heirs of Safdar Shah. It is impossible to hold therefore that Saadat Shah had no interest in the hypothecated property by right of inheritance from his father and his uncle, who were the original mortgagors.

It is unnecessary for us to consider whether the application for bringing defendants 2—4 upon the record as heirs of Safdar Shah was within time or not. The position is that Jamila Begam has been found to be the lawful widow of Saadat Shah, a deceased defendant, and the question arises: What is the effect of the plaintiff's omission to implead Jamila Begam as a legal heiress and legal representative of Saadat Shah? It has been contended by the learned advocate for the appellant that the effect of the plaintiff's failure to implead Jamila Begam is to cause the abatement of the whole suit. He contends that the heirs of the mortgagors are jointly liable to pay the whole amount of the mortgage money and that it is not open to the mortgagee to obtain a decree against a portion of the mortgaged property for recovery of the proportionate amount of mortgage money. He has been unable to refer us to any clear authority in support of his contention.

On the other hand it has been argued by the learned advocate for the respondent that even though it may be held that the suit has abated as against the deceased defendant Saadat Shah this does not necessarily mean that the whole suit has abated. His contention is that the mortgagee is entitled to a decree for sale of the remaining mortgaged property, that is, the mortgaged property excluding the share of Saadat Shah, and is entitled to sell the remaining portion of the mortgaged property to recover a proportionate amount of the mortgage money. In our opinion this contention is correct and must prevail. It must be held that the suit has abated as against the deceased defendant Saadat Shah under O. 22, R. 4 (3) as one of his legal representatives namely, his widow has not been brought on the record within the period of limitation. It must be noted however that this sub-rule clearly lays down that the suit shall abate as against the decased defendant only. O. 1, R. 9 further shows that a suit cannot be defeated by reason of non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. We have been referred to the ruling of a Bench of this Court in *Ganeshi Lal* v. *Charan Singh* (1). In that case a plaintiff mortgagee sued for recovery of the whole of his mortgage money by sale of the whole of the mortgaged property but by an oversight omitted to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit it was held that so much claim should be decreed as was proportionate to the interests of the persons who were before the Court. We agree to the reasoning of this decision which follows an earlier decision of the Calcutta High Court reported in *Imam Ali* v. *Baij Nath Ram Sahu* (2).

In our opinion therefore the plaintiff is entitled to a decree for sale of the property of the defendants other than the deceased defendant Saadat Shah to recover a proportionate amount of the mortgage money. It is necessary that the trial Court should come to a finding on the extent of the share in the property owned by Saadat Shah. We accordingly remand the case to the trial Court for coming to a finding upon the issue, What is the extent of the share in the mortgaged property owned by Saadat Shah deceased? After recording a finding on this issue the trial Court should pass a decree for sale of the remaining mortgaged property, that is, excluding the share of Saadat Shah for the recovery of a proportionate amount of the mortgage money. The remand is under O. 41, R. 23, Civil P. C. The decrees of both the Courts below are discharged. Parties will be allowed to adduce evidence regarding the issue which we have remitted for decision to the trial Court. Parties will pay and receive costs in all Courts in proportion to success and failure.

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(1) [1913] 35 All. 247=19 I.C. 614.

(2) [1906] 33 Cal. 613=3 C.L.J. 576=10 C.W.N. 551.

B.V./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 237

DALAL, J.

Ali Hasan—Plaintiff—Appellant.

v.

Mt. Rashidan and *another*—Defendants—Respondents.

Second Appeal No. 1497 of 1928, Decided on 20th February 1930, from decree of Dist. Judge, Gorakhpur, D/- 14th June 1928.

Transfer of Property Act (4 of 1882), S. 54—Sale—Transfer of property to wife in payment of dower is sale.

Assignment of property by a Mahommedan to his wife as her dower is not a sale; but transfer of property to the wife, in payment of a certain amount of dower is a sale within the meaning of S. 54: 5 *All.* 65 and 4 *I. C.* 466, *Foll.*; *A. I. R.* 1927 *Oudh* 204, *not Foll.* [P 237 C 2]

Har Bans Sahai—for Appellant.

Iqbal Ahmad and *Munnar Alam*—for Respondents.

Judgment.—I do not agree with the view of law taken by the learned Judge of the lower appellate Court that a transfer by a Muhammadan in lieu of a certain dower debt does not amount to a sale. In the present case the plaintiff, son of one Jahangir, who was the son of Mt. Misran Bibi, sued for his share of a certain house on the death of Mt. Misran Bibi. Jahangir had predeceased Misran Bibi. The defence of plaintiff's stepmother Mt. Batulan, Jahangir's second wife, was that the house had been gifted to her. This defence is put forward in a somewhat inartistic manner in para. 3 of Mt. Batulan's written statement:

> "This defendant was not willing to marry, and she gave her consent only when it was agreed upon that in lieu of her dower debt the father of the plaintiff and Mt. Misran Bibi would give her the house in dispute. Accordingly, in lieu of her dower debt, the plaintiff's father and Mt. Misran Bibi gave her the house in dispute and put her in possession thereof."

The house was the property of Mt. Misran Bibi, so Jahangir had no interest therein which he could transfer, and Mt. Misran Bibi was not bound to pay the dower debt and therefore the transfer by her could not have been in lieu of dower debt. In my opinion the second view taken by the lower appellate Court is correct, that the transfer was a gift by Mt. Misran Bibi in order to induce Mt. Batulan to marry Jahangir whose first wife had died before then. Taking this view of the case the transfer was a gift pure and simple. The objection therefore, that the transfer being a sale ought to have been evidenced by a registered and stamped deed, does not arise and the plaintiff cannot lay any claim to the house.

The respondent's counsel raised the plea of adverse possession that the holder of property in pursuance of an ineffective sale must be considered to be a trespasser; this plea will be of no avail to him because the suit has been brought within twelve years of Mt. Batulan's marriage.

It appears to me that the Oudh ruling, *Talib Ali* v. *Kaniz Fatima Begam* (1), quoted by the lower Court, is in conflict with the ruling of this Court reported as *Fida Ali* v. *Muzaffar Ali* (2) which is entitled to particular respect and it is the judgment of a very eminent Muhammadan jurist. At p. 69 of the report the distinction is drawn between assignment of property to a wife as her dower in which case there will be no sale and the transfer of property to a wife in payment of a certain amount of dower, in which case it would be a sale. This view was accepted by a Bench of the Calcutta High Court in 1906 in *Abbas Ali* v. *Karim Bakhsh Shikdar* (3). It is however not necessary to enter into a detailed discussion of this matter having regard to the view of the transaction taken by me.

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(1) A. I. R. 1927 Oudh 204=102 I. C. 142=2 Luck. 575.

(2) [1883] 5 All. 65=(1883) A. W. N. 175.

(3) [1909] 4 I. C. 466.

This appeal fails and is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 238

MEARS, C. J. AND SEN, J.

Ram Das – Plaintiff—Appellant.

v.

Parmanandgir and *another*—Defendants—Respondents.

Letters Patent Appeal No. 51 of 1929, Decided on 4th December 1930, from decision of Boys, J., D/- 6th November 1928, in Second Appeal No. 1176 of 1926.

(a) **N. W. P. Rent Act (12 of 1881), S. 7—Position of zamindar usufructuarily mortgaging his zamindari including *sir* enunciated—Agra Tenancy Act (2 of 1901), S. 10.**

A zamindar who makes a usufructuary mortgage of his zamindari including his *sir* lands does not so lose or part with his proprietary rights within the meaning of S. 7, N. W. P. Rent Act, so as to become an exproprietary tenant of his *sir* land, although under S. 10, Tenancy Act, the proprietor of a mahal or a part of a mahal becomes the exproprietary tenant of a *sir* land upon his executing a usufructuary mortgage of the zamindari share or of the *sir* plots: 16 *All.* 327 (*F.B.*), *Ref.* [P 240 C 2]

(b) **N. W. P. Rent Act (12 of 1881), S. 9 (2)—Zamindar making usufructuary mortgage of zamindari without *sir* in 1867 and of *sir* in 1895—Plaintiff taking assignment of first in 1900 and defendant of second mortgage in 1910—In 1913 plaintiff purchasing equity of redemption of both mortgages and suing defendant for redemption of *sir* mortgage of 1895—Plaintiff is entitled to redeem.**

Prior to the passing of the Tenancy Act, a zamindar who made a usufructuary mortgage of his zamindari without *sir* could validly mortgage his *sir* land subsequently and such a mortgage did not offend against the provisions of S. 9 (2), N. W. P. Rent Act.

A zamindar made a usufructuary mortgage of his zamindari without *sir* in 1867. Subsequently in 1895, he executed a usufructuary mortgage of his *sir*. Plaintiff took an assignment of the first mortgage in 1900 and the defendant of the second mortgage in 1910. In 1913 plaintiff purchased the equity of redemption in the property covered by both the mortgages and instituted a suit against the defendant for redemption of the mortgage of 1895 relating to *sir*.

Held: that the plaintiff was entitled to redeem. [P 241 C 2]

(c) **Agra Tenancy Act (2 of 1901), S. 10—*Sir* land mortgaged usufructuarily before Act—Subsequent sale of zamindari together with *sir* after the Act—Right of exproprietary tenant to recover possession of *sir* plots does not arise till his vendee has redeemed mortgage.**

The right of a usufructuary mortgagee to retain possession of the *sir* land mortgaged to him before Act 2 of 1901 came into force is not affected by a sale of the zamindari share together with the *sir* after the enforcement of the aforesaid act. In such a case the mortgagee continues to be the mortgagee of the *sir* plots and the right of the exproprietary tenant to recover possession does not arise till his vendee has-redeemed the mortgage. The right of the exproprietary tenant must be deemed to be in abeyance during the continuance of the mortgage. [P 241 C 1]

S. S. Sastry—for Appellant.

U. S. Bajpai—for Respondents.

Mears, C. J.—This is an appeal by the plaintiff under S. 10, Letters Patent Act, and arises out of a suit for redemption of a mortgage which was created under a registered instrument dated 30th December 1895.

Sheobalak, Sheoratan, Ranjit Ram and Bhagwati Prasad were members of a joint Hindu family and owned a zamindari share consisting of 1 anna 15 gandas in mauza Tingrahi. This zamindari share included certain *sir* plots having an area of 6 bighas 16 biswas. On 20th July 1867 Sheobalak and Sheoratan made a usufructuary mortgage of the zamindari share referred to above (but not the *sir* lands appertaining to the zamindari) in favour of Mahipal and Sheo Bandhan. On 30th December 1895 Sheobalak and Mt. Ananti who was the widow of Sheoratan and mother and guardian of Rajit Ram, Bhagwati Prasad and Mt. Atasi executed a usufructuary mortgage of the entire *sir* lands in favour of Ram Chandra Das for Rs. 140.

Under a sale deed dated 20th January 1900 the mortgagees of the zamindari share assigned their rights and interests to Ram Dass, the plaintiff-appellant. On 20th March 1910, Bhikam Chand and Gokul Chand, sons of Ram Chandra Das sold their mortgagee rights in the *sir* plots together with some other properties to Mahant Anand Gir who was the spiritual preceptor of the defendant Parmanand Gir.

The result of the two last-mentioned transactions was that the plaintiff became the assignee of the mortgagee rights in the zamindari and the defendant became the assignee of the mortgagee rights in the *sir* lands.

Sheobalak, Sheoratan and Ranjit Ram having died during the continuance of the joint family, the estate vested in Bhagwati Prasad alone by survivorship. On 2nd June 1913 Bhagwati Prasad sold his equity of redemption in 1 anna 15 gandas zamindari share and also 6 bighas 16 biswas of *sir* lands to the plaintiff Ram Dass. In consequence of this transaction the rights of the mortgagor and the mortgagee having merged in the same person, Ram Dass became the absolute owner of 1 anna 15 gandas of the zamindari of mouza Tingrahi. He also became the owner of the mortgagor's interest in 6 bighas 16 biswas of *sir* land which had remained in possession of Mahant Anand Gir by reason of the assignment of the mortgagee rights under the deed dated 30th December 1895.

The present suit was commenced by Ram Dass on 24th October 1924 in the Court of the Munsif of Mirzapur and was directed against Mahant Parmanand Gir, the successor-in-title to the estate of Mahant Anand Gir.

The plaintiff, as purchaser of the equity of redemption claimed to redeem the mortgage dated 30th December 1895 related to the *sir* plots. He also claimed Rs. 252 for arrears of rent due from the defendant on the allegation that Bhikam Chand and Gokul Chand had been paying an annual rent of Rs. 28 in respect of the land to the plaintiff and that the payment had been continued by Anand Gir but that no payment had been made since 1322-F corresponding to 1915 A. D. As regards this sum the plaintiff had instituted a suit in the revenue Court against the defendant but the suit was dismissed on the ground that the relation between the parties was not that of landlord and tenant and that the claim for arrears was not therefore cognizable by a Court of revenue.

The plaintiff admits that a sum of Rs. 140 is payable to the defendant as the price of redemption but he prays that the said amount be deducted from the sum of Rs. 252 which was due to him and that a decree for the balance be passed in his favour.

The suit was contested on the ground that the plaintiff was not entitled to redeem the mortgage or to sue for arrears of rent and that in any case the plaintiff was not entitled to recover arrears for a period of more than three years.

Three issues were framed by the Court of first instance and they were decided in favour of the plaintiff. The Court clearly held that the plaintiff was a person having "any interest in or charge upon the right to redeem the property within the meaning of S. 91 (b). T. P. Act (4 of 1882) and as such was entitled to redeem. The Court observed that

"the question whether any expropriatary rights accrue on such redemption to the original mortgagor or not will be a question between the plaintiff and the original mortgagor, and the defendant can have no right under the law except to get back his money advanced in terms of the deed of mortgage."

As to the claim for arrears it observed as follows :

"In the deed it is mentioned that the rent of the property transferred is Rs. 28 per annum. The contention of the plaintiff is that this Rs. 28 is the measure of land revenue over the whole patti in the possession and ownership of the mortgagor and this amount had to be paid by the mortgagee to the mortgagor or to any transferee of the mortgagor and that the mortgagee was to benefit himself by the usufruct obtained over and above this Rs. 28 per year . . . . Thus it appears from the conduct of the parties that Rs. 28 was payable to the mortgagor or a transferee of the mortgagor from the original mortgagee under the deed dated 1895."

On these findings the plaintiff's claim was decreed and the defendant was directed to pay Rs. 112 to the plaintiff within a month.

On appeal the lower appellate Court affirmed the decision of the trial Court. It held that the plaintiff was entitled to redeem and that the suit for redemption could not be defeated by reason of the accrual of an expropríetary tenancy in favour of Bhagwati Prasad :

"The plaintiff is the proprietor of the land and he is certainly entitled to redeem the mortgage ; if his vendor has got any expropriatary title it is between him and the plaintiff but the defendant cannot make a stand on the rights of Bhagwati. Bhagwati, if he so likes can sue for possession against the plaintiff within six months of his possession."

It also upheld the claim for Rs. 252 on the ground that the plaintiff was entitled to recover that amount under S. 76 (c), T. P. Act :

"According to S. 76 (c), T. P. Act, he must pay the rent and all public charges out of the income of the property and after payment of such charges he can appropriate the rest of the profits towards his interest. This amount was to be paid to the zamindar. Since 1913 plaintiff has been the zamindar of the plots and the mortgagees were bound to pay that amount to them . . . . I think the learned Munsif was justified in taking into account this sum and as the mortgagee did not pay what he was bound to pay to the mortgagor he was entitled to get that amount deducted at the time of the payment of the mortgage-money and if there was any surplus in his favour to get a decree for that against the mortgagee."

On appeal a learned Judge of this Court by his decision dated 6th November 1928 overset the decrees of the Courts below and dismissed the plaintiff's suit in its entirety. By an oversight the claim for recovery of Rs. 252 was not gone into.

Dealing with the plaintiff's title to redeem under the purchase of the year 1913 the learned Judge observes as follows :

> "They thus became in 1913 full proprietors. But difficulty has arisen in reference to a further clause of the sale-deed. It purported to transfer to the plaintiffs the *sir* plots formerly vested in Sheobalak and Sheoratan. This again can only mean that it purported to transfer to them the ex-proprietary or cultivatory rights which remained with the heirs of Sheobalak and Sheoratan subject to the mortgage of 1895 if that was a valid mortgage.
>
> "Now it is by virtue of this latter clause, their purchase of the cultivatory or ex-proprietary rights of the successor-in-interest of the original mortgagors, that they have purported to bring the present suit for redemption of the mortgage of 1895.
>
> "The defendant pleaded that the plaintiffs had no right to institute a suit for redemption at all. He contended that the cultivatory rights remained in Sheobalak and Sheoratan and their successor-in-interest, and did not vést in any way at all in the plaintiffs. The contention appears valid, and, so put, it cannot be really seriously contested by the plaintiffs. In 1913 the transfer by the heirs of Sheobalak and Sheoratan of their exproprietary rights was invalid. . . . . Any persons having any interest in the proprietary rights have a right to redeem a mortgage affecting those proprietary rights, but the proposition appears to me to be stated too widely when it says that because a plaintiff had acquired the full proprietary rights, he had therefore a right to redeem a mortgage of merely exproprietary rights."

The judgment evidently proceeds upon a misapprehension of facts.

When the usufructuary mortgage of the *sir* plots was executed on 30th December 1895 the Act in force was the N W. P. Rent Act (12 of 1881 local). S. 7 of the Act provided that

> "every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as *sir* in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants at will for land of similar quality and with similar advantages.
>
> Persons having such rights of occupancy shall be called 'exproprietary tenants' and shall have all the rights of occupancy tenants."

Section 9 (2) provided that

> "no other right of occupancy shall be transferable in execution of a decree or otherwise done by voluntary transfer between persons in favour of whom as cosharers such right originally arose, and to have become by succession cosharers therein."

It was held by a Full Bench of this Court in *Khiali Ram* v. *Nathu Lal* (1) that "a right of occupancy" referred to above must not be confounded with "a right to occupy." What para. 2, S. 9, Act 12 of 1881 does enact is "no other right of occupancy shall be transferable, etc." which is a very different thing from enacting that "no other right to occupy shall be transferable."

> "Paragraph 2, S. 9 makes all rights of occupancy other than those of tenants at fixed rates absolutely incapable of being transferred except by voluntary transfer between persons in favour of whom as cosharers such right originally arose, or to have become by succession cosharers therein."

The transfer of a right to occupy by the execution of a usufructuary mortgage-deed did not therefore offend against the provisions of S. 9 (2) of the Act. It was held in *Madho Bharti* v. *Barti Singh* (2) that a zamindar who makes a usufructuary mortgage of his zamindari including his *sir* land does not so "lose or part with his proprietary rights" within the meaning of S. 7, Act 12 of 1881 so as to become an exproprietary tenant of his *sir* land.

Under S. 10, Tenancy Act (2 of 1901 local), the proprietor of a mahal or of a part of a mahal became the ex-proprietary tenant of a *sir* land upon his executing a usufructuary mortgage of the zamindari share or of the *sir* plots.

It ought to be distinctly understood that on 30th December 1895 Sheobalak and Mt. Ananti were the owners in possession of the *sir* plots 14 in number having a total area of 6 bighas 16 biswas. Upon their usufructuarily mortgaging these plots to Ram Chandra Das, no exproprietary rights arose in their favour under S. 7, N. W. P. Rent Act (12 of 188.), which was then in force. The exproprietary rights in those plots did not accrue in favour of Bhagwati Prasad till on his executing the sale deed in favour of Ram Dass, appellant, on 2nd June 1913. The exproprietary right accrued in the *sir* plots by reason of S. 10, Act 2 of 1901 which was then in force, but it did not in any way affect the legality or validity of the usufructuary mortgage which had been created before the passing of that act (see the saving clause in S. 2, sub-S. 4 of the Act). The point is covered by the decision of this Court in *Sheo Lal Singh* v. *Shukhdeo Singh* (3). In this case the title of the usufructuary mortgagee under an instrument of 1894 was in issue, and it was held that the mortgage having been made in 1894, the provisions of the Agra

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(1) [1893] 15 All. 219=(1893) A.W.N. 125.

(2) [1894] 16 All. 337=(1894) A.W.N. 110 (F.B.).

(3) [1909] 31 All. 368=2 I. C. 462.

Tenancy Act of 1901 did not apply and the mortgagor acquired no expropriétary rights in respect of the *sir*.

On 2nd June 1913 the defendant was in possession as mortgagee of the zamindari rights in the *sir* lands. Bhagwati Prasad, as the representative of the original mortgagors, was the owner of the equity of redemption in the said plots. He sold the equity of redemption in the said plots to the plaintiff-appellant. It was after the sale, and not before, that he became the exproprietary tenant with reference to the said plots. Under the sale deed, dated 2nd June 1913, Bhagwati Prasad did not transfer his exproprietary rights in the *sir* plots to the plaintiff nor could the transaction be treated as one purporting

> " to transfer to the plaintiff the exproprietary or cultivatory rights which remained with the heirs of Sheobalak and Sheoratan subject to the mortgage of 1895 if that was a valid mortgage. "

The right of usufructuary mortgagee to retain possession of the *sir* land mortgaged to him before Act 2 of 1901 came into force is not affected by a sale of the zamindari share together with the *sir* after the enforcement of the aforesaid Act. In such a case the mortgagee continues to be the mortgagee of the *sir* plots and the right of the exproprietary tenant to recover possession does not arise till his vendee has redeemed the mortgage. The right of the exproprietary tenant must be deemed to be in abeyance during the continuance of the mortgage. Except in the loose sense, the mortgage cannot be said to attach to the exproprietary right. In *Sham Das* v. *Batul Bibi* (4), where Rajab Ali, a zamindar, having mortgaged by way of usufructuary mortgage his zamindari together with his *sir* land, subsequently lost his zamindari rights and became an exproprietary tenant of the *sir*. It was held that the usufructuary mortgage did not become ineffectual :

> " When Rajab Ali lost his proprietary rights in the *sir*, his tenure was changed, no doubt, from that of a proprietary tenure to an exproprietary tenure. Some interest however in the *sir* lands still remained vested in him ; but he had already disposed of the usufruct of the land by the mortgages which he had executed in favour of the defendants. These mortgages, we think, attached to, and bound the estate of the mortgagor in its altered conditions. "

We are in general agreement with this decision.

We are therefore of opinion that the learned Judge of this Court was in error in holding that the plaintiff-appellant was not entitled to redeem the mortgage.

We have no doubt that the plaintiff has failed to prove his right to recover Rs. 252. This part of the case is set out in para. 5 of the plaint. We have examined in detail the two documents dated 30th December 1895 and 20th April 1910. There does not appear to have been any stipulation or agreement between the parties to those documents under which a sum of Rs. 28 was payable annually by the usufructuary mortgagee to the original mortgagor or to his successor-in-interest. In the document of 1895 a sum of Rs. 12 has been shown as rent against five of the plots mortgaged, and a sum of Rs. 16 against the remaining seven plots. The relation between the parties was that of mortgagor and mortgagee. These entries cannot be construed to mean that the mortgagee had thereby agreed to pay those two sums as rent to the mortgagor. There is the usual indemnity clause in the mortgage bond, that in the event of the mortgagee being deprived of his possession or upon his losing the mortgage security, he will be entitled to recover the principal sum with interest at the rate of 2 per cent per annum. This has been construed by the Courts below to mean that this clause, together with entries relating to rent, amounts to an agreement on the part of the mortgagee to pay Rs. 28 annually to the mortgagor after deducting from the usufruct of the property the profits due to him at the rate of 2 per cent on the principal mortgage money. This is a forced and an unnatural construction of the documents.

Section 76 (c), T. P. Act, is not helpful to the plaintiff-appellant. There is no evidence on the record that this sum of Rs. 28 is the proportionate share of revenue payable for the *sir* plots mortgaged. We are therefore of opinion that the plaintiff has failed to make out his case for the recovery of Rs. 252.

The result is that we allow the appeal in part, modify the decree of this Court and also of the lower Courts by granting the plaintiff a decree for redemption of the mortgage, dated 30th December 1895, upon his depositing in the Court of first instance Rs. 140 to the credit of the defendant-respondent within three months of this date. Let a decree be prepared under O. 34, R. 8, Civil P.C. The plaintiff's claim for recovery of Rs. 252 is dismissed. Parties to pay and receive costs throughout in proportion to their success and failure.

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(4) [1902] 24 All. 538=(1902) A. W. N. 155.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 242 (1)

MUKERJI AND BENNET, JJ.

Mohammad Husain —Applicant.

v.

Mt. Nanhi and *others*—Opposite Parties.

Civil Revn. No. 143 of 1930, Decided on 2nd December 1930, from decree of Addl. Munsif, Bijnor, D/- 1st April 1930.

Civil P. C. (1908), S. 115—Award granting joint decree against defendants as heirs of deceased—Award set aside, one defendant not being party to reference—High Court will not interfere—Arbitration.

Where an arbitrator makes an award granting a joint decree against defendants as heirs of the deceased, and the trial Court sets it aside on the ground that one of the defendants was not a party to the reference, it would be necessary to calculate the different shares, distributable to the different heirs even for upholding the award partially and High Court will not interfere in revision : *A. I. R.* 1924 *Pat.* 33, *Dist.* [P 242 C 2]

B. Malik—for Applicant.

Shiva Prasad Sinha—for Opposite Parties.

Mukerji, J.—This is an application in revision against an order passed by a learned Munsif, dated 1st April 1930, by which he set aside an award and directed that the suit should proceed in his Court. It appears that the plaintiff paid off a certain debt due by these persons, Mt. Nanhi and her two children Amir Husain and Allah Dei as the heirs of Chhedda. The debt was a mortgage debt for Rs. 500 and the plaintiff paid off the debt on the assurance that his nephew would be married by the mother to the daughter and the mother would relinquish her share in the inheritance in favour of Mt. Allah Dei, the proposed wife of the plaintiff's nephew. After the payment, the negotiations fell through and the plaintiff brought this suit out of which this revision has arisen. During the course of the hearing Amir Husain died, and he was succeeded by his mother's sister and paternal uncle Saddu, a brother of Chhedda, the father and mortgagor. It was agreed that there should be a reference to arbitration, and that one Mr. Zahiruddin should decide the matter in difference among the parties. Mr. Zahiruddin submitted an award and an exception was taken to it by Saddu that he had made no reference and he was not bound by the award.

Two points have been taken in this Court : firstly, Saddu was, as a matter of fact, a party to the reference to arbitration and secondly even if he was not he could be exempted from his proportionate liability as the plaintiff proposed to do so and the rest of the award could be upheld by the Court below.

On the first point it seems clear from the petition of reference that Saddu was not a party to the reference. Nobody signed for him and nobody professed to verify the petitions before the Court on Saddu's behalf.

On the second point it appears that the arbitrator made an award granting a joint decree for money against all the defendants and against the property mortgaged by Chhedda. It is urged on the authority of *Raghunath Shukul* v. *Ramrup Raut* (1) that it was open to the Court below to differentiate and exempt the share of Saddu and to make a decree against the rest. The case quoted however was entirely different from the facts before us. There the several defendants were severally and separately in possession of different plots of land, and it was held that if some of the defendants holding separate property were not bound by the award their shares could be exempted. Here we find that the decree was a joint one, and unless we sit down to calculate the different shares, distributable to the different heirs we cannot uphold the award even partially. In the circumstances we do not think that we should interfere in revision. In the result the application fails and is hereby dismissed with costs.

P.N./R.K. *Revision dismissed.*

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(1) A. I. R. 1924 Pat. 33=76 I. C. 2=2 Pat. 777.

A. I. R. 1931 Allahabad 242 (2)

MEARS, C.J. AND SEN, J.

Chandharan Krishna Kumari—Appellant.

v.

Chaudhri Naubehar Singh — Respondent.

First Appeal No. 212 of 1929, Decided on 28th November 1930, from order of Addl. Dist. Judge, Moradabad, D/- 3rd May 1929.

Succession Act (1925), S. 384—No appeal lies from order refusing to cancel certificate.

No appeal lies from an order refusing to cancel a succession certificate, it being not an order granting, refusing or revoking a certificate. [P 243 C 1]

L. M. Roy—for Appellant.

N. C. Vaish—for Respondent.

Sen, J.—This appeal is clearly misconceived and ought to be dismissed. On 20th December 1920 a succession certificate was granted to the appellant conditional upon her furnishing security for Rs. 6,000. A security bond was duly executed. She made an application for the cancellation of the said bond but her application was dismissed on 13th July 1928. A second application to the same effect was made and this application also shared the same fate. An appeal has been presented to this Court from the order of the learned Additional District Judge of Moradabad refusing to cancel the certificate. A preliminary objection has been takento the hearing of the appeal on the ground that no appeal lies. An appeal is clearly a creature of statute. Under S. 384, Succession Act (Act 29 of 1925), an appeal lies to the Court from an order of a District Judge granting, refusing or revoking a certificate under Part 10 of the Act. The order in question is one refusing to cancel the certificate, and not being an order granting, refusing or revoking a certificate no appeal clearly lies. We accordingly dismiss this appeal with costs including in this Court fees on the higher scale.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 243

SEN, J.

Wali Mohammad—Applicant.

v.

Ganpat and *another*—Opposite Parties.

Civil Revn. No. 33 of 1930, Decided on 23rd May 1930, from order of Judge, Hamirpore, D/- 20th December 1929.

Contract Act (9 of 1872), Ss. 129 and 130—Contract of surety for appearance of judgment-debtor is one of continuing guarantee and is revocable by notice to creditor—Civil P. C. (1908), S. 145.

Where a person becomes a surety, and executes a surety bond stipulating: "I, the executant, agree to become a surety for the judgment-debtor and covenant that I shall produce the judgment-debtor in Court on each and every occasion when his attendance is called for by the order of the Court," the contract is of continuing guarantee and it can be revoked by the guarantor, as to future transactions, by notice to the creditor. The fact that the revocation takes place a day before the day which has been fixed for the appearance of the judgment-debtor in Court does not in any way militate against the right of the guarantor to revoke the guarantee as to future transactions. [P 244 C 1]

K. N. Laghate—for Applicant.

Ambika Prasad—for Opposite Parties.

Judgment.—Ganpat and another obtained a money decree from the Court of Small Causes against one Baldeo for Rs. 144 and costs on 3rd August 1928. The decree-holders applied on 2nd August 1929 for execution of their decree by arrest of the judgment-debtor. The judgment-debtor was arrested and brought in Court on 3rd August 1928. He asked for time to pay the decretal amount. The Court ordered him to produce a surety to guarantee his appearance in Court on the various and several dates when his attendance might be required. Wali Mohammad, the applicant, undertook to become a surety for him and executed a surety bond on 3rd August 1928. He stipulated as follows:

> "I, the executant, agree to become surety for the judgment-debtor and covenant that I shall produce the judgment-debtor in Court on each and every occasion when his attendance is called for by the order of the Court."

The Court directed that a month's time be allowed to the judgment-debtor to pay up the decretal amount, and the surety was directed to produce the judgment-debtor in Court on 3rd September 1929.

The surety appeared in Court, along with the judgment-debtor on 2nd September 1929, when the judgment-debtor deposited Rs. 15 in part payment of the decree and prayed for further time up to the month of Aghan. The surety applied to the Court to be released from his contract of guarantee and protested that no further time should be allowed to the judgment-debtor. The Court refused the prayer of the surety. It did not discharge him from his liability, granted time to the judgment-debtor for payment of money up to 21st October 1929 and directed that the surety should be produced in Court on that date. On 21st October 1929, the judgment-debtor did not appear in Court, nor did he pay the balance of the decretal amount. The surety appeared and submitted that the judgment-debtor could not be prevailed upon by him to attend the Court. Thereupon the Court directed that the surety should be sent to the civil jail for a period of six months for non-payment of the decretal amount. This order has given rise to the present application for revision. The judgment of the Court below is sketchy and unsatisfactory. The crucial question in the case was whether the contract entered into by Wali Mohammad was one of continuing guarantee or otherwise. In order to determine this question the Court ought to have examined the terms of the contract. The Court ought to have addressed itself to the further question whether the contract came within the definition of a continuing guarantee as given in S. 129, Contract Act. If the Court held that it was a continuing guarantee, a further question remained to be answered as to whether the guarantor could or could not revoke his guarantee as to future transactions by giving the necessary notice to the creditor. These vital questions have been completely ignored and by an arbitrary judgment the surety has been directed to be detained in the civil prison for a period of six months. One cannot withhold the feeling that the liberty of the King's subject has been trenched upon by the Court below most unreasonably, and, I may add, almost oppressively.

It is contended that the contract entered into by the surety was of the nature of a "continuing guarantee" within the meaning of S. 129, Contract Act. The guarantee was evidently given for the performance of a series of acts whenever they might happen. It extended to each and every occasion when the presence of the judgment-debtor was to be directed for fulfilment of his obligation to pay the decretal amount in whole or in part. Under S. 130, Contract Act, a continuing guarantee may at any time be revoked by the surety, as to future transactions by notice to the creditor. The Court below is of opinion that, in the absence of an especial stipulation in the contract of guarantee reserving to the guarantor a right of revocation, the said right cannot be exercised. If the contract be one of continuing guarantee, as I hold it to be in the present case, it can be revoked by the guarantor as to future transactions by notice to the creditor. The fact that the revocation took place a day before the date which had been fixed for the appearance of the judgment-debtor in Court does not in any way militate against the right of the guarantor to revoke the guarantee as to future transactions. The surety under the contract was bound to produce the judgment-debtor in Court on 3rd September 1929. The surety was not prepared to be responsible for the appearance of the judgment-debtor in Court after the last mentioned date. He was quite within his rights to give a notice of a revocation of his contract with reference to any future date of attendance which might be fixed by the Court. The Court below has not considered the scope and effect of Ss. 129 and 130, Contract Act, and has erred in holding that the surety was not competent to revoke the contract of guarantee with reference to future transactions. I am clearly of opinion that the order passed by the Court below, directing detention of the applicant in jail for a period of six months by reason of the non-appearance or in default of appearance of the judgment-debtor on 21st October 1929, is illegal and unjustified. I accordingly allow this application, set aside the order of the Court below and direct that Wali Mohammad be discharged at once.

P.N./R.K. *Revision allowed.*

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* A. I. R. 1931 Allahabad 244
Full Bench

MUKERJI, BANERJI AND BENNET, JJ.

Mt. Abhilakhi—Applicant.

v.

Sada Nand and *others*— Opposite Parties.

Review of Judgment in Letters Patent Appeal No. 38 of 1929, Decided on 16th January 1931, order on application of Mt. Abhilakhi, applicant.

*** (a) Civil P. C, (1908), S. 117—Civil Procedure Code applies even to Letters Patent appeals.**

Section 117 applies the provisions of the Civil Procedure Code to chartered High Courts in the exercise of their appellate civil jurisdiction including their jurisdiction in Letters Patent appeals: *A.I.R.* 1921 *P.C.* 80, *Rel. on.*; 1 *A.L.J.* 509 and *A. I. R.* 1915 *P. C.* 85, *Held Overruled by A. I. R.* 1921 *P. C.* 80. [P 247 C 2]

*** (b) Civil P C., (1908), S. 114 — No review lies from judgment of Bench hearing appeal under Letters Patent (Allahabad), Cl. 10.**

Per *Full Bench.*—Procedure is one thing and jurisdiction is another. There is a clear distinction between procedure and jurisdiction. A Bench hearing a Letters Patent appeal derives its jurisdiction to hear the appeal from the Letters Patent and not from the Code, because the Letters Patent provide that such an appeal should lie to a Bench and the Code makes no such provision and as S. 114 is not intended to provide for the review of judgments passed in the exercise of jurisdiction derived from other laws, an application for review of judgment passed by a Bench hearing an appeal from the decision of a single Judge would not lie: (*Mukerji, J*, contra). 1 *A. L. J.* 509 and *A I.R.* 1915 *P.C.* 85, *Appr.*; 40 *Mad.* 651, *Diss. from*; *A.I. R.* 1921 *P.C.* 80, *Expl.*; *A.I.R.* 1926 *Mad.* 316 (*F.B.*),*Expl* and *Dist.*[P 248 C 2, P 251 C 1]

A. Sanyal—for Applicant.

Ambika Prasad Dube and *Kedar Nath Sinha*—for Opposite Parties.

Opinion

Mukerji, J.—The question that has been referred for decision to the Full Bench is a short one, namely:

> "Whether under the provisions of the Civil Procedure Code (Act 5 of 1908), an application for review of a judgment, passed by a Bench hearing an appeal from the decision of a single Judge of the Court under Cl. 10 of the Letters Patent of the Allahabad High Court, lies."

The answer to the question depends on the further question whether the Civil Procedure Code applies to a hearing of a Letters Patent appeal. By S. 117, Civil P. C., the provisions of the Code, except as provided therein, apply to chartered High Courts. Unless therefore the hearing of a Letters Patent appeal comes within the exceptions mentioned in S. 117 the provision of the Civil Procedure Code would apply to such an appeal. It is conceded that the exceptions enumerated do not apply to such an appeal except R. 35, O. 41, Civil P. C. The Bench of a High Court hearing an appeal from the decision of a single Judge is as much a High Court as the single Judge himself. The Letters Patent declare that certain appeals would lie to the High Court: see Cl. 11. The High Court consists usually of more than one Judge, and by the Letters Patent the High Court is to frame rules by which it is to be settled what kind of cases would go before what number of Judges. The Letters Patent contemplate that there may be appellate decisions in certain cases by a single Judge. In such cases they provide that a further appeal would lie to two or more Judges of the same Court. A Letters Patent appeal therefore is as much an appeal to the High Court as any other appeal. In any case, the Judges composing the Bench hearing the Letters Patent appeal are as much a High Court as Judges hearing, say, a first appeal from the judgment of a Subordinate Judge or a District Judge. The procedure to be applicable is that provided by O. 41, Civil P. C. excepting R. 35: see O. 49. R. 3, Civil P. C., last clause.

It is therefore clear, that the procedure before and at the hearing, of a Letters Patent appeal by a Bench of the High Court, and the delivery of the judgment, are all governed by O. 41, Sch. 1, Civil P. C.

Then the question is whether a review is allowed by the Code in respect of a judgment delivered by the Bench hearing the Letters Patent appeal. The answer is to be extracted from the provisions of S. 114, Civil P. C, read with O. 41, Sch. 1 of the same Code. S. 114, starts with the words "subject as aforesaid." This refers to S. 113 which runs as follows: "Subject to such condition and limitation as may be prescribed." S. 114 therefore should read as follows: "Subject to such conditions and limitation as may be prescribed, any person considering himself aggrieved . . . ." In this particular case the qualifying words have no special importance. S. 114 enumerates three cases in which a review of judgment is allowed. The first is "a decree or order from which an appeal is allowed by the Code but no appeal has been preferred." The second is "a decree or order from which no appeal is allowed by the Code." We are not concerned with the third case in which also a review of judgment is allowed. The third case is an entirely independent case and has no reference to cases 1 and 2. If we read case No. 2 in which a review of judgment is allowed we find that a judgment given by a Bench of the High Court hearing a Letters Patent appeal comes clearly and without any ambiguity within the language of the case. The judgment of the High Court has to be followed by a decree which would be executable as any other decree of the civil Court. The decree therefore that would be prepared in pursuance of the judgment of the High Court deciding a Letters Patent appeal is a decree from which no appeal is allowed by the Civil Procedure Code. Indeed, no appeal whatever is allowed by any law, unless it be a case in which an appeal to His Majesty in Council is admissible under the Civil Procedure Code. In this particular case which is under reference the suit was of a small value and an appeal from the Letters Patent Bench decision to His Majesty in Council is out of the question. We can therefore safely say that it is a decree from which no appeal is allowed by the Civil Procedure

Code. It has been argued that the cases 1 and 2 are to be taken together and the word "decree" in case 2 is to be treated as a decree as described in case 1. In other words, it is stated that the decree mentioned in case 2 must be a decree which is provided for by the Civil Procedure Code itself. I find it extremely difficult to accept this interpretation although even if this interpretation be permissible, it would not make any difference in the end. As I have already pointed out, case 3 in which a review is allowed stands by itself and apart from cases 1 and 2. There is no reason to suppose that in interpreting the language by which case 2 has been described we .should import some of the language employed in describing case 1. This method of reading case 2 in my opinion is inadmissible under the true rules of interpretation.

Assuming however that we are to qualify the word "decree" as used in the description of the second case by the words "a decree provided for or passed under the provisions of the Civil Procedure Code," this would make no difference, for, as I have already pointed out the decree that is made by a Bench of the High Court on the hearing of a Letters Patent appeal is a decree made under the provisions of the Civil Procedure Code as applied by S. 117 of the same Code. I need not repeat that the procedure at the hearing and the method of deciding are all dictated by the Civil Procedure Code, namely, Sch. 1, O. 41, excepting R. 35 of the said order.

It has been argued that, as the appeal is provided by the Letters Patent and not by the Civil Procedure Code, it must be taken that the decree that is passed by the Bench of the High Court hearing a Letters Patent appeal is a decree which is something different from a decree passed under the provisions of the Civil Procedure Code. I can find no warrant for such a construction. The appeal is to the "High Court," and the procedure is that prescribed by the Civil Procedure Code. Under the Letters Patent a third appeal is provided for but the appeal is to be heard by the same High Court and the hearing and the judgment are to be governed by the same Code, namely the Civil Procedure Code. The mere fact that the Letters Patent provided for a third appeal while the Civil Procedure Code allows only two appeals does not in any way take away the applicability of the provisions of the Civil Procedure Code from the appeal itself.

Particular stress has been laid on the fact that in case 2, in which a review of judgment is provided for, the words "by this Code" appear. It is argued that these words .contemplate that where an appeal is allowed by the Letters Patent case 2 has no application. I fail to see how this interpretation follows from the words employed in describing case 2, for as a matter of fact no appeal is allowed from the judgment of a Bench hearing a Letters Patent appeal even by the Letters Patent. The result is that an appeal is allowed neither by the Civil Procedure Code nor by the Letters Patent. If such be the case then the decree is surely a decree "from which no appeal is allowed by this Code" within the meaning of Cl. (b), S. 114 and Cl. (b), O. 47 in which the words "by this Code" do not appear.

On a bare reading of the provisions of the Civil Procedure Code I am of opinion that a review of judgment is allowed in the case under consideration.

As regards authority it was conceded that there are only two in this Court, directly applicable. In the case of *Hafiz Muhammad Mohsin* v. *Sheo Prasad* (1) the judgment consists of a single sentence and is based an a wrong apprehension of the law. It is said that the Civil Procedure Code does not apply to a hearing of an appeal preferred under the Letters Patent. I have shown above that this is wrong. The opinion expressed is against the clear words of S. 632, Civil P. C. of 1882, which was then in force and which was not even quoted before the learned Judges. The second case reported in *Ranjit Singh* v. *Maharaj Bahadur Singh* (2) merely follows the earlier case. It appears that the correctness of the earlier decision was not contested before the learned Judges who decided the later case. I have already shown that S. 117, Act 5 of 1908, which takes the place of S. 632, Civil P. C. of 1882, clearly makes the Civil Procedure Code applicable to all cases coming before the High Court either on its appellate or original side. The decision of the Privy Council case in *Sabitri Thakurain* v. *Savi* (3), removes any doubts on the point. The Allahabad cases are therefore no longer any authority on the point. In the Madras case of *Venkatasubbarayadu* v. *Sri Krishna Yachendralu* (4) two learned Judges held that a review of a judgment passed on the hearing of a Letters Patent appeal was permissible. The same view has been taken by a learned Judge of the Bombay High Court in *Ratanchand Khimchand* v. *Damji Dharsey*, *A. I. R.* 1927 *Bom.* 232.

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(1) [1904] 1 A. L. J. 509.

(2) A. I. R. 1918 P.C. 85=48 I.C. 262=45 I.A. 162=46 Cal. 173 (P.C.).

There are a few cases decided in the Allahabad High Court in which it was held that a cross-objection under R. 22, O. 41, Civil P. C., was not maintainable in a Letters Patent appeal. The latest case on the point follows the earlier case in which the decision was based on the ground that O. 41, Civil P. C., does not apply to the hearing of a Letters Patent appeal. This opinion is clearly erroneous, as has been shown above, on the language of the Codes of 1882 and 1908, and the Privy Council case in *Sabitri Thakurain* v. *Savi* (3). These cases therefore are no authority on the point for decision. In *Venkatesam Chetty* v. *Motichand Gulabchand* (5) a Full Bench of the Madras High Court took a contrary view.

For reasons given above I would hold that an application for review of a judgment passed on the hearing of a Letters Patent appeal is maintainable.

Bennet, J.—This is a reference to a Full Bench of the question whether a Bench of this Court has jurisdiction to review its own judgment delivered in Letters Patent appeal. A learned single Judge of this Court passed a judgment dismissing a second appeal. In Letters Patent appeal, under Cl. 10 of the Letters Patent, a Bench of this Court allowed the second appeal in part and granted a decree to that effect. The appellant in second appeal has again come before this Court with an application for review of the judgment of the Bench in Letters Patent appeal, asking for further relief. The opposite party objected that no application for review lay. The question is whether the provision in S. 114, Civil P. C., does or does not apply to Letters Patent appeals.

In the first place the applicant relied on S. 117, Civil P. C., for the proposition that the provisions of that Code do apply to Letters Patent appeals. The opposite party contended that S. 117 only referred to the original civil jurisdiction of chartered High Courts. The section provides:

> "Save as provided in this Part or in Part 10 or in rules, the provisions of this Code shall apply to such High Courts."

It was argued that the exempting provisions were S. 120 of Part 9, S. 129 of Part 10, and O. 49, R. 3, and that all these provisions related to original civil jurisdiction. Therefore it was said, because the exceptions relate to original civil jurisdiction, S. 117 itself must only relate to original civil jurisdiction. We consider that the premises are inaccurate and the argument is unsound. As to the premises, O. 49, R. 3, specifically refers to appellate jurisdiction in stating that O. 41, R. 35, shall not apply to the appellate jurisdiction of chartered High Courts. We also point to the language of S. 117 itself, which is perfectly general, and has nothing to indicate that its provisions were only intended to apply to the original civil jurisdiction of chartered High Courts. We conclude therefore that S. 117, applies the provisions of the Civil Procedure Code to chartered High Courts in the exercise of their appellate civil jurisdiction including their jurisdiction in Letters Patent appeals.

But the question remains whether on the particular wording of S. 114, Civil P. C., that section is or is not intended to give a chartered High Court jurisdiction to review a judgment made in Letters Patent appeal.

The subsection in question is S. 114 (b) which states:

> "Subject as aforesaid, any person considering himself aggrieved (b) by a decree or order from which no appeal is allowed by this Code, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

The difficulty arises from the three words "by this Code". Now these words do not occur in O. 47, R. 1, which repeats the three parts of S. 114. It was therefore argued that the words "by this Code" should be ignored, and that as they do not appear in the order, the section has been modified by the order. The words in the section, "subject as aforesaid," are apparently intended to repeat the words in the previous S. 113, which are "subject to such conditions and limitations as may be prescribed." It was therefore argued that the order did prescribe the condition and limitation by implication that these words "by this Code" should have no effect in S. 114 (b). In the first place we note that R. 1, O. 47, makes no mention of the words "subject as aforesaid," and if the argument were correct, these words would also have no force, thus taking away the basis of the argument itself. In the next place we observe that Part 10 of the Code deals with rules, and S. 121 in Part 10 provides that

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(3) A.I.R. 1921 P.C. 80=60 I.C. 274=48 I. A. 76=48 Cal. 481 (P.C.).
(4) [1917] 40 Mad. 651=32 I.C. 873.
(5) A. I. R. 1926 Mad. 316=93 I. C. 293=49 Mad. 291.

> "the rules in Sch. 1 shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part."

Section 122 gives High Courts established under the High Courts Act power to make rules annulling, altering or adding to all or any of the rules in Sch. 1. But S. 128 (1) provides that

> "such rules shall not be inconsistent with the provisions of the body of this Code."

We consider therefore that the rules in Sch. 1 must be read with the sections of the Code and cannot be held to override those sections. We are strengthened in this conclusion by the consideration that it would be singularly inconsistent to enact a Code in which the rules in the schedule were inconsistent with the sections and were to be read as overriding the sections. We consider that words "subject to such conditions and limitations as may be prescribed" mean that conditions and limitations may be laid down within the limitations prescribed by the sections, and not that the limitations laid down by the sections may be extended.

In our opinion therefore the words in S. 114 (b) "by this Code" must be taken into account and they cannot be ignored. We consider that these words did not find a place in this subsection accidentally and that due weight must be assigned to them.

Now sub-S. (b), S. 114, has three elements: firstly a "decree" or "order" and secondly one "from which no appeal is allowed by this Code" and thirdly a "judgment."

In the first place we shall consider whether the words "allowed by this Code" can be applied to the judgment in a Letters Patent appeal. In our view the procedure in a Letters Patent appeal like the procedure in any other civil appeal is governed by the Code. The decree which follows is a decree drawn up in accordance with the Code. But procedure is one thing and jurisdiction is another and we draw a clear distinction between procedure and jurisdiction. We consider that a Bench hearing a Letters Patent appeal derives its jurisdiction to hear the appeal from the Letters Patent and not from the Code because the Letters Patent provide that such an appeal should lie to a Bench and the Code makes no such provision. A somewhat similar case would be an appeal to the High Court under S. 476-B, Criminal P. C., against an order of a subordinate civil Court making or refusing to make a criminal complaint. The Civil Procedure Code governs the procedure in such an appeal. This is the procedure in this Court, and there are rulings to this effect of the Calcutta High Court reported in *A. I. R.* 1927 *Cal.* 98, *Nasaruddin Khan* v. *Emperor* and *A. I. R* 1929 *Cal.* 428, *Mahendra Nath Das* v. *Emperor*. But the appeal is not one "allowed by the Civil Procedure Code," it is an appeal allowed by S. 476-B, Criminal P. C., and the appellate Court derives its jurisdiction from that section. Another example is the probate and divorce jurisdiction of the High Court which is derived from the Letters Patent and from various Acts, though the procedure is in general regulated by the Civil Procedure Code.

In these cases in our opinion the Bench which hears the case or appeal does not derive its jurisdiction from the Civil Procedure Code, and for this reason the judgment of the Bench cannot be said to be a judgment allowed by the Civil Procedure Code.

Now if the judgment in a Letters Patent appeal is not a judgment "allowed by the Code" why should the criterion of whether an appeal is or is not allowed by the Code against its decree be introduced as the criterion for allowing a review of that judgment? We consider that if S. 114 were intended to apply to judgments not allowed by the Code the words "by this Code" would be omitted and the criterion would simply be whether an appeal was allowed or not. The intention of S. 114 (a) and (b) appears to be that an application for review shall not lie if an appeal has been filed. That result is attained by providing that a review lies: (a) if an appeal lies but no appeal is preferred or (b) if no appeal lies. If the words "by this Code" did not appear in S. 114 (a) and (b) this result would be attained whether there was an appeal allowed by the Code or by any other law, and the section would then apply to reviews of judgments passed in exercise of jurisdiction derived from other laws.

But the words "by this Code" do exist in S. 114 (a) and (b). If we were to hold that S. 114 would allow reviews of judgments passed in exercise of jurisdiction derived from other laws, then the section would fail to attain its object which we consider to be that an application for review shall not lie if an appeal has been filed. For we can easily conceive that the other law might provide for an appeal and the result would be that the Court which made the judgment might review it even though an appeal had been filed. This view then leads to a result contrary to what we conceive to be the plain intention of the section and accordingly we reject this view. We are therefore left with the conclusion that S. 114 is not intended to provide for the review of judgments passed in the exercise of jurisdiction derived from other laws and that an application for review of judgment would not lie in the present case.

It was argued that because the result of a Letters Patent appeal is a decree of the High Court, and all decrees of the High Court must be taken to be decrees under the Code, therefore S. 114 will apply. But the drawing up of a decree is a mere matter of procedure and the right to apply for review is a right which like the right to appeal must be created by a definite provision of statute. We would stress the fact that although S. 114 refers to "decree or order" the review is a review of a judgment. And the judgment in a Letters Patent Appeal is a judgment passed in the exercise of jurisdiction granted by the Letters Patent and not in the exercise of jurisdiction granted by the Code. It is because this jurisdiction is not derived from the Code that we consider that S. 114 (b) is not intended to apply. For, if it were intended to apply, why would the qualification be added "from which no appeal is allowed by this Code"?

Why would the qualification not be merely "from which no appeal is allowed?"

There are some further considerations which point to the same conclusion. In the first place we consider that if S. 114 were intended to refer to other laws, the section would state so plainly and not leave this important matter to be read into it by inference. In other parts of the Code where right of appeal is laid down the Code does not expressly refer to other laws. Thus S. 104 lays down the orders from which an appeal lies under the Code, and states that there shall be no appeal from any other orders "save as otherwise expressly provided in the body of this Code or by any law for the time being in force." S. 96 makes similar provision for other laws in regard to first appeals and S. 100 in regard to second appeals. But when we come to review in S. 114 there is no reference to other laws. We consider therefore that this omission of any reference to other laws in S. 114 indicates that the provisions for review were not intended to apply to proceedings held in exercise of jurisdiction derived from other laws.

Next we may refer to the way in which other laws have dealt with this right of review. Besides the civil Courts, the most important Courts which use the Civil Procedure Code are the revenue Courts. As to the way in which these Courts derive their powers of review, we may refer to the Agra Tenancy Act. Act 2 of 1901. S. 193 applies the provisions of the Civil Procedure Code so far as they are not inconsistent with the Act and accepts certain parts of the Code. The part of the Code dealing with review is not accepted. Therefore, if the interpretation which the applicant asks us to put on S. 114 were correct, the provisions of the Code for review would apply to revenue Courts. But the legislature did not think so and the Act makes special provisions for review by the Board of Revenue in S. 183, and S. 184 provides:

> "Every other Court shall be competent to review its judgment in accordance with the provisions of Ch. 47, Civil P. C."

By making such express provisions the legislature implied that the provisions for

for review would not apply to proceedings under other laws without such express provisions. The provision in Act 3 of 1926, the present Agra Tenancy Act, is similar. We now turn to consider the way in which different High Courts have dealt with this question. In the Allahabad Court the question first arose in *Hafiz Muhammad Mohsin* v. *Sheo Prasad* (1). The judgment merely stated that the objection prevailed that no application for review lay. The main argument was that S. 623 of the Code of 1882 did not apply as the right to apply for review was like the right to appeal and was created by statute and unless there was express provision permitting an application for review, a Court could not alter or modify its judgment, because it had become functus officio as soon as it had decided the appeal. In 1918, ten years after the present Civil Procedure Code came into force, this decision was followed in *Kalyan Singh* v. *Allah Diya* (2), but again no reasons were given. The practice of the Allahabad High Court therefore for twenty-six years has been that applications do not lie for review of Letters Patent appeal judgments.

In the Madras High Court a different view has been taken in *Venkatasubbarayadu* v. *Sri Rajah Krishna Yachendrulu Varu Bahadur* (4). There is only a very brief passage on p. 652 alluding to S. 114 of the Code which says:

> "It was then argued that the review section, S. 114 of the Code (Act 5 of 1908), cannot apply, as it provides only for the review of decrees or orders passed under the Code of Civil Procedure. We are not impressed by this argument. In the first place decrees are passed in appeals heard under the Letters Patent only under the Civil Procedure Code. In the second place, Cl (b), S. 144, does not require that orders and decrees should have been passed under the Code."

With due respect to the learned Judges who gave this ruling we would point out that in their first argument no distinction is drawn between the procedure in Letters Patent appeals, which is prescribed by the Code, and the jurisdiction which is derived from the Letters Patent. The fact that the procedure of the Code applies to the hearing of these appeals and to the decree does not require that every section of the Code should apply irrespective of the wording of that section. In regard to the second argument we consider that the question is not whether the decree or order is under the Code but whether the judgment to be reviewed is made in exercise of jurisdiction derived from the Code or derived from another law. Moreover the argument in the ruling merely is that there is no express provision in the section on the point. There is of course no express provision either way; and if there had been any express provision the question which is before us could not have arisen. It is because there is no express provision that we have to rely on implication to ascertain what is the meaning of the section. The ruling in question does not deal with the difficulty arising from the words "by this Code," and therefore the ruling does not assist in the interpretation of the section.

Reference was also made to *Venkatesam Chetty* v. *Mothichand Gulabchand* (5), but that ruling merely laid down that the provisions of O. 41 do apply to appeals from the original side of a High Court, and a cross-objection may be filed. And reference was made to a ruling of their Lordships of the Privy Council, *Sabitri Thakurain* v. *Savi* (3), at p. 487 (of 48 *Cal.*) it is stated:

> "The real question is whether O. 41, R. 10, applies to such appeals, as the High Court thought it did, and to this question alone their Lordships will proceed to address themselves."

There was therefore no question of the interpretation of S. 114 in that ruling. We may summarize our view of the question under reference by stating that, while the procedure of the Civil Procedure Code does apply to the hearing of Letters Patent appeals and to the consequent decrees, the jurisdiction in the exercise of which the judgments are made is derived from the Letters Patent, and not from the Code; the criterion in S. 114 (a) and (b) whether an appeal is allowed by the Code would not be introduced if the section were intended to apply to judgments passed in the exercise of jurisdiction not derived from the Code; and if the section were meant to apply to such judgments then the criterion would merely have been whether an appeal was allowed without reference to the Code; further, if the section were applied to such judgments the object of the section, to ensure that an application for review should not lie if an appeal has been filed, might be frustrated; and lastly, if the section were intended to apply to such judgments, the section would contain an express reference to other laws, as is found in Ss. 96, 100 and 104, which deal with the right to appeal, a right similar to the right to apply for review.

In view of the considerations which we have set forth we are of opinion that there is no right to apply for review of the judgment of a Bench of this Court made in Letters Patent appeal, and we accordingly return an answer to that effect.

Opinion of the Full Bench.—The answer of the majority of the Judges composing the Full Bench to the question, whether an application for review of judgment lies, where an appeal has been decided under the Letters Patent, is that no such application for review of judgment lies.

R.K. *Reference answered.*

A. I. R. 1931 Allahabad 251

KING, J.

Makund Ram—Defendant—Appellant.

v.

Mt. Ruqaiya Khatun and *another* — Plaintiffs—Respondents.

Stamp Reference in First Appeal No. 2 of 1928, Decided on 28th July 1930.

Court-fees Act (7 of 1870), S. 7 (4) (c)—Appeal praying modification of decree by granting declaration that his right could not be sold—Case falls under S. 7 (4) (c).

M a subsequent transferee of the mortgaged property, parted with his proprietary interest in the property in favour of his sons. Under the terms of the partition the property went to the sons, while *M* was to get maintenance allowance from his sons, which was further secured by a charge upon the property in the hands of the sons. The suit for sale upon the mortgage was dismissed against the sons as time barred, but decreed as against *M*, and under the decree *M's* charge was to be sold in execution of the decree. *M* appealed praying that the decree be modified by granting declaration that the plaintiff was not entitled to get the right of *M* sold,

Held: that the relief for modification was not superfluous and that the case was governed by S. 7 (4) (c). [P 252 C 1]

U. S. Bajpai and *R. C. Ghatak*—for Appellant.

A. M. Khwaja—for Respondents.

Judgment.—This is a stamp reference in respect of an appeal which purports to seek the relief of a mere declaration. The reference arises out of a suit for sale upon a mortgage. One of the defendants, Makund Ram, was impleaded as a subsequent transferee of a portion of the mortgaged property. Subsequently, it transpired that Makund Ram had parted with his proprietary interest in the property by a partition in favour of his two sons and a grandson. Under the terms of the partition the property went to the sons, while Makund Ram himself was entitled to get a maintenance allowance of Rs. 80 per mensem from his sons and grandsons. The latter were to be personally liable for payment of this amount, and the allowance was further secured by a charge upon the property in the hands of the sons. The suit was dismissed as against the sons as being time barred, but was decreed against the remaining defendants, including Makund Ram; and the decree contained a direction that Mukund Ram's charge upon the mortgaged property was to be sold in execution of the decree.

Makund Ram appealed against the decree, claiming his relief as follows:

> "That the Hon'ble Court will be pleased to modify the decree of the Court below by granting a declaration that the plaintiffs are not entitled to get the right of Makund Ram sold, or grant such other and further relief as it may deem fit."

The appeal was valued at Rs. 7,970 (the decretal amount) and a court-fee of Rs. 10 only was paid on the memorandum of appeal as for a declaration.

Objection was taken by the Chief Inspector of Stamps that the court-fee was insufficient, as the declaration asked for was not without consequential relief, and by merely filing a copy of the judgment in the execution proceedings the appellant would be able to save his charge from sale.

The Taxing Officer, after hearing the advocates for the parties, was of opinion that the relief for a declaration was misconceived, and the appellant was really claiming that the charge should not be sold under the decree appealed against. The Taxing Officer was however of opinion that the subject matter in dispute was incapable of being estimated at a money value and that therefore a fixed fee might be paid under Sch. 2, Art. 17, Cl. 6.

It has been contended before me that this is an appeal for a mere declaration in which no consequential relief is prayed, and that the fixed court-fee of Rs. 10 is sufficient. It is also urged that, in any case the value of the subject matter in dispute cannot be estimated at a money value, since this is not a claim for maintenance, but only a claim that a certain charge for maintenance shall not be sold in execution of the decree.

It has been contended by the learned Assistant Government Advocate that the court-fee is payable under S. 7, Cl. 4 (c), to obtain a declaratory decree or order where consequential relief is prayed. It is pointed out that the appellant himself has asked that the decree of the trial Court be modified by granting a declaration. This means that the appellant asks the High Court to grant a declaration that the plaintiffs are not entitled to sell the right of Makund Ram and to modify the decree of the Court below in accordance with that declaration. I think this clearly amounts to a claim for a declaration where consequential relief is prayed. It is contended by the appellant's counsel that the relief for modification of the decree of the Court below is merely superfluous since that would follow necessarily by the granting of the declaration. I do not think that that relief is in any way superfluous. What the appellant really desired was to get the decree of the Court below modified ; and he sought to obtain his object by obtaining a declaration to the effect that the plaintiffs are not entitled to get his right sold. I hold that S. 7, Cl. 4 (c), governs the case.

That being so the question whether the subject matter in dispute is capable of being estimated at a money value does not arise, since the fee is to be paid according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. In this case the appellant has valued it at Rs. 7,970. The court-fee therefore must be paid ad valorem at that amount. The appellant is allowed fifteen days from the re-opening of the Court after the vacation for depositing the court-fee.

P.N./R.K. *Order accordingly.*

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BANERJI AND KING, JJ.

Lachhman Singh—Plaintiff — Appellant.

v.

Todar Mal and *others* —Defendants—Respondents.

First Appeal No. 194 of 1927, Decided on 1st December 1930, from decision of Addl. Sub-Judge, Mirzapur, D/- 28th March 1927.

Registration Act, S. 2 (7) — Agreement to lease must effect actual demise and operate as lease.

An "agreement to lease" must be a document which effects an actual demise to operate as a lease.

When a document provided that lease would be granted to the plaintiff on the happening of a contingent event within six months and upon a certain indeterminate act and on the date of that document the property to be demised was under a zaripeshgi lease in favour of a third person and a suit was pending against that person and the deed contained certain conditions as to payment etc., such a document could not be regarded as an "agreement to lease" within S. 2 (7): *A. I. R.* 1919 *P. C.* 79, *Rel. on.* [P 253 C 2]

P. L. Banerji, *A. Sanyal* and *S. D. Sinha*—for Appellant.

K. N. Katju, *Ambika Prasad* and *B. C. Ganguli*—for Respondents.

Banerji, J.—This is a plaintiff's appeal in a suit for specific performance of a contract said to have been entered into between the plaintiff Lachhman Singh and Bageshri Dayal. The learned Subordinate Judge dismissed the suit holding that the letter referred to in para. 2 of the plaint, dated 3rd February 1921, was inadmissible in evidence and no contract between the parties could be proved.

It appears that Bageshri Dayal died in the year 1922 and was succeeded by Todar Mal and Birumal, defendants first party. On 23rd October 1925 Todarmal and Birumal executed a lease in favour of Baijnath and others, defendants second party. After the execution of the lease in their favour defendants second party applied to the revenue Court to have their names entered in the revenue papers. Lachhman Singh plaintiff objected, but his objections were disallowed and the names of Baijnath and others were entered as lessees: hence the suit by Lachhman Singh.

The defence to the action among others was that the agreement referred to in the plaint was not admissible in evidence and that the plaintiff's claim was barred by time. Several issues were framed but the learned Subordinate Judge, by an order of 26th March 1927, directed the parties to produce evidence in respect of issue 3 only, and then the parties were permitted to argue issues 1 (b), 3 and 5. The learned Subordinate Judge, holding that the document of 3rd February 1921 was not admissible in evidence, held that the plaintiff was not entitled to seek specific performance of the alleged contract. As regards issue 3 it was held that the claim regarding specific performance was cognizable by the civil Court, but that under the Tenancy Act the suit for possession should be instituted in the revenue Court. As regards issue 5 it was held that the plaintiff's claim was not barred by limitation.

The plaintiff has come up in appeal before us and it is contended by the learned counsel for the appellant that the learned Judge of the Court below, in view of the ruling of their Lordships of the Privy Council in the case of *Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (1), should not have held the letter of 3rd February 1921 to be inadmissible in evidence.

The learned advocate for the respondents has supported the judgment of the Court below regarding the finding as to the inadmissibility of the letter in question and has also submitted that the finding as to limitation was incorrect.

As regards the question of limitation it is no doubt true, as contended by the learned advocate for the appellant, that the question depends on facts and that the learned Subordinate Judge confined the parties to evidence on issue 3 ; therefore the plaintiff was unable to give evidence relating to any matter with reference to issue 5 We therefore cannot accept the finding of the learned Subordinate Judge as regards limitation, and as we are remanding the case, it will be open to the parties to give evidence on the question of limitation and to get a fresh finding by the Court below.

The letter of 3rd February 1921 is, in our opinion, not an agreement to lease within the meaning of the term "agreement to lease" in the Registration Act as interpreted by their Lordships of the Privy Council. At p. 491 (of 47 *Cal.*) of the case of *Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (1) their Lordships of the Privy Council have stated as follows :

> "With regard to the first, the Registration Act of 1908 provides that "lease" includes an agreement to lease, and by S. 17 enacts that leases must be registered, the penalty for non-registration being imposed by S. 49, which provides that, if not registered, no document shall affect immovable property which it comprises or be received as evidence of any transaction affecting such property. If the document in question can be regarded as a lease within the meaning of this definition it could not be received in evidence. Their Lordships are of opinion that it cannot be so regarded. An "agreement for a lease," which a lease is by the statute declared to include, must, in their Lordships' opinion, be a document which effects an actual demise and operates as a lease."

The learned Subordinate Judge has reproduced the document and it is perfectly clear that on the happening of a contingent event within six months and upon a certain indeterminate act, a lease would be granted to the plaintiff. On the date of this letter the property, or a part thereof, was under a zarpeshgi lease in favour of Jhullar and a suit was pending against Jhullar. Payment was to be made by the plaintiff to Jhullar, or to the plaintiff if Jhullar admitted the claim of the plaintiff, and then a proper receipt or satisfaction of the decree was to be issued to Bageshari Dayal, whereupon Lachhman Singh could claim a lease to be executed in his favour. A document which provides for all these, in our opinion does not amount to "an agreement to lease" within the meaning of the Registration Act, as interpreted by their Lordships of the Privy Council in the case referred to above. We are therefore of opinion that the finding on issue (b) by the learned Subordinate Judge should be set aside, which we hereby do. We remand the case under the provisions of O. 41, R. 23 and direct that all the issues which were framed by the Court below may be determined according to law, and that the suit be re-admitted under its original number and proceeded with. The plaintiff-appellant is entitled to the costs of this appeal. Costs in the Court below will abide the directions of that Court.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 253

SULAIMAN AND YOUNG, JJ.

Raj Kumar and *others*—Defendants—Appellants.

v.

S. Mohan Lal — Plaintiff — Respondent.

First Appeal No. 191 of 1929, Decided on 13th December 1930, against decree of Sub-Judge, Moradabad, D/- 15th January 1929.

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(1) A.I.R. 1919 P.C. 79=53 I.C. 534=46 I.A. 240=47 Cal. 485.

Hindu Law — Joint family — Manager — Whether alienation of family property to raise money for family business is justified or not depends upon particular circumstances —Test is whether transaction is for benefit of estate and is such as prudent man would have carried out.

The question whether the alienation of the family property in order to raise money for a family business was or was not justified must depend on the particular circumstances of each case. The test is whether the transaction was to the benefit of the estate and was such as a prudent owner would have carried out with the knowledge available to him. The transaction would have to be judged not by its results but by what might have been expected to be its results at the time it was entered into. The subsequent results cannot be a decisive factor but merely furnish circumstantial evidence as to the propriety of the act at the time: *A. I. R.* 1927 *P. C.* 121, *Ref.*; *A. I. R.* 1928 *All.* 403 and *A. I. R.* 1928 *All.* 454 (*F. B.*), *Disc.*

[P 255 C 2 ; P 256 C 2]

Iqbal Ahmad, P. L. Banerji and *S. N. Seth*—for Appellants.

U. S. Bajpai and *P. M. L. Verma*—for Respondent.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for sale on the basis of a mortgage deed dated 14th October 1920 for Rs. 4,000 executed by Mukat Lal, defendant 1, for self and as guardian of his two minor sons. All these persons are impleaded in the suit, as also other minor sons who were born subsequently. The claim was contested on the ground that the mortgage was without any legal necessity and was not binding on the family. The reply of the plaintiff was that the money had been required for the purposes of an ancestral business and the debt was binding on the family.

The learned Subordidate Judge has come to the conclusion that it is not true that there was any ancestral family business, but it is proved that the money was required for a family business which had been carried on by Mukat Lal for about 14 years before the loan and that the money was utilized for the purpose of increasing the stock of cloth. He commented on the fact that defendant 1 had not produced the account books of the business, and thought that it was a fact which went a great way against him and in favour of the plaintiff. He came to the conclusion that in view of the fact that Mukat Lal had been and was still running the business of selling cloth for a long time, it was the main source of income for the support of his family. He cited cases which laid stress on a prudent act of a manager being binding on the family, and then held that the debt was borrowed for legal necessity and its payment was binding on the defendants.

It will be conceded that there was no clear issue as to whether the transaction at the time it was entered into was one which a prudent manager of a joint Hindu family would enter into.

The defendants have come in appeal and on their behalf it is urged that the loan was not supported by any legal necessity.

The evidence led on behalf of the plaintiff that the same business had been carried on in the lifetime of Mukat Lal's father, was meagre and weak. The learned Subordinate Judge did not considered it strong enough to establish such a case. We are not prepared to differ from that view. It may therefore be taken that the plaintiff has failed to prove that any ancestral business which had been carried on by the deceased father of Mukat Lal had descended to him (Mukat Lal). But the learned Subordinate Judge has found that Mukat Lal had been carrying on this business for many years before this loan was taken. This finding is based, not only on the evidence led by the plaintiff, but also on the statement of a witness for the defendants, namely, Chidda Khan, who stated in 1929 that Mukat Lal alone had started the cloth business about twenty or twenty-two years ago and that he was still doing that cloth business. The eldest son, Raj Kumar, was about 12 years of age when the loan was taken, and therefore on the evidence of Chidda Khan, even he was not born when the business was started by the father, who was at that time the sole male member of the family. On the evidence, we accept this finding.

The execution and the receipt of the consideration for this loan were also denied by the defendants. But there can be no doubt that the document was duly executed and the full amount of consideration was paid to Mukat Lal before the Sub-Registrar. Mukat Lal has not thought fit to come into the witness box and deny the execution and the receipt of the consideration. The endorsement by the Sub-Registrar on the back of the document proves the execution and the payment of the consideration. We are fully satisfied that the amount was paid.

We further accept the finding of the Court below that this amount was utilized for the purchase of fresh stock for this business. The best evidence which would have made this point clear consisted of the account books of the shop itself, but they have been withheld by the defendants. Mukat Lal's statement was that they had been taken away by a partner of his and were sold as waste paper. A few years before the suit was filed Mukat Lal had himself instituted suits on the basis of his account books, and therefore he cannot say that no account books exist. His story that they have been sold as waste paper equally cannot be accepted. The learned Judge thought that they had been suppressed and he considered that a fair presumption could be made against the defendants for not having produced these books. There is however other oral evidence which shows that cloth was purchased by Mukat Lal just after this loan. Witnesses for the plaintiff have deposed that the value of the stock in the shop was raised by about Rs. 4,000. There is also evidence to show that another dealer was paid Rs. 740 towards the purchase of cloth in October 1920. The evidence on behalf of the defendants is practically nil. An attempt was made on their behalf to make out that the whole of this sum was squandered away by Mukat Lal in gambling. The finding was against the defendants and the learned counsel for them has not thought it fit to press that point before us. It may therefore be taken as established that the whole of this amount was utilized for the purpose of purchasing cloth in order to raise the stock of this business.

It is next contended before us that to increase the stock of a business is not such necessity as would justify an alienation of joint family property. Reliance is strongly placed on the case of *Inspector Singh* v. *Kharak Singh* (1). In that case it was laid down that it is not open to the karta of a joint Hindu family including minor members and governed by the Mitakshara law, to start a new venture by creating liability on the ancestral property, even though the new business is likely to bring large profits to the karta or through him to his sons. It was further remarked that the " benefit to the estate " contemplated by their Lordships of the Privy Council in some leading cases was a benefit of a defensive nature calculated to protect the estate from possible danger or destruction. In that case the money had been taken for the purpose of starting a new business of plying motor lorries. The Bench held that the loan was not justified. One reason given was that a new business could not be started when minor members existed who could not give a valid consent. It was however remarked on p. 587 that a business may be started at a time when there is no minor member in the family and with the consent of the sole or all the adult members. Doubt was expressed on the view taken in an earlier case of *Jado Singh* v. *Natthu Singh* (2), and it was considered that the authority of the manager to bind the family by debts incurred for a family business was restricted to an ancestral business. The point however did not strictly arise in *Inspector Singh's* case (1).

So far as the proposition that the benefit to the estate must be of a defensive nature is concerned, a Full Bench of this Court in the case of *Jagat Narain* v. *Mathura Das* (3) has not accepted it. It has been held in this last mentioned case that a manager of a joint Hindu family has power to alienate joint Hindu property provided the transaction is for the benefit of the family, and that the transaction need not be of a defensive nature, but it must be such as a prudent owner would enter into, taking into consideration all the facts available to him including the fact that he was dealing with the property in which his sons had an equal interest with him.

It seems to us that it is not necessary to decide this broader question of law or to express any final opinion on the question on which apparently a conflict of view exists.

In the present case, as pointed out above, the business was started by Mukat Lal before any of his sons were born. At that time the family consisted of a sole male member, who had full authority to start the business, and no question of any invalidity of the consent of minor members arose at all. At the time when it was started it might have been one of a speculative nature, if it was an entirely new trade by Mukat Lal. But by the time the loan was taken, the business had been run on for 14 years, and it might well be that on account of the experience gained by him the business could not be said to be anything of a speculative nature. The sons who are born in a Hindu family acquire an interest in the family property by their birth In this case a family business existed at the time the eldest son was born, and therefore he would acquire an interest in this business with all its assets and liabilites.

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(1) A. I. R. 1928 All. 403 =112 I. C. 881 = 50 All. 776.

(2) A. I. R. 1926 All. 511 =98 I. C. 773 = 48 All. 592.

(3) A. I. R. 1928 All. 454=50 All. 969 (F. B.).

Without deciding the point conclusively we would assume that a Hindu father has no authority to start an altogether new venture in the form of a new business, no matter whether it may be considered beneficial by him or not. We would further assume that if .the manager suddenly increased the capital of a running buisness to such a great extent as practically to constitute a new venture, there would be no authority for alienating the joint family property, in order to raise money for it. On the other hand, we are not prepared to accept the contention made on behalf of the appellants that the manager is bound to carry on a business on the same scale as it had gone on in the past without any right to improve it or extend it. It is difficult to see that there is any obligation on the manager to keep a particular business up to a fixed limit and not enlarge it. It follows therefore that the mere fact that the capital was increased would not by itself make it unjustified.

It seems to us that the question whether the alienation of a family property in order to raise money for a family business was or was not justified, must depend on the particular circumstances of each case. In the case of *Niamat Rai* v. *Din Dayal* (4) their Lordships of the Privy Council considered that a joint family business was a business which was carried on with the joint family funds for the benefit of the joint family and that the properties of the joint family, both moveable and immovable, including the shares of the minor members of the family, are liable for debts incurred in carrying on the business and that it is within the power of the manager in a proper case to mortgage or sell immovable as well as moveable property to raise money for the purpose of discharging such debts or enabling the business to be carried on. But there is no doubt that in that case it was a business to which the minor members had apparently succeeded.

As observed by the Full Bench in the case quoted above, the test was to be whether the transaction was to the benefit of the estate and was such as a prudent owner would have carried out with the knowledge that was available to him at the time; the degree of prudence being the prudence which a man would exercise with the knowledge available to him. It further held that the transaction would have to be judged not by its results but by what might have been expected to be its results, at the time it was entered into. The subsequent results cannot of course be a decisive factor, but merely furnish circumstantial evidence as to the propriety of the act at the time.

It is pointed out on behalf of the appellants that the case was not approached from this standpoint in the Court below, and it is urged that the defendants have not had an opportunity of producing sufficient evidence to explain the nature of the transaction. We think that there is force in this contention, and that a clear finding on an issue to that effect should be asked for.

We accordingly send down the following issue to the Court below for determination:

Issue.—Whether having regard to all the circumstances that existed at the time and the knowledge that was availbale to Mukat Lal, it was for the benefit of the estate and a prudent act on his part, to raise the capital of the family business by Rs 4,000 by borrowing money by mortgaging the family property on the terms of the mortgage deed? The parties will be at liberty to adduce fresh evidence on the point. The findings will be returned within three months. The usual ten days will be granted for filing objections if any.

R.M./R.K. *Case remanded.*

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(4) A. I. R. 1927 P. C. 121=101 I. C. 373=54 I. A. 211=8 Lah, 597 (P. C.).

A. I. R. 1931 Allahabad 257

BENNET, J.

Abdul Shakur Khan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 368 of 1930, Decided on 12th August 1930, against order of Sess. Judge, Agra.

(a) Criminal P. C. (1898), S. 133 (1)—It is not incumbent on Magistrate to make an inquiry first as to whether there has been encroachment on public road or not—It is after both parties appear before him that he has to make the inquiry.

The expression "on taking such evidence, if any, as he thinks fit" does not make it incumbent on the Magistrate to hold an inquiry whether the alleged encroachment on the public road is made or not. If a Magistrate were to come to a finding ex parte that there was an encrochment on the public road before he made an order for the opposite party to put in a written statement and produce evidence, it would be merely in most cases a waste of time and no such procedure is laid down in S. 133. It is after the parties have appeared before the Magistrate that he makes his inquiries and comes to a finding on the point. [P 257 C 2]

(b) Criminal P. C. (1898), S. 135—Encroachment on public road under control of District Board—Member of District Board nominated by District Board is not unsuitable person to serve on jury.

A member of the District Board who is appointed to carry out certain public functions is not an unsuitable person to be nominated by the District Board to serve on a jury, for the purposes of seeing whether there is an encroachment on the public road under the control of the District Board : 37 *All.* 26, *Expl.* and *Dist.* [P 258 C 1]

(c) Criminal P. C. (1898). Ss. 133 (1) and 135 (2)—Person applying to have his case decided under S. 135 (2) waives right to assert that the matter is of civil nature.

A person making an application to have his case decided under S. 135 (2) waives all right to assert that the matter is of a civil nature and that S. 133 does not apply and he cannot re assert the right in revision proceedings. [P 258 C 2]

M. H. Faruqi—for Applicant.

M. Walliullah—for the Crown.

Judgment.—This is an application in revision on behalf of one Abdul Shakur, a clerk in the General Post Office, Agra, against an order of a Magistrate directing that an encroachment on a public road in Tundla made by the applicant should be removed. The history of this proceeding is that the District Board made an application to the Magistrate alleging that there was this encroachment by building a shop, etc. on the public road which was in the charge of the District Board. It has been argued by the learned counsel for the applicant that the duty of the Magistrate, on receiving this information, was to take evidence and to come to a finding on the question of whether the encroachment was made on the public road or not. It is argued that this duty is imposed on the Magistrate by S. 133 (1), paras 1 and 2, Criminal P. C. But I consider that the expression "on taking such evidence, if any, as he thinks fit" does not make it incumbent on the Magistrate to hold such an inquiry. In the present case the Magistrate had the allegation before him that the encroachment was made on the public road' and he adopted the course of issuing notice on the opposite party to put in his written statement, and on the parties to produce their evidence. If a Magistrate were to come to a finding ex parte that there was an encroachment on the public road before he made an order for the opposite party to put in a written statement and produce evidence it would be merely, in most cases, a waste of time, and no such procedure is laid down by the section. It is after the parties have appeared before the Magistrate that he makes his enquiry and comes to his finding on this point.

On 6th March 1929 Abdul Shakur put in a written statement in which he alleged that he was in possession of the land on which he had built this alleged encroachment, and he claimed to be holding under a lease originally from the zamindar on 3rd February 1894 and subsequently from the District Board in 1904. If matters had proceeded in the ordinary way, presumably the parties would have produced evidence before the Magistrate or the defendant might have objected to the jurisdiction of the Magistrate. But on 18th March 1929, Abdul Shakoor put in an application to the Magistrate asking that the matter should be tried by a jury. This application is under S. 135 (b), Criminal P. C. Accordingly this application shows that Abdul Shakur had abandoned the contention that this matter did not come under Cl. 10, Criminal P. C., and his contention that the matter was one for the civil Court and not for a Magistrate. In that application Abdul Shakur nominated two of his coreligionists as members of the jury. The District Board nominated two persons, one of whom, Khairathi Beg, was a member of the

District Board. The Magistrate nominated the Naib Tahsildar as foreman. It is now urged that the jury was improperly constituted, because the District Board had nominated one of its members as a member of the jury. Reference is made to *Farzand Ali* v. *Hakim Ali* (1), and it is claimed that this ruling is an authority for the proposition that it was improper for the District Board to nominate one of its members. In that case there was an alleged encroachment on a public road, and the matter was brought to the notice of the Magistrate by a petition presented by a private individual Hakim Ali. The Magistrate in appointing a jury asked Hakim Ali to nominate a member of the jury. Hakim Ali nominated a person who was his supporter. A learned single Judge of this Court came to the conclusion that it was improper that the Magistrate should have had a member of the jury nominated by Hakim Ali. On p. 28 of the ruling it is stated :

> "In the present case the question before the Magistrate was whether there had been an obstruction to a public way, or inconvenience of members of the public entitled to use the same. Hakim Ali had no locus standi in the matter, once he had performed what was perhaps his duty as a good citizen in calling the attention of the Magistrate to the existence of the nuisance. In so far therefore as the rulings to which I have been referred lay down the principle that it is expedient that Magistrates should be on their guard against allowing a proceeding of this sort to assume the character of a private litigation and allowing it to be treated as a dispute to which two private individuals representing opposite interests are the parties, I am in entire accord with the same "

This ruling therefore lays down that a private individual should not be allowed to nominate a member of the jury to try the question of an encroachment on the public road But in the present case the District Board is not a private individual. The District Board is in charge of that public road, and therefore the ruling has no application to the present case. I do not consider that a member of the District Board, who is appointed to carry out certain public functions, is an unsuitable person to be nominated by the District Board to serve on a jury for purposes of seeing whether there is an encroachment on the public property under the control of the District Board. Accordingly I consider that the jury was not improperly constituted.

The only other point in the grounds of revision is that the matter was of a civil nature and that S. 133, Criminal P. C., does not apply. But by his application to have the case decided under S. 135 (b), Criminal P. C., the applicant has waived those claims and he cannot re-assert them at this stage of the proceedings. I consider that the finding of the jury was a finding by a validly constituted jury and the Magistrate has passed his order in accordance with that finding. Therefore it necessary that the order of the Magistrate should be upheld and I refuse this application in revision.

R.M./R.K. *Application dismissed.*

A. I. R. 1931 Allahabad 258

BENNET, J.

Chunku and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 19 of 1930, Decided on 15th August 1930, from order of Addl. Sess. Judge, Cawnpore, D/- 23rd December 1929.

(a) **Penal Code, S. 465—Criminal intention to cause wrongful gain to one or wrongful loss to another is sufficient for forgery.**

It is sufficient for the purposes of forgery to show that there was a criminal intention to cause wrongful gain to one or wrongful loss to another person as that constitutes the definition of "dishonestly" in S. 24, Penal Code. It is not necessary that the wrongful gain or wrongful loss should be actually caused It is sufficient that there should be the intention of causing it : 11 *B. H. C. R.* 3; 5 *All.* 217 and 7 *All.* 459, *Dist.* [P 261 C 1]

b) **Penal Code, S. 471—Evidence insufficient to prove that accused actually committed forgery—Accused may be convicted under S. 471 and not under Penal Code, S. 465.**

Where evidence is insufficient to legally prove that all the accused or any one of them actually committed the offence of forgery their conviction under S. 465 is bad in law. They may be convicted under S. 471 for fraudulently or dishonestly using a document as genuine which they knew or had reason to believe to be a forged document. [P 261 C 2]

F. O. ONeill and *K. D. Malaviya*—for Applicants.

M. Waliullah—for the Crown.

Judgment.—This is an application in revision on behalf of 13 persons, who have been convicted under Ss. 465 and 471, I. P. C., and sentenced by a Magistrate to one year's rigorous imprisonment. The facts of the case as set forth in the judgment of the learned Sessions Judge are as follows. There was a partition case of the village of Kairi in Banda District begun in the year 1909. These proceedings went on until 1918 when the Board of Revenue rejected the application for partition on the ground that the village was "khetwat." Some years later in 1923 some of the cosharers applied to the Collector and suggested that the partition proposed in 1909, which had apparently proceeded as far as the preparation of khurras, should be recorded as it stood in the papers by treating it as an application for partition made on agreement. On 17th March 1924 the cosharers of the village were summoned to Court and asked to file an agreement to the effect that they had made a partition of this village into the khurras prepared by the revenue Court and that they had agreed to this partition.

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(1) [1915] 37 All. 26=16 Cr. L. J. 40=26 I. C. 632.

Various delays occurred and in 1925 the papers were filed. Some years later on 19th April 1926 an application Exs. 10 and 10-A, was made to the revenue Court purporting to be under S. 107, Land Revenue Act and purporting to be by 24 cosharers. In this application there are no cosharers named as opposite parties. The application was accompanied by an agreement Exs. 11 and 11-A. The application states that the cosharers had agreed to the khurras among themselves dividing the village into 18 mahals and asking that mutation should be made according to this partition in the revenue papers. The agreement set forth that the parties to that agreement had agreed to the partition into the 18 mahals already effected. Then there was an application made on 29th July 1926 by Jagannath and Sheo Pershan and two others, Ex. 40, to the effect that they do not want the partition of 1909 to be carried into effect. An enquiry was started by the order of the District Magistrate of 7th August 1926, and it was ascertained that the signatures of Sheo Pershan and Jagannath appeared on the application Exs. 11 and 11-A and on the agreement Exs. 10 and 10-A. These persons denied that these signatures were genuine, and the 13 accused were prosecuted under Ss. 465 and 471 in regard to these two documents. The evidence for the prosecution consisted of the statements of of Sheo Pershan and Jagannath that they did not make these signatures, and their evidence was confirmed by the fact that they had all along been objecting to this partition into these khurras. There was also the evidence of the Government Examiner of Questioned Documents, and he stated that the signatures on the application and agreement were not by the same persons as the signatures of Sheo Pershan and Jagannath submitted to him. The defence on the other hand, called a witness, D. W. 2 Raggu, who stated that all the accused were present when the documents in question were executed by Sheo Pershan and Jagannath, in their written statement the accused also pleaded that the signatures of Sheo Pershan and Jagannath were made in their presence. On the evidence before them the two lower Courts have come to the conclusion that it is proved that the signatures are not made by Sheo Pershan and Jagannath. The Courts have also held that as the accused pleaded that those signatures were made in their presence therefore the accused must have had knowledge of the fact that the signatures were not genuine. The 13 accused are persons who admit that they signed the agreement and the application, Exs. 10 and 11, and they also made an appeal No. 89 of 1929 on the strength of that application and that agreement having been jointly executed by Sheo Pershan and Jagannath.

Some point was taken for the defence that the Government Examiner of Questioned Documents was first questioned about the signatures of Sheo Parshan and Jagannath on the verification on the back of the agreement. Subsequently he was recalled as a witness o the Court under S. 540, Criminal P. C., and also asked in regard to the signatures on the front of the agreement and on the application which purported to be those of Sheo Parshan and Jagannath. It was argued that the accused should have had a further opportunity to adduce additional evidence in regard to those signatures on the front of the agreement and on the application. But it appears to me that the defence evidence would be the same for the signatures on different portions of each document and that the defence could not have been in any way prejudiced by the procedure. It was also not shown to me that the Court was acting in any way outside its powers in recalling the Government Examiner of Questioned Documents as a witness under S. 540, Criminal P. C., in order to rectify an obvious omission in his evidence recorded as a prosecution witness. S. 540 provides that the Court may recall a person under that section who has been already examined as a witness and the section provides that the Court shall recall such person if his evidence appears to it essential to the just decision of the case. In the present case it is clear that the evidence of the Examiner of Questioned Documents was essential to the just decision of the case in regard to all the signatures and not merely in regard to the two signatures about which he was asked in his examination as a prosecution witness. The procedure of the Court therefore was perfectly correct. No application was made after the examination of this witness to the effect that the defence desired to call additional evidence on the point.

The main argument addressed in revision to this Court was to the effect that even on the finding that the signatures of Sheo Pershan and Jagannath were not genuine, still the offence of forgery or using these documents knowing them to be forged documents would not be complete because the intention required for the crime of forgery would not exist. It has been stated in para. 2 of one of the applications of revision by Mr. O'Neill that these signatures do not amount to forgeries as the documents were not drawn up with intent to cause injury to any person or to cause any person to part with property nor did these documents have the potentiality of causing wrongful loss or wrongful gain or to defraud any person.

Reference was made by the learned counsel to *Reg.* v. *Bhavani Shankar* (1).

In that case *A* signed *B's* name to petitions presented by *C* to the Mamlatdar, requesting his summary assistance under Regulation 17 of 1827 for the recovery of rents from *K's* tenants. In this case *A* was the manager of *B* and *B* declared that he had given *A* authority to sign his name and *B* had no objection to his name being used by *A*. The High Court found in the first place that the lower Courts were wrong in convicting *A* of forgery because the prosecution had failed to prove that *A* was acting without authority from *B*. The High Court went on to state that even if it were proved that *A* had no authority to sign *B's* name it would also be necessary to prove that *A* had signed the petitions dishonestly or fraudulently and that it was not sufficient for the Courts to hold that the intention was to deceive the Mamlatdar because the Mamlatdar could not be injured by such deception nor could wrongful loss or gain have been caused to him. The act was done for the benefit of the master and the master was legally entitled to the rent for which the assistance of the Mamlatdar was asked. Now if we apply the principle of this ruling to the present case we find that so far from Jagannath and Sheo Parshan stating that the accused had authority to sign for them they denied it. Further it is not suggested that the fraud was on the Court, but is suggested that the fraud was on Jagannath and Sheo Parshan the persons whose names were signed.

As regards the question of wrongful gain or wrongful loss we most look at the nature of the agreement Ex. 10, and the application, Ex. 11 The learned counsel argued merely on the wording of S. 107, Land Revenue Act (3 of 1901), but this was not an ordinary application under that section asking the Court to make a partition of the village. If it had been an ordinary application, the question of wrongful loss to the complainants would have arisen from the fact that they would have been deprived of notice of these proceedings issuing on the application and they would have been deprived of making the objection that the Board of Revenue had held that this village should not be partitioned, because the property in it was not held jointly by cosharers, but was held khetwat, which I understand means that the different fields were held in separate ownership. However the application was not an ordinary application, but the application asks that a partition already agreed to by the parties should be entered in the revenue papers instead of the existing khewat. That partition was the division into 18 mahals which had been made in the partition begun in 1909. The complainants Jagannath and Sheo Pershan did not agree to this division of the village, as they considered that they would suffer loss by the exchange of their existing rights for the rights proposed in the new partition. Accordingly the document of agreement would inflict on them wrongful loss, and would give to the other cosharers, the accused, wrongful gain. It was argued by the learned counsel for the accused that the proceedings could not go through without Jagannath and Sheo Pershan becoming aware of them and making objection as they did make on 29th July 1926, but that objection was only made after the period of three months and ten days, and it is possible that the accused may have hoped that the Court would reject that application of 29th July 1926 by Jagannath and Sheo Pershan on the ground that the agreement Ex. 10 showed that they had already consented to the partition already made. It is sufficient for the purposes of forgery to show that there was a criminal intention to cause wrongful gain to one or wrongful loss to another person as that constitutes the definition of "dishonestly" in S. 24, I. P. C. It is not necessary that the wrongful gain or wrongful loss should be actually caused. It is sufficient that there should be the intention of causing it. S. 464 states that a person makes a false document when he does certain acts in regard to a document dishonestly. Accordingly I consider that the present case differs fundamentally from that recorded in 11 *Bombay High Court Reporter* at p. 3.

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(1) [1874] 11 B. H. C. R. 3.

The next case mentioned was *Empress* v. *Fateh* (2). In this case the vendees of a plot of land altered the number by which the land was described in the deed of sale, doing so because such number was not the right number. Having made this alteration they used the deed of sale as evidence in a suit. It was held that the alteration of the deed did not amount to forgery within the meaning of S. 463, I. P. C., because there was no intention to cause wrongful loss or wrongful gain or to defraud. In this case the vendees merely altered the number of the plot to correspond with the boundaries which had actually been given in the sale deed, a wrong number having been accidentally inserted in the deed. There was no fraud or wrongful loss to the vendor, and the alteration in the document merely made the document agree with the intention of the vendor in making the transfer. That would therefore be no wrongful loss caused to the vendor. The present case is essentially different, because the addition of the names of Jagannath and Sheo Parshan to the deed of agreement would cause a transfer of their existing property to which they did not agree.

The next ruling to which reference was made was *Queen-Empress* v. *Sheo Dayal* (3). In this case it was found that four payments of rent had actually been made and receipts had been issued but had been lost. Other receipts had been manufactured identical with the receipts which had been lost. There could therefore have been no wrongful gain or wrongful loss caused as the result of the existence of these fabricated receipts as they were only intended to support a legal claim. For the reasons already stated this case differs essentially from the one at present before me. Dr. Malaviya advanced an argument based on a ruling dealing with the mere filing in the Court of the document which had not been used in evidence. But the case is different here as the plaint on being filed in Court had fulfilled its function and the agreement on which the plaint was based was also filed in Court as the basis of the plaint.

I consider that the offence of forgery was committed in regard to the two documents, the application and the agreement. But I do not think that the evidence is sufficient to legally prove that the 13 accused persons committed the offence of forgery. Accordingly I consider that the conviction under S. 465 I. P. C., is bad, and I set it aside. But I consider that all the 13 accused had committed the offence of S. 471 I. P. C., fraudulently or dishonestly using as genuine a document which they knew or had reason to believe to be a forged document.

Argument has been made that the sentence is excessive, but for an offence of this nature the three months rigorous imprisonment to which the Sessions

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(2) [1882] 5 All. 217=(1882) A.W.N. 227.

(3) [1885] 7 All. 459=(1885) A. W. N. 85.

Judge has reduced the sentence is not excessive.

Accordingly I set aside the conviction under S. 465, I P.C., and I maintain the conviction under S. 471, I. P. C., of all the accused and sentences of three months rigorous impresonment on each of them They must all surrender to their bail.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 262

KENDALL, J.

Emperor

v.

Bansidhar and *others*

Criminal Ref. No. 676 of 1930, Decided on 8th December 1930, made by Sess. and Sub-Judge, Etawah, on 15th September 1930.

Criminal P. C. (1898), S. 162—Copy of statement of prosecution witnesss refused to accused on ground that it was not full statement but memorandum – Memorandum in police diary being as effective to contradict prosecution witness as a full statement refusal to accused of its copy is prejudicial to him.

The application of the accused for a copy of the statements of the prosecution witnesses as recorded in the police diary had been rejected on the ground that they were not full statements but only amounted to memorandum of the statements.

Held: that the Court had not refused the copies on the only grounds that were allowed by proviso 2 of the section for adopting such acause after recording its opinion in terms of those grounds only. Such a refusal had been prejudicial to the case of the accused because the object of the law was to enable the accused to contradict a witness in Court by making use of a previous statement of his. The memorandum in a police diary may often be found as effective for that purpose as a full statement would be. Though tne application might have been made for purposes of cross-examination, yet that would not exclude the purpose of contradicting the witnesses. Hence such refusal was prejudicial to the case of the accused as also on the ground that the Court had acted illegally in not following a mandatory provision of the statute. [P 262 C 2,P 263 C 1]

Saila Nath Mukerji—for Applicants.

M. Waliullah—for the Crown.

G. Agarwala and *K. N. Agarwala*—for Opposite Party.

Judgment. —This is a reference made by the learned Additional Sessions Judge of Etawa recommending that a conviction by a Bench of Magistrates which has been upheld by the District Magistrate should be quashed and the sentences set aside. The facts are not of importance. The reference is made on the ground that the Bench Magistrates refused the applications made by the accused under S. 162, Criminal P. C., to be supplied with copies of the statements made by the witnesses for the prosecution to the police.

The application made to the Bench for copies of these statements was rejected after the Magistrates had perused the police diaries on the ground that what was recorded in the diaries consisted not of the statements of the witneses at length but merely of a memorandum of such statements taken down by the investigation officer.

Under proviso. 1, S. 162 (1), Criminal P. C.:

> "When any witness is called for the prosecution in such an enquiry or trial whose statement has been reduced into writing as aforesaid the Court shall on the request of the accused . . . . direct that the accused be furnished with a copy thereof in order that any part of such statement if duly proved may be used to contradict such witness. . . . ."

It is only in two cases that the Court can refuse the copies as proviso 2 shows, namely when it is of opinion (1) that any part of any such statement is not relevant or (2) that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest.

In these cases the law directs that the Court shall record such opinion.

In the present case the Court that is to say the Bench of Magistrates did not record any such opinion. It merely recorded that the statements were not full statements but only amounted to a memorandum. If the copies were to be denied to the accused under provision 2, S. 162 then the procedure laid down was not followed because the Court did not record such opinion.

Nevertheless it may be argued that this would be only an irregularity, and if an examination of the record showed that the real reason of the Court for refusing the copies was the reason laid down by the law then the mere fact that the Court had not recorded its opinion would not vitiate the trial. This may be so but in the present case it is clear that this was not the reason. The Court has recorded the reason for refusing the copies viz: that the statements are not full statements but only a memorandum.

It may be and has been argued before me on behalf of the counsel for the complainant in this case that where there is only a memorandum and not a full statement the Court is under no obligation to provide the accused with a copy. To this argument I cannot accede. The object of the law is to enable the accused to contradict a witness in Court by making use of a previous statement of his and it may be that the memorandum in the police diary is just as effective for that purpose as a full statement would be. The learned District Magistrate who went into the facts of the case very carefully has remarked that the accused demanded statements of the prosecution witnesses "for the purposes of cross examination and not of contradicting the witnesses" and that the accused had not been in any way prejudiced through the absence of copies. The application for the copies may have mentioned that the copies were needed for cross-examination but that would not exclude the purpose of contradicting the witnesses and as I have said above a memorandum might be quite sufficient for this purpose and it is therefore not possible to say that the accused were not prejudiced.

In any case the law appears to me to be perfectly clear. There is a definite provision under which the Court was obliged to supply the copies or direct that they should be supplied. The omission to supply the copies may have prejudiced the accused and in any case the Court acted illegally in not following a mandatory provision of the statute. That is sufficient to vitiate the proceedings.

It has been contended on behalf of the complainant that if the procedure was illegal a re-trial ought to be ordered. The Additional Sessions Judge has however considered this point and has not recommended a retrial. The case was not a particularly serious one and the accused have already been put to a good deal of inconvenience and expense as well as having been in jail for some small portion of the period to which they were sentenced. For these reasons I accept the reference and quashing the convictions by the Bench Magistrates set the sentences aside. As the convictions have been set aside it follows that an application which has been made by the complainant for enhancement of the sentences must be and is hereby rejected.

B.V./R.K. *Reference accepted,*

A. I. R. 1931 Allahabad 263

DALAL, J.

Raghubar Dayal Misra and *another*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 499 of 1930, Decided on 17th November 1930, from order of Sess. Judge, Bulandshahr, D/- 4th July 1930.

(a) **Penal Code (1860), S. 506—Shopkeeper asked not to import any foreign cloth for sale or in default threat held out to him that his shop would be picketed—Offence under S 506 held to be committed.**

R being desirous of preventing the dealers in cloth from importing any more foreign cloth for sale, served on a shopkeeper *A* a notice along with an agreement. The shopkeeper was directed to execute the agreement, and in default the threat was held out that his shop would be picketed. The proposed agreement was to the effect that the shopkeeper would not import any more foreign cloth for sale at his shop for at least one year and would pay a fine of Rs. 10 to the authority issuing the notice if he failed to carry out this agreement. It was argued that there would be no loss to ths property of *A* when he was graciously permitted by *R* to sell the foreign cloth which he did possess in the shop, and all he was called upon to agree to was not to import foreign articles.

Held: that taking the common business point of view, the threat by *R* amounted to injury to the property of *A* and that *R's* action amounted to an offence under S. 506. [P 264 C 1]

(b) **Criminal P. C. (1898), S. 155 (3)—Scope.**

Investigation under Ch. 14 includes investigation held under S. 155 (3) under the orders of a Magistrate. [P 424 C 2]

Nanak Chand—for Applicants.

M. Waliullah—for the Crown.

Judgment.—Mr. Nanak Chand took upon himself the task of satisfying the Court that the action of the applicants did not amount to an offence under S. 506, I. P. C. The first part of that section runs as follows:

> "Whoever commits the offence of criminal intimidation shall be punished with imprisonment."

And the offence of criminal intimidation is defined in S. 503 as:

> "Whoever threatens another with any injury to his person, or reputation or property . . . . . . with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do . . . . as the

means of avoiding the execution of such threat, commits criminal intimidation."

The applicants were desirous of preventing the dealers in cloth in the market of Sikandrabad in the district of Bulandshahr from importing any more foreign cloth for sale; so in the middle of May last the applicant Ratan Lal served on a shopkeeper of the name of Abdul Sattar a notice Ex. B along with an agreement Ex. C. The shopkeeper was directed to execute the agreement Ex. C and in default the threat was held out that his shop would be picketed. Mr. Nanak Chand drew my attention to the fact that at that time picketing was not an offence. The proposed agreement was to the effect that the shopkeeper would not import any more foreign cloth for sale at his shop for at least one year and would pay a fine of Rs. 10, presumably to the authority issuing the notice, if he failed to carry out this agreement. The notice and the agreement should be taken jointly. The applicants must have desired to cause alarm to Abdul Sattar by picketing, otherwise the threat of picketing would have been no threat at all. They must have known that Abdul Sattar would be alarmed at the suggestion of picketing and would therefore agree to abide by the terms submitted by them to him to carry on his business. It was argued that there would be no loss to the property of Abdul Sattar when he was graciously permitted by the applicants to sell the foreign cloth which he did possess in the shop, and all he was called upon to agree to was not to import foreign articles. Business is not carried out in the manner possibly suggested by the learned counsel that a shopkeeper imports a certain number of articles, sells them and then imports a second number of articles after the first set has been sold. The better classes of people in these provinces are notoriously ignorant of business; so one can understand how Mr. Nanak Chand came to advance such an argument. Business consists of constant purchase and sale. There may be certain articles of larger utility and demand which have to be more constantly imported, and a business would come to a standstill if even a small shop is prohibited from importing articles with which it deals for a period of one year. Taking the common business point of view I have not the slightest doubt that the threat by the applicants amounted to injury to the property of Abdul Sattar. There is no denial of such a threat being offered. The conviction was therefore fully justified.

Mr. Nanak Chand referred to certain antecedent facts. There was decided reluctance on the part of the Magistrate to grant bail for a bailable offence. In my opinion it is unfortunate that this should have happened. Also the applicants should have been granted a more reasonable opportunity of coming to this Court to obtain a transfer of the case for hearing. On 29th May the Magistrate was requested to postpone the trial under S. 526 (8), Criminal P. C., to enable the applicants to approach this Court and the time granted was up to 10th June. I think that the Magistrate ought to have noticed that there were only three days after 29th May during this period when this Court was open. For that reason it would have been advisable to grant a second application for postponement.

I do not think that the complaint against the Sub-Inspector of prosecuting the case when it was a noncognizable one is justified under the law. It was admitted by Mr. Nanak Chand that under S. 155 (3), Criminal P. C., the Sub-Inspector was empowered to investigate this noncognizable offence as the District Magistrate had directed him to do so. His argument was that the authority of the police terminated with the investigation, and that there was no authority to prosecute. I read the provisions of Ch. 14, Criminal P. C. differently. S. 170 of that Code lays down:

> "If upon an investigation under this chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial; or if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed."

I am of opinion that investigation under this chapter would include investigation held under S. 155 (3) under the order of a Magistrate. It is admitted that the Sub-Inspector did not send the applicants to the Court having jurisdiction in custody, but waited till the Magistrate himself had issued bailable warrants before arresting the applicants. I was not told that bail was actually tendered and the Sub-Inspector refused to accept it. The statement here was that the applicants desired information as to the offence and that such information was not given to them. I think that the applicants must have known that the warrants were bailable, or if they did not they ought to have put this pertinent question instead of making an enquiry about a matter which they ought so have discovered from the Court having jurisdiction.

The sentence is of four months rigorous imprisonment. As however in my opinion the applicants were unreasonably detained in custody when they ought not to have been, I reduce the sentence in each case to imprisonment for two months, otherwise the revision application is dismissed. The applicants, if on bail, shall surrender to undergo the balance of their sentence. Mr. Nanak Chand has made a prayer to the Court that the imprisonment may be simple. I direct accordingly.

P.N./R.K. *Sentence reduced.*

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* A. I. R. 1931 Allahabad 265

MEARS, C. J. AND SEN, J.

Emperor—Appellant.

v.

Sat Narain—Opposite Party.

Criminal Appeal No. 691 of 1930, Decided on 24th November 1930, against order of acquittal passed by Sess. Judge, Allahabad, D/- 30th June 1930.

* **(a) Criminal P. C. (1898), S. 412—Person pleading guilty under S. 380, Penal Code, owing to misconception of his right in property—His right of appeal is not barred.**

Where an accused person pleads guilty on a charge under S. 380 Penal Code, but the said plea is founded upon an erroneous conception of one's right in the property, S. 412. Criminal P. C., is inapplicable to the case and cannot shut out one's right of appeal. [P 266 C 1, 2]

(b) Hindu Law—Stridhana — Nature and rights as to saudayika explained.

"Saudayika" is a term applied to gifts made to a woman at, before or after marriage, by her parents and their relations or by her husband and his relations. In other words it means gifts from relations as distinguished from gifts from strangers. A woman has absolute power of disposal over her saudayika stridhan, even during coverture. She may dispose of it by sale or by gift, or by will or in any other way she pleases even without the consent of her husband. [P 266 C 2]

U. S. Bajpai—for the Crown.

P. N. Ghose—for Opposite Party.

Mears, C. J.—This is an appeal by the Local Government from an order passed by the learned Officiating Sessions Judge of Allahabad, dated 30th June 1930 oversetting an order of a Magistrate of the First Class who had convicted one Sat Narain under S. 380, I. P. C.

The prosecution in this case was initiated on a police-report made by one Venayak on 11th March 1930, in which he stated that certain gold and silver articles of jewellery and a silver lota of the total value of Rs. 283 had been stolen from inside a box in his house the key of which used to be with his wife, Mt. Ram Kali, and that he suspected that the respondent Sat Narain and one Girja Brahman of Rampur, who used to come to his house, had removed these articles in collusion with his wife. A detailed description of the alleged "stolen" property was given at the foot of the police-report.

With the exception of a ring, a necklace and a mohar the other articles alleged to be stolen were recovered from the possession of Jaggu, Tulsi, Ganga and Shoe Murat with whom they had been pawned by Sat Narain, and four articles from Mt Jasodri with whom they had been pledged by Mt. Ram Kali between the months of Bhadon and Pus. There is evidence that Sat Narain had represented to Jaggu that the articles pawned with him were his property. There is also evidence that Sat Narain accompanied Mt. Ram Kali when she went to Mt. Jasodri to pawn the four articles mentioned above.

The police sent up both Sat Narain and Mt. Ram Kali for their trial under S. 380, I. P. C.

The houses of Venayak and Sat Narain are contiguous. Sat Narain and Venayak belong to the same caste of maha-Brahmans and are pattidars.

Venayek gave his age as 40 years before the Magistrate. He has appeared before us and is undoubtedly much older. Ram Kali is admittedly a young woman of about 25. The Magistrate describes the husband as old, infirm and valetudinarian, and the wife as a young, vigorous woman. Upon this hypothesis he builds up the theory that an illicit intimacy had sprung up between Sat Narain and Ram Kali and that the wife, anxious to retain and rivet the affection of her youthful lover, had readily parted with the property and spent it on him.

Ram Kali admits giving some of the property to Sat Narain, and the latter admits receiving some of the property from her, but he pleads that he pawned them at her instance and for her benefit. There is no evidence on the record to disprove the statement except that of Jaggu, who states that Sat Narain represented that he was the owner of the articles sought to be pawned. It is clear that Jaggu's statement is self-exculpatory.

There is no evidence on the record of any illicit intimacy between Sat Narain and Ram Kali. The question of Ram Kali's character or reputation was not in issue before the Magistrate and we express no opinion on it. But it is abundantly clear that Sat Narain and Ram Kali are friends and that such articles as Ram Kali handed over to Sat Narain were gifts or handed over for the purpose of pawning.

The learned Magistrate convicted both the accused on a twofold ground: (1) That the articles were the property of Venayek; (2) that both the accused had pleaded guilty. He directed that Ram Kali be released on her executing a bond for Rs. 100 with two sureties for like amount, to be of good behaviour for a year and to appear and receive sentence whenever called upon to do so. He sentenced Sat Narain to one day's simple imprisonment and a fine of Rs. 300. Sat Narain appealed. The learned Sessions Judge on appeal reversed the convction and sentence. Ram Kali filed no appeal.

A preliminary objection was raised in the Court below that Sat Narain having pleaded guilty to the charge, had no right of appeal, and S. 412, Criminal P. C., was cited in support of this contention. This plea was repelled by the Court below. The learned Government Advocate has put this forward as a substantive plea in his appeal to this Court. We are of opinion that this plea must fail. Where an accused person pleads guilty on a charge under S. 380, I. P. C., but the said plea is founded as here upon an erroneous conception of one's right in the property, S. 412, Criminal P. C., is inapplicable to the case and cannot shut out one's right of appeal.

The Court of first instance has not considered the case in its proper perspective and has failed to grasp the nature and character of the wife's interest in the property. Both in the police report and in his deposition in Court, Venayek claims that the property belonged to him. These statements obviously proceed upon the common and popular conception of the husband's dominion over the wife's property In the police report, it is admitted that out of item 16 a pair of silver dadni and dhar was a present to the wife by her mother. The learned Magistrate thought that

> "all the articles were not exclusive property of the husband. Some belonged to the husband, others belonged to the wife."

He observed:

> "The articles are such which cannot be said to be the exclusive property of Mt. Ram Kali, for the list includes such articles as silver lota, etc."

The wife's version is that the articles belonged to the husband, but were given to her by the husband (pahnaya tha), but that the husband continued to be the owner. Here again the wife commits the popular blunder as to the right of ownership in the stridhan property. The articles were given to her by the husband or by her mother, and they constituted saudayika stridhan under the Hindu law. According to Mr. Mulla's Principles of Hindu Law, Edn. 5, p. 139:

> "Saudayika is a term applied to gifts made to a woman at, before or after marriage by her parents and their relations or by her husband and his relations; in other words, it means gifts from relations as distinguished from gifts from strangers . . . . A woman has absolute power of disposal over her saudayika stridhan, even during coverture. She may dispose of it by sale, or by gift, or by will, or in any other way the pleases, even without the consent of her husband."

The following facts stand out in clear relief:

(1) The property in controversy was the absolute property of Mt. Ram Kali being her saudayika stridhan under the Hindu law.

(2) She was quite within her rights in pawning some of these articles to Mt. Jasodri.

(3) It was within her competence to make a present of any of these articles to Sat Narain or anyone else.

(4) The husband was not competent to dispute the legality or validity of the transfers effected by Mt. Ram Kali or Sat Narain.

(5) It therefore follows that the pawnees are entitled in law to be restored to the possession of the articles pledged and to retain them in possession until they are redeemed.

Upon the finding set out above we are of opinion that Sat Narain is not guilty under S. 380, I. P. C., nor also was Mt. Ram Kali. The appeal by the Local Government therefore fails and is hereby dismissed.

As the result of our finding the articles which were produced in the Court below, and some of which under our order dated 12th November 1930 have been produced by Venayek in this Court should be sent back to the Sub-divisional Officer with the direction that they might be restored to the pawnees concerned. Venayek is also directed to produce before the Sub-divisional Officer items 5, 11 and 14 which were made over to him by the Court below and which have not been produced before us and which the pawnees have a right to hold until the money due to them is paid.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 267

MEARS, C. J. AND KING, J.

Emperor—Applicant.

v.

Prem Narain—Accused — Opposite Party.

Criminal Revn. No. 686 of 1929, Decided on 29th April 1930, from order of Addl. Sess. Judge, Agra, D/- 3rd August 1929.

Criminal P. C., S. 222 (2)—Offence of embezzlement of four sums of money on specified dates within one year—Charge in respect of all as one offence is correct and does not contravene provision of Criminal P. C., S. 234.

In a prosecution for embezzlement of four sums of money there was only one charge framed, and that charge, although it did not set out the total of the money, said to have been embezzled, specified all the items. It also specified the dates upon which the sums were alleged to have been embezzled. The time included between the first and the last of such dates was less than two months.

Held: that the charge was correctly drawn up in accordance with the provisions of S. 222, sub-S. (2), and the charge must be deemed to be a charge of one offence within the meaning of S. 234, and there was no misjoinder of charges since the accused was upon his trial for only one offence, and there was no question of the trial having been vitiated by the trial of the accused for more than three offences: 24 *All.* 254; 27 *All.* 69 and 33 *All.* 36, *Rel. on*; *A. I. R.* 1927 *All.* 223; *A. I. R.* 1922 *Mad.* 435; 20 *C. L. J.* 784 and 25 *Mad.* 61 (*P.C.*), *Dist.* [P 268 C 1]

U. S. Bajpai—for the Crown.

Sailanath Mukerji and *Hazari Lal Kapoor*—for Opposite Party.

King, J.—This is an application in revision by the Local Government against an order passed by the Additional Sessions Judge of Agra setting aside the conviction and sentence of Prem Narain under S. 409, I. P. C., on the ground of misjoinder of charges, and directing a retrial. The accused Prem Narain was a clerk in the Cantonment Board Office and he was charged with having embezzled sums of money entrusted to him in his capacity as a public servant. Evidence was led to show that there had been embezzlements amounting to about Rs. 1,500 but the charge against the accused was that he had embezzled four sums of money on or about 9th January, 5th February and 13th February 1929. It must be observed that only one charge was framed in which all the four sums of money, said to have been embezzled, are specified, and the dates of the alleged embezzlements are also specified.

It will be noticed that the embezzlements are said to have taken place on three dates and four items are specified. That means that on one date, namely on 13th February 1929, two items are alleged to have been embezzled consisting of Rs. 2-13-0 and Rs. 9-6-0 respectively, totalling Rs. 12-3-0.

The trial Magistrate found the accused guilty of having embezzled the sums of money specified on three dates, namely, 9th January, 5th February and 13th February, and sentenced him to rigorous imprisonment for the period of two years on each of the three counts, the sentences to run concurrently.

The accused came up in appeal before the Additional Sessions Judge and took the objection, which was not mentioned in the grounds of appeal, that the trial was bad in law and contravened the provisions of S. 234, Criminal P. C. The argument was that the accused had, in effect, been tried on four charges of embezzlement and as S. 234 permits an accused person to be tried at one trial for not more than three offences of the same nature committed within twelve months, the trial was bad in law. The view taken by the learned Additional Sessions Judge was that each defalcation constituted a separate and distinct offence and therefore the procedure offends against the provisipns of S. 234.

In our opinion the Court below has come to an erroneous decision owing to its not having considered the provisions of S. 222, sub-S. (2), which runs follows:

> "When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates betwe n which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning ot S. 234, provided that the time included between the the first and last of such dates shall not exceed one year."

In the present case there was in fact only one charge framed, as we have already mentioned, and that charge, although it did not set out the total of the money, said to have been embezzled, did specify all the items. It also specified the dates upon which the sums were alleged to have been embezzled. The time included between the first and the last of such dates is less than two months. Therefore the charge was correctly drawn up in accordance with the provisions of S. 222, sub-S. (2), and the charge must, in accordance with the provisions of that subsection, be deemed to be a charge of one offence within the meaning of S. 234. It follows that there can be no misjoinder of charges since it must be held that the accused was upon his trial for only one offence, and there is no question of the trial having been vitiated by the trial of the accused for more than three offences. In our opinion the language of Ss. 222 and 234, when read together makes the position perfectly clear and it would hardly be necessary to consider any judicial pronouncement on the point. We have however been referred by the Government Advocate to several decisions of this High Court which support the view which we have independently arrived at.

In the case of *Emperor* v. *Gulzari Lal* (1), where an accused person was charged with having misappropriated or committed criminal breach of trust in respect of an aggregate sum of money the whole sum being alleged to have been wrongfully dealt with by the accused within a period not exceeding one year, it was held that the mere fact that the items composing the aggregate sum are specified and may be more than three in number, will not render the charge obnoxious to the prohibition implied by S. 234, Civil P. C.

A similar view was taken by this High Court in the case of *Emperor* v. *Ishtiaq Ahmad* (2). In that case, in a charge of criminal misappropriation, there were three counts. Each count specified the sum of money alleged to have been misappropriated by the accused on the particular day, but in two out of the three cases the total sum consisted of three separate items in each instance. It was held that a charge so framed did not offend against S. 234, Criminal P. C. This decision is very directly applicable to the case before us. In the case before us there are three counts in the charge and it is only in the case of one count that the total alleged to have been embezzled in a particular day consisted of two items.

Finally our attention has been drawn to the case of *Emperor* v. *Ibrahim Khan* (3). In that case an accused person was charged under S. 409, I. P. C., with having embezzled an aggregate sum of Rs. 208-12-0 on various dates between 1st July and 1st November 1909. It was held that the charge so framed was not open to objection, notwithstanding that evidence was available as to the various items of which the aggregate sum charged was composed. It appears that the aggregate sum consisted of some 18 items. These three cases lend strong support to the view which we take of the relevant provisions of the Code.

The Court below has relied upon a ruling in the case of *Raman Lal* v. *Emperor* (4). This ruling is clearly distinguishable upon the facts. In that case the applicant was found to have committed criminal breach of trust in a series of transactions which did not take place within the space of one year, and all these transactions were joined together in one charge in respect of an offence under S. 381, and the applicant was convicted under S. 408, I. P. C. It was held that in such circumstances the trial was vitiated in the same way as if there had been a misjoinder of charges. It will be noticed however that the transactions did not take place within the space of one year and that the charge was of offences under S. 381. S. 222, sub-S. (2), has no application to offences under S. 381. This ruling therefore is no good authority for the opposite view. The learned Judge in the Court below has also relied upon a case which he has cited as "24 *Cr. L. J.* 462." He does not give the names of the parties, as he should have done, but we are informed that the case is the same as that reported in *A. I. R.* 1922 *Mad.* 435: *Chakrakodi Shama Shastri* v. *Emperor*. In that case the accused appears to have been charged, not with criminal misappropriation of money or criminal breach of trust, but with falsification of accounts. That ruling therefore is of no help to us in the present case.

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(1) [1902] 24 All. 254.

(2) [1904] 27 All. 69=(1904) A. W. N. 165.

(3) [1911] 33 All. 36=11 Cr.L.J. 442=7 I. C. 186.

(4) A. I. R. 1927 All. 223 = 99 I. C. 603 = 28 Cr. L. J. 171=49 All. 312.

Lastly the Court below relied upon a case which it cited as "20 *Cr. L. J.* 784." Here again no names of the parties are given, but we understand that it is the same as *Avadh Behari Lal* v. *Emperor* (5). That case is also distinguishable because the accused was sent up for trial on eight counts not only for criminal breach of trust but for other offences also under Ss. 218 and 466, I. P. C. The Court held that there was misjoinder of charges, but that case is of no authority for the proposition that there was any misjoinder of charges in the present case.

The learned advocate for the respondent has cited the case of *Ganga Prasad* v. *Emperor* (6) which was decided by a single Judge of this Court. In that case the accused was convicted of criminal misappropriation in respect of 26 items which were alleged to have been misappropriated by him within the space of one year. It was held that the joinder of charges was illegal and vitiated the trial. Unfortunately the learned Judge did not give any reasons in support of his view, and it is apparent that none of the earlier cases decided by this Court, to which we have referred above, were brought to his notice. He merely refers to the Privy Council case of *N. A. Subramania Iyer* v. *Emperor* (7) which is no authority for the view that the present trial was vitiated by misjoinder of charges. In the Privy Council case it was held that S. 234, Criminal P. C., which provides that a person may only be tried for three offences of the same kind, if committed within a period of 12 months, is plainly contravened by trying an accused on an indictment charging him with no less than 41 acts extending over a period of two years.

In the present case the alleged embezzlements extend over a period of less than two months, and the Privy Council ruling has no application. We are satisfied that there was no defect in the trial owing to misjoinder of charges. Under the provisions of S. 222 the accused must be held to have been upon his trial for only one offence, and the Magistrate was not, strictly speaking, correct in sentencing him separately on each of the three counts. He should have passed one sentence for the one offence with which the accused was charged. The irregularity is of no practicial importance as the sentences are to run concurrently. We accordingly set aside the order of the Court below and direct the Court below to dispose of the appeal on its merits.

M.N./R.K. *Order set aside.*

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(5) [1919] 53 I. C. 624.

(6) A. I. R. 1923 All. 483 = 76 I. C. 654 = 25 Cr. L. J. 220.

(7) [1902] 25 Mad. 61 = 28 I. A. 257 = 8 Sar. 160 (P.C.).

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KING AND BENNET, JJ.

Emperor—Applicant.

v.

Johri—Opposite Party.

Criminal Ref. No. 271 of 1930, Decided on 9th September 1930, submitted by Sess. Judge, Agra, D/- 20th March 1930.

Penal Code, S. 211—Person making false charge to police of cognizable offence, institutes criminal proceedings.

A man who sets the criminal law in motion by making a false charge to the police of a cognizable offence institutes criminal proceedings within the meaning of S. 211, and if the offence falls within the description in the latter part of the section, he is liable to the punishment there provided. Making of a false charge to the police of a cognizable offence is the institution of criminal proceedings within the meaning of

S. 211 : 17 *Cal.* 574 (*F. B.*) ; 20 *Mad.* 79 ; 32 *Mad.* 258 (*F. B.*) and *A. I. R.* 925 *Pat.* 678, *Foll.*;5 *All.* 215; 5 *All.* 598; 16 *All.* 124; 6 *A.L.J.* 989 and 17 *I. C.* 791, *not Foll.*

[P 270 C 2; P 271 C 1, 2]

M. Waliullah—for the Crown.

Bennet, **J.**—This is a reference by the learned Sessions Judge of Agra recommending that the commitment of Johri to the Court of Session for trial under part 2, S. 211, I. P. C., should be quashed. Johri made a report under S. 304, I. P. C., against certain persons, and the case for the prosecution is that that report was false. If the case comes under part 2 of S. 211, I. P. C., the case would be triable only by the Court of Session. The police made an investigation into the report and found it to be false, and the persons named in it were not prosecuted. Hence the Sessions Judge considers that no criminal proceedings were instituted and therefore the charge of making the false report comes under the first part of S. 211, I. P. C., and is punishable with two years' imprisonment of either description or with fine or with both and as the committing Magistrate can pass such sentence he should dispose of the case himself.

The view of the Sessions Judge is in accordance with the rulings of this Court. But as three other High Courts have taken a different view, the learned single Judge of this Court before whom the case came referred it to a Bench of two Judges.

Section 211 states as follows:

> " Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both and, if such criminal proceeding be instituted on a false charge or an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

The words in this section which have given rise to difference of opinion are the words " if such criminal proceeding be instituted." The Allahabad view of these words has been that they mean that a criminal prosecution should have taken place. The High Courts of Calcutta, Madras and Patna hold that these words cover a report in the police station even though the police do not prosecute on it.

The Allahabad cases are in historical order as follows : *Empress of India* v. *Pitam Rai* (1). Pitam made a false report to a police officer but the police did not prosecute the person he accused. A single Judge, Mahmood, J., held that there was no institution of criminal proceedings and therefore no offence under part 2 of S. 211, I. P. C. In the next year, 1883, this ruling was followed by another single Judge in *Empress* v. *Parahu* (2). In 1893 the matter came before a Bench of two Judges of this Court, in *Queen-Empress* v. *Bisheshar*(3) on a reference by a Sessions Judge who considered that the Full Bench ruling of the Calcutta High Court in *Karim Buksh* v. *Queen-Empress* (4). should be followed. Unfortunately the Acting Public Prosecutor did not place this view before the Court and in a ruling of eight lines the Bench stated that they preferred the previous Allahabad rulings. There is no discussion of the merits of either view in this ruling; so it can hardly be taken as an authoritative decision between the two conflicting views.

This was followed in 1909 by *Emperor* v *Jagmohan* (5) and in 1912 by *Barkatullah* v. *Sadho Kalwar* (6). These were single Judge rulings.

In none of these rulings is there any discussion of these difficulties ; there is merely the assumption that the phrase " institution of criminal proceedings " can only refer to the institution of a criminal case in Court.

The Calcutta High Court followed the Allahabad view in a Bench ruling, *Queen Empress* v. *Karim Buksh* (7), but the matter was fully considered by a Bench of five Judges in 1888 in *Karim Buksh* v. *Queen-Empress* (4) where it was laid down that

> " a man who sets the criminal law in motion by making a false charge to the police of a cognizable offence institutes criminal proceedings within the meaning of S. 211, I. P. C., and if the offence falls within the description

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(1) [1882] 5 All. 215=(1882) A. W N. 225.
(2) [1883] 5 All. 598=(1883) A. W. N. 149.
(3) [1894] 16 All. 124=(1894) A. W. N. 10.
(4) [1890] 17 Cal. 574 (F. B.).
(5) [1908] 6 A. L. J. 989.
(6) [1912] 13 Cr. L. J. 855=17 I. C. 791.
(7) [1887] 14 Cal. 633.

in the latter part of the section, he is liable to the punishment there provided."

The reasoning on which this conclusion is reached is as follows :

> " There are two modes in which a person aggrieved may seek to put the criminal law in motion. He may make a charge . . . . . . to the police. If the information discloses a cognizable offence, the proper officer of police may proceed to make an investigation ; and if the result of that investigation is adverse to the accused, he is, in due course, brought by the police before a Magistrate. If the information does not disclose a cognizable offence, the police cannot take any step of their own authority. Secondly, a person aggrieved may lay a charge, or, as the Code calls it, a complaint (S. 191) before a Magistrate whichever of these methods is adopted, the thing done by the accused is the same, that which is called in the one case giving information, in the other making a complaint. In each case the steps that follow are governed by the Criminal Procedure Code. In each the first step taken by the accuser is ordinarily also the last, for from that time the control of the investigation or the enquiry passes out of his hands into those of the constituted authorities."

The ruling then points out that the expressions "instituting proceedings" and "making a charge" are not mutually exclusive, because there is no mode by which a private accuser can institute criminal proceedings except by making a charge, and because part 2 of the section speaks of proceedings instituted on a false charge. But the expressions are not co extensive, because a charge to the police of a noncognizable offence or a charge to a civil Court of a public officer asking for sanction to prosecute, cannot be considered the institution of criminal proceedings.

A Bench of the Madras High Court in *Queen-Empress* v. *Nanjunda Rau* (8) followed the ruling of the Calcutta Full Bench in *Karim Buksh* v. *Queen Empress* (4) and dissented from the Allahabad rulings reported in *Empress* v. *Pitam Rai* (1) and *Queen-Empress* v. *Bisheshar* (3). One passage in this ruling may be quoted :

> " It is argued that, when a charge is preferred to the police, it merely sets them on enquiry, and they may find the charge to be false and refuse to proceed with the charge without the accused being even aware that any complaint has been made against him ; but precisely the same may be said when a complaint is made to a Magistrate. He is not bound to take any action against the person accused . . . . . . yet it could hardly be contended that the complaint to the Magistrate did not amount to " the institution of criminal proceedings " within the meaning of the section."

Reference was made to the Calcutta Full Bench ruling, *Karim Buksh* v. *Queen-Empress* (4), in a later case in the Madras High Court, *The Sessions Judge of Tinnevelly Division* v. *Sivan Chetti* (9), Full Bench, where the principle of that ruling was followed and where the majority of the Full Bench extended the principle by holding that a false complaint to a Village Magistrate of an offence which he was bound to report to the police under S. 45, Criminal P. C., was an institution of criminal proceedings within the meaning of S. 211, I. P. C. In 1925 the matter came before a Bench of the Patna High Court in *Parameshwar Lal* v. *Emperor* (10), and the Bench dissented from the Allahabad ruling *Queen Empress* v. *Bisheshar* (3) and followed the Calcutta Full Bench ruling *Karim Buksh* v *Queen-Empress* (4). The Allahabad ruling *Queen-Empress* v. *Bisheshar* (3) has therefore been considered and dissented from by three other High Courts, and in one case dissented from by a Bench of five Judges. The weight of authority is therefore heavily against the ruling *Queen-Empress* v. *Bisheshar* (3). The reasoning contained in the rulings of the other High Courts is clear and cogent. I therefore consider that we should follow the rule of the other High Courts and hold that making of a false charge to the police of a cognizable offence is the institution of criminal proceedings within the meaning of S. 211, I. P. C. There is another reason which inclines me to this view, which reason has not been mentioned in any of the rulings. This is the definition of "investigation" and "judicial proceeding" in S. 4 (1) (l) and (m), Criminal P. C:

> " "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf."

This clearly shows that "criminal proceedings" include the investigation by a police officer. On the other hand proceedings in Court are distinguished, as sub-S. (m) says:

> " "Judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath."

These definitions show that if part 2, S. 211, I. P. C., were intended to apply only where proceedings had taken place in Court the language used would not have been "if such criminal proceeding be instituted" but "if criminal proceedings be instituted in Court" or "if judicial proceedings be instituted." As the section simply refers to criminal proceedings I consider that it refers to a police investigation as well as to a prosecution.

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(8) [1897] 20 Mad. 79=1 Weir 188=7 M. L. J. 16.

(9) [1909] 32 Mad. 258 = 9 Cr. L. J. 170 = 1 I. C. 187 (F. B.).

(10) A. I. R. 1925 Pat. 678=4 Pat. 472.

Another reason for accepting the Calcutta view is that it would be unlikely that the Penal Code would make such a distinction in the two parts of the section as regards the amount of punishment, and make the difference depend on consequences over which the accused had no control.

I consider that the commitment of Johri to the sessions was correct and that the reference should be refused, and that the Sessions Judge should be directed to proceed with the trial of Johri according to law.

King, J. — I agree. The accused is alleged to have made a report to the police falsely charging certain persons with having committed an offence under S. 304, I. P. C. The police investigated and found the charge to be totally false. The persons charged were not prosecuted. The question is whether the accused, by causing the police to make an investigation, should be held to have caused the institution of a criminal proceeding on a false charge, within the meaning of para. 2, S. 211, I. P. C.

I think an investigation of an alleged cognizable offence must be regarded as a "criminal proceeding." This is in accordance with the ordinary meaning of these words, as I understand them. Moreover, under S. 4 (1) (l) an "investigation" is expressly defined as including all the proceedings under the Code for the collection of evidence conducted by a police officer. So if the police make an investigation in consequence of a false charge of a cognizable offence, I think it must be held that "criminal proceedings" have been instituted on a false charge, within the meaning of para. 2, S. 211, I. P. C.

It may be objected that if a false charge resulting in an investigation amounts to instituting a criminal proceeding, then how are we to give effect to the distinction, made in para. 1, S. 211, between: (1) instituting a criminal proceeding; and (2) charge a person with the commission of an offence? One answer is that the institution of criminal proceedings does not necessarily involve an accusation of any offence. For instance a man may make an application to a Magistrate that security for good behaviour should be taken from a certain person on the ground that he is by habit a robber. No charge is made of any offence, nevertheless the application must, I think, amount to "institution of criminal proceedings" if the Magistrate holds any inquiry. The same argument would apply to all proceedings requiring security for keeping the peace or for good behaviour. The fact that they are "criminal proceedings" cannot be doubted, but they do not proceed upon the allegation that any offence has been committed. There is therefore at least one clear distinction between the institution of criminal proceedings and the accusation of having committed an offence. There may be other distinctions, but it is unnecessary for our purpose to pursue the subject further.

The Allahabad decisions, starting with *Empress* v. *Pitam Rai* (1), merely assume that the institution of criminal proceedings means the institution in a criminal Court, or the institution of judicial proceedings. They do not even discuss the question whether "criminal proceedings" cannot be given a wider meaning so as to include a police investigation. The only Allahabad case decided by a Bench of two Judges is *Queen-Empress* v. *Bisheshar* (3), but with all due respect to the learned Judges I do not think the judgment can be considered satisfactory. The point at issue was not argued and no reasons are given for dissenting from the Full Bench decision in *Karim Buksh* v. *Queen-Empress* (4). My learned brother has discussed the case law and shown that the Madras and Patna High Courts have expressly dissented from the Allahabad view and have preferred to follow the Calcutta Full Bench decision. I also think that the latter decision is correct and should be followed.

I concur in the order proposed.

K.N./R.K. *Order accordingly.*

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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BENNET, J.

Nek Ram—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 688 of 1930, Decided on 16th October 1930.

(a) Criminal P. C., S. 162 — S. 162 is imperative — Magistrate has no discretion but must hand over copies of statement in police diary.

Section 162 is imperative and in all cases coming under that section, a copy of the statement in the diary must be granted. A Magistrate has no discretion to decide whether there is any contradiction or not and then to grant a copy if contradiction exists. It is only certain portions of that statement which may be excluded in the discretion of the Court. Those portions are portions which are inexpedient in the public interest. [P 274 C 2]

(b) Criminal P. C., S. 526 — Witness making different statement in Court—Defence asking for copy in diary to contradict witness—Magistrate seeing no contradiction and refusing copy—Case held fit one to be transferred to another Magistrate.

A witness for the prosecution made in the Court a statement different from the one made by him to the police. The defence counsel asked for a copy of that statement in the police diary to contradict the witness. The Magistrate made the following order: "It is true that after reading Tulla's statement I allowed a copy of the same to be given to the accused, but immediately after I was asked by the Prosecuting Inspector to reconsider my order on the ground that there was nothing in the statement to call for a contradiction, I carefully went through the statement again and found nothing contradictory therein. This was the reason why I refused to issue a copy thereof."

Held: that the Magistrate had no power to refuse copy and as he must have been influenced by other causes in doing so, it was a fit case for transfer from his Court to another. [P 274 C 1]

(c) Criminal P. C., S. 526 — Grounds—Where Magistrate, instead of ordering prosecution under S. 190 (1) (c) sends back papers to the police, case should be transferred from his Court.

Where a Magistrate, after examining the police diary, comes to the conclusion that the police have not properly investigated the case and that a certain person should have been prosecuted, his proper course is to pass an order under S. 190 (1) (c), Criminal P. C., ordering his prosecution. In that case the provisions of of S. 191, Criminal P. C., would apply and it would be open to the person so prosecuted to ask that the case should be transferred to another Magistrate. But if instead of this he sends the papers back to the police with no order and the man is prosecuted, there is sufficient reason for transferring the case from his file to another Magistrate. [P 274 C 2, P 275 C 1]

Saila Nath Mukerji—for Applicant.

U. S. Bajpai—for the Crown.

Judgment.—This is an application on behalf of one Nek Ram asking that either a charge framed against him should be cancelled or that the case should be transferred to another Magistrate. The facts of the case, so far as relevant to this application, are shown by the record and an affidavit. On 27th July 1930 it is admitted that Birendra, a young man of twenty years, who is also an accused, took two rupees and went to a shop of Ram Babu at a short distance from the shop of the applicant Nek Ram. Birendra is a servant of Nek Ram and works in his shop which is for drugs. Ram Babu found that the two rupees were false and he handed the boy Birendra over to the police. The defence is that two customers had come to the shop of Nek Ram before it was open at twelve o'clock and that these customers had given the two rupees asking that the boy Birendra should bring change, and that these two customers subsequently disappeared when Birendra was arrested and a crowd collected. It was also the defence of Nek Ram that he was not present at the shop at the time when Birendra left the shop to get the Rs. 2 change. It is of considerable importance in the case to see at what stage the story about the two customers was put forward. In the police diary it was stated by Tulla, a witness for the prosecution, as follows:

"*Yehi rupie the jo Birindar Kumar ne rezgari ke lene ki lie mudai Ram Babu ke die the aur un logon ke kahne par ke yeh kharab malum hote hain wuh kahan se laya hai to kaha ke do gahak ae hain unko bhang kharidna hai, rozgari ki unko zarurat hai.*"

This shows that, according to Tulla, Birendra put forward the story of the two customers at the time of his arrest. When Tulla gave evidence before the Magistrate he stated:

"I did not question Birendra. Birendra did not tell me that the change of two rupees was wanted for two customers who wanted some bhang. I did not say this to the Sub-Inspector."

When this statement was made in cross-examination the defence counsel asked for a copy of the statement in the diary in order to use it to contradict the witness. The Magistrate makes the following statement in regard to this incident:

"It is true that after reading Tulla's statement I allowed a copy of the same to be given to the accused, but immediately after I was asked by the Prosecuting Inspector to reconsider my order on the ground that there was nothing in the statement to call for a contradiction, I carefully went through the statement again and found nothing contradictory therein. This was the reason why I refused to issue a copy thereof."

I am quite unable to understand the mental process by which the Magistrate arrives at the conclusion that there is no contradiction between the statement of Tulla in the diary and the statement of Tulla in Court. To my mind it is obvious that there is a very material contradiction. That being so, I consider that the Magistrate was entirely wrong in refusing to grant the copy of the diary. The question arises whether this action of the Magistrate was due to some mental incapacity on his part to understand whether there was a contradiction or not or whether it was due to some other cause. I do not consider that a Magistrate of some experience who knows Urdu as his mother tongue would be unable to appreciate the fact that there was a contradiction. Accordingly I consider that the Magistrate was influenced by some other cause and I consider that he must have made this order because he was in some way prejudiced against the accused. That being so, I consider that the application for transfer is well founded, and accordingly on this ground alone I consider that there is sufficient reason to transfer this case. S. 162, Criminal P. C., is imperative and states as follows:

> "Provided that, when any witness is called for the prosecution in such enquiry or trial, whose statement has been reduced in writing as the aforesaid, the Court shall, at the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by S. 145, Evidence Act, 1872."

It is clear that this proviso does not state that it is for the Magistrate to make up his mind whether there is any contradiction, and if he considers that a contradiction is established, to grant a copy, and if he does not consider that a contradiction is established to refuse a copy. The only discretion given to the Magistrate is contained in the second proviso as follows:

> "Provided, further, that, if the Court is of opinion that any part of such statement is not relevant to the subject matter of the enquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused."

This proviso shows that in all cases a copy of the statement in the diary must be granted. It is only certain portions of that statement which may be excluded in the discretion of the Court. Those portions are portions which are inexpedient in the public interest. I consider that the clause "inexpedient in the public interest" governs both the previous clauses. It is not suggested by the Magistrate that there was anything in the statement of Tulla which would be inexpedient in the public interest to disclose. Accordingly the Magistrate had no right whatever to refuse to grant this copy on the ground that no contradiction was in his opinion established. The next ground on which a transfer is asked is contained in para. 17 of the affidavit as follows:

> "As I have also received information that the City Magistrate had suggested to the Superintendent of Police, that I should also be challaned."

The explanation of the Magistrate on this point is as follows:

> "I assure you on my honour as a gentleman that I never asked or suggested to the Superintendent of Police to challan Nek Ram. The fact is that after going through the police diary and seeing the counterfeit coins (which were struck) I came to the conclusion that the investigation was not properly made. For this reason I returned the papers to the Superintendent of Police, who probably, after considering the whole case, challaned Nek Ram as well."

In this explanation the Magistrate states that he came to the conclusion that the investigation was not properly made. It is not suggested that he means that any witness for the prosecution was not called who should have been called. Apparently what he means is that he came to the conclusion that Nek Ram should be prosecuted. When the Magistrate came to that conclusion his proper course was to pass an order under S. 190 (1) (c), Criminal P. C., ordering the prosecution of Nek Ram. In that case the provisions of S. 191, Criminal P. C., would apply, and it would be open to Nek Ram to ask that the case should be transferred to another Magistrate. Instead of doing this the Magistrate sent the papers, and by this apparently he means his judicial file as well as the police papers, to the Superintendent of Police. The Magistrate has not mentioned any written order with which he sent the papers, nor is there any written order on the Magistrate's file or the file of the police papers. There is a written order of the Magistrate dated 20th August 1930, asking the Superintendent of Police to return the file. I am unable to understand why the Magistrate should have sent the file to the Superintendent of Police, unless some oral suggestion was made by the Magistrate to the Prosecuting Inspector or someone else that the Superintendent of Police should examine the file with a view to the prosecution of Nek Ram. I note that, although the Magistrate has stated that he did not make such a suggestion to the Superintendent of Police, he has not stated that he did not make the suggestion to the Prosecuting Inspector or to some one else. In any case it is clear that the Magistrate had the prosecution of Nek Ram in his mind at the time he sent the papers. For the purpose of transfer, that I consider is sufficient. It was not correct for the Magistrate to take such an action instead of making an order under S. 191 (1) (c). The only object in the Magistrate acting as he did must have been to deprive Nek Ram of his right of transfer under S. 191, Criminal P. C. I consider therefore that on this ground also it is proper that this case should be transferred to the Court of another Magistrate.

In regard to application that this Court should cancel the charge sheet and order further proceedings to be dropped, I consider that it is not proper that this Court should weigh the merits of a case against an accused at this stage of the proceedings. Accordingly I consider that it is sufficient that an order of transfer should be made; and accordingly I direct that this record be returned to the District Magistrate of Agra and that he should direct that this case should be heard by some Magistrate other than Mr. Wali Bakht. The Magistrate who hears the case should grant accused a copy of the statement of Tulla in the diary and recall Tulla for cross-examination on that statement, and have it proved by the Sub-Inspector who took it down.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 275

MUKERJI AND BENNET, JJ.

Ram Lal and *another* — Plaintiffs—Appellants.

v.

Shiama Lal and *others* — Pro forma Defendants—Respondents.

Second Appeal No. 444 of 1929, Decided on 1st December 1930, from decision of Addl. Sub-Judge, Farrukhabad, D/- 12th December 1928.

(a) Transfer of Property Act (1882), S. 43 — For purchasing two groves, the very two groves with some other property mortgaged—Mortgagor does not transfer mere possibility and on principle of "feeding the estoppel" mortgagees were entitled to enforce their mortgage against the two groves—Transfer of Property Act, S. 6.

Certain two groves with some other property of the mortgagor, had been mortgaged for the purpose of purchasing the very two groves from its owner and the mortgagee wanted to enforce his mortgage against those groves on which an objection was taken, that it could not be so done as the mortgagors had no interest in the property sold at the date of the mortgage.

Held: that the money, as a matter of fact, had been advanced on security of the property, that was going to be purchased and that no third party's interest intervened between the execution of the security and the execution of the sale deed with respect to that security. In this case the mortgagors were not transferring their future right to succeed which was a mere possibility but had actually entered into an agreement with the vendor to purchase the vendor's right of ownership of the grove. The facts as regards the sale transaction had been recited in the mortgage deed and the mortgage deed had also stated that a sale deed would be executed in favour of the mortgagors. Hence, in the above circumstances, on principle of "feeding the estoppel" the mortgagees were entitled to enforce their mortgage against the groves: *A.I.R.* 1926 *All.* 102, *Dist.* [P 276 C 1, 2]

(b) Transfer of Property Act (1882), S. 3—Registration is notice.

The registration of a prior transaction is notice to a party entering into a transaction with respect to the same property on a subsequent date: *A. I. R.* 1921 *P. C.* 112, *Expl.* [P 276 C 2]

U. S. Bajpai and *G. S. Pathak* — for Appellants.

S. N. Seth—for Respondents.

Mukerji, J.—This appeal is bound to succeed. The plaintiffs are mortgagees under a simple mortgage dated 19th January 1920. They obtained as their security besides other properties, two groves. The groves were transferred by way of mortgage and sale in favour of the defendants other than the mortgagors who figured as defendants 1 and 2 in the suit. One of the transferees raised the plea that the plaintiffs were not entitled to bring the groves to sale. The reason was that at the date of the mortgage, the mortgagors Madho Singh and Bahadur had not got a sale deed in respect of the two groves in their favour. The sale deed in their favour was executed five days later on 24th January 1920. It appears that a certain Hindu owned the groves. On his death, they were inherited by his wife Mt. Sukhrani. Mt. Sukhrani sold the groves to one Azizuddin. The mortgagors claiming as reversioners contested the sale, but ultimately, finding that they could not successfully contest the sale, they agreed with Azizuddin to purchase the groves. They had to pay a certain amount of money to Azizuddin, and to raise this they made the mortgage in question. These facts are recited in the mortgage deed and the mortgage deed states that a sale deed would be executed in favour of the mortgagors. The argument therefore is that at the date of the mortgage, the mortgagors had no interest in the property sold and therefore these groves could not be so brought to sale. This argument of the contesting defendants found favour with the Court below hence the appeal by the plaintiffs.

We find as a matter of fact that the money was advanced on the security of the property that was going to be purchased. We find that no third parties' interest intervened between the execution of the security and the execution of the sale deed with respect to the security. There is no rule of law which prevents the mortgagee from selling the property, in the circumstances stated above. It was argued for the respondent that S. 43, T. P. Act, did not apply in terms. Possibly it does not. The case of *Mulraj* v. *Indar Singh* (1), was cited on behalf of the respondent. But that case is distinguishable. There, it was pointed out that to allow the particular party to rely on S. 43 and to take his stand on it would mean that he would be allowed to defeat the provisions of S. 6, T. P. Act. In this case the mortgagors were not transferring their future right to succeed, which would be a mere possibility. In this case they actually entered into an agreement with Azizuddin that Azizuddin would sell his rights to them and they would purchase it. By agreement Azizuddin was declared to be the owner of the property and Azizuddin had every right to sell the property.

We hold that on the principle of "feeding the estoppel" the plaintiffs are entitled to enforce their mortgage against the groves.

It was argued for the contesting respondent that he is a transferee for value without notice, but the registration of the mortgage of 19th January 1920, was notice to him. This Court has laid down for the last 30 years that the registration of a prior transaction is notice to a party entering into a transaction with respect to the same property on a subsequent date. The case of *Tilakdhari* v. *Khedan Lal* (2) does not upset this view of the High Court. Indeed there is much there to support this view. All that their Lordships of the Privy Council held was that the registration of a subsequent transaction was no notice to the holder of a prior charge.

In the result, we hold that the groves are liable to be sold. We allow the appeal, modify the decrees of the Courts below and direct that the groves be sold along with the other properties mortgaged. The appellants will have their entire costs of the suits and appeals throughout.

B.V./R.K. *Appeal allowed.*

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(1) A. I. R. 1926 All. 102 = 92 I. C. 471 = 48 All. 150.

(2) A. I. R. 1921 P. C. 112=48 Cal. 1 (P.C.).

A. I. R. 1931 Allahabad 276

SULAIMAN AND NIAMATULLAH, JJ.

Bhaiya Raj Kishore Lal—Defendant—Applicant.

v.

Jageshwar Dayal—Plaintiff—Opposite Party.

Civil Revn. No. 51 of 1929, Decided on 23rd April 1930, against order of Munsif, Basti, D/- 15th September 1928.

Arbitration—Arbitrator cannot be allowed to make private enquiries.

Unless expressly authorized to do so, an arbitrator cannot be allowed to make private enquiries and allow himself to be influenced by evidence which either party has no opportunity to check or meet: 4 *A. L. J.* 159, *Rel. on.* [P 276 C 1]

Shiva Prasad Sinha—for Applicant.

M. Walliullah—for Opposite Party.

Sulaiman, J.—This is an application in revision from an order setting aside an award on the ground that the arbitrator was guilty of legal misconduct inasmuch as he had made confidential enquiries behind the back of the plaintiff. It is well settled that, unless expressly authorized to do so, an arbitrator cannot be allowed to make private enquiries and allow himself to be influenced by evidence which either party has no opportunity to check or meet: *Daya Kishen* v. *Dharam Das* (1). The reference to arbitration directed him to make "enquiries," which cannot mean secret or private enquiries. The application has no force and is dismissed with costs.

P.N./R.K. *Revision dismissed.*

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(1) [1907] 4 A. L. J. 159=(1907) A. W. N. 75.

* * A. I. R. 1931 Allahabad 772

Full Bench

SULAIMAN, KING AND SEN, JJ.
on difference between
MUKERJI AND NIAMATULLAH, JJ.

Nannu Mal – Plaintiff—Appellant.
v.
Ram Chander and *others*—Defendants—Respondents.

Second Appeals Nos. 1491 and 1490 of 1926, Decided on 19th November 1929, against decision of 2nd Addl. Sub-Judge, Aligarh, D/- 13th July 1926.

* * **(a) Transfer of Property Act (1882), S. 70**—(Per *Full Bench*) **Sale in execution of decree on prior mortgage obtained in suit to which subsequent mortgagee was not party—Auction purchaser erecting building on site purchased — Building is accession liable to be sold in satisfaction of subsequent mortgage—Though Ss. 51 and 63 do not apply case comes under S. 70—Auction-purchaser must be treated as successor in interest of mortgagor—Transfer of Property Act, Ss. 51 and 63**—(*Sen, J.* contra.).

Per *Full Bench.*—An auction purchaser at a sale, held in execution of a decree passed on foot of a prior mortgage, to which the second mortgagee was no party, is not entitled to remove the materials of the building erected by him, but the building is liable to be sold as an accession to the second mortgage. For although neither S. 51 in terms or in principle,nor S. 63 is applicable to such a case, S. 70 applies and the building must be treated as an accession. S. 70 applies because it is a section which regulates not only the rights and liabilities of mortgagors and mortgagees but also the rights and liabilities of the representatives or successors in interest of the mortgagors and mortgagees respectively; and such auction-purchaser having acquired all the mortgagor's right title and interest in the property must be treated as his successor in interest: (*Sen, J.* contra.). 6 *W. R.* 228 and *A. I. R.* 1929 *All.* 12, *Dist.*; *A. I. R.* 1929 *All.* 12, *not Appr.* 20 *Mad.* 190; 31 *Mad.* 425, *Rel. on*; 36 *Mad.* 194, *Dist*,; (*Other cases referred.*) [P 289 C 1]

(b) Practice — Precedents — Decision on question actually heard is good authority—Fact that decision would have been otherwise, had certain provision of law been brought to Court's notice is immaterial.

Per *Niamatullah, J.*—The decision on the question actually heard is a good authority for the proposition enunciated therein, even if the parties or any of them did not, for reasons of their own, rely on a particular provision of law which provision, if brought to the notice of the Court might have made the decision different. [P 280 C 2]

(c) Transfer of Property Act (1882), Ss. 70 and 63—Accession — Additions by human agency whether amount to accessions depends on circumstances.

Per *Niamatullah, J.*—The word "accession" occurring in S. 70, and in the cognate S. 63 has a technical meaning. Every addition to or improvement on the mortgaged property by whomsoever made cannot be regarded as an "accession." An addition made to a mortgaged property by natural causes such as the one mentioned in Illus. (a) to S. 70, requires no discussion and can admit of no doubt. As regards additions or improvements due to human agency, it depends upon the circumstances of each case whether the addition or improvement should be regarded as accession or otherwise. [P 281 C 2]

(d) Transfer of Property Act (1882), S. 63—House standing on site or grove on land are accessions not capable of separate enjoyment as such.

Per *Sulaiman, J.*—Houses standing on a site or a grove on a land are accessions not capable of separate enjoyment and hence the mortgagor can claim the whole accession being delivered with the mortgaged property at the time of redemption : *A.I.R.* 1925 *All.* 427 and *A. I. R.* 1928 *All.* 381, *not Appr.* [P 283 C 2]

(e) Transfer of Property Act (1882), S. 70—Question of notice is not material in case under S. 70.

The question of want of notice, although material for purposes of S. 51 is of no significance so far as S. 70 is concerned. [P 286 C 2]

(f) Interpretation of Statutes—Statute prevails against equity however wholesome atter may be.

Per *Sen, J.*—A clear provision of statute has to be followed and given effect to and it cannot be displaced by a mere equitable principle however wholesome it might be. [P 291 C 1]

(g) Transfer of Property Act (1882), S. 3—(Per *Sen, J.*) **Registration of mortgage is no notice.** (*Mukerji, J.* contra.)

Per *Sen, J.* — Registration of a mortgage under the Registration Act is not per se constructiev notice of the mortgage : (*Mukerji J.*, contra) *A I.R.* 1921 *P.C.* 112 *Rel. on.* [P 293 C 1]

(h) General Clauses Act (10 of 1897), S. 3 (20)—Good faith means honesty of dealing—Auction-purchaser is not bound to search registry.

Per *Niamatullah* and *Sen, JJ.* — Good faith as defined in S. 3 (20) is equivalent to honesty of dealing and does not entail upon the auction purchaser the necessity of searching the registry before he bids at auction. [P 293 C 2]

S. N. Seth—for Appellant.

S. K. Dar—for Respondents.

Order of Reference

Mukerji, J. — This is an offshoot, as it were, of Second Appeal No. 1490 of 1926 decided by us on 8th November 1929, *Nannu Mal* v. *Ramcharan Lal* (1). It appears that in execution of a prior mortgage held by two persons Ram Charan Lal and Ganga Sahai, the mortgaged property was sold and was purchased partly by the prior mortgagees and partly by defendants 4 to 7 in the suit. There was a second mortgage in favour of Nannu Mal the plaintiff, although the deed stood benami in the name of Kundan Lal plaintiff 2. The second mortgagee was not a party to the suit of the prior mortgagee. The auction-purchasers Nos. 4 to 7 have built a small house on a part of the property purchased by them. Their contention is that either the plaintiff Nannu Mal should pay them the value of the building erected by them which value has been estimated at Rs. 200 or these defendants should be allowed to remove the materials of the building before the sale takes place.

The Court of first instance did not accede to the request of the defendants and they appealed to the lower appellate Court. There they succeeded, the learned Judge of the lower appellate Court holding that if plaintiff 1 wanted,

> "to enjoy the benefit of the enhancement in the security due to the constructions made by the appellants, he would have to pay a sum of Rs. 200 to the appellants before the chabutra with the structures thereon is put up for sale otherwise the appellants would be entitled to remove the materials without causing any detriment to the chabutra."

The plaintiff in this second appeal contends that the building erected by the auction-purchasers was in the nature of an accession to the property and it is therefore under S. 70, T. P. Act, liable to be sold as a part of the mortgaged property. In my opinion there is no answer to this contention. S. 70 has been very widely worded: it does not say by whom the accession should be made. The accession may be the result of nature or it may be effected by the mortgagor or any representative of his. So long as the accession takes place to the mortgaged property, the mortgagee is entitled to it for the purposes of security. Illus. (b) to S. 70, makes it perfectly clear to my mind that the putting up of a building on a part of the mortgaged property amounts to an accession. The mere fact that a transferee, by auction sale of the mortgagor's interest, has put up the building makes no difference at all.

The case of *Kalyan Das* v. *Jan Bibi* (2) has been cited before us as an authority for the proposition that a subsequent purchaser, who is unaware of of the existence of the prior mortgage, and who erects a building in good faith, is entitled to remove the building. To start with, in this particular case there is no material before us to show that the auction-purchasers were not aware of the fact that the registered mortgage in favour of Nannu Mal existed as a matter of fact. Beyond saying that they were transferees by auction sale in good fatih they never said that they were not aware of the fact that there was a second mortgage. It is the duty of any person dealing with property to find out from the registration office what charges there are on the property. This Court has over and over again held that registration is notice to all subsequent transferees. Therefore it was necessary for the auction-purchasers to find out, in their own interest, from the registration office before they made the purchase whether any mortgage existed on the property or not. There is no finding of fact to support a plea akin to the plea of S. 51, T. P. Act. Besides with all respect, I discover that S. 70, T. P. Act, was not pleaded before their Lordships who decided the case of *Kalyan Das*. On the facts, in my opinion this case is distinguishable from the decision quoted above. If that were not so I would have respectfully dissented from the opinion expressed in that case. But it is really not necessary in view of the fact that the pleadings do not justify the respondents in saying that they had no notice of the mortgage of Nannu Mal, or that they believed in good faith that they were absolutely entitled to the property.

For the foregoing reasons I would allow the appeal and delete from the decree of the Court below the words:

> "If plaintiff 1 wishes . . . . without causing any detriment to the chabutra."

I would award the entire costs of this appeal to the plaintiffs as against the contesting respondents Ram Chander, Shib Chander and Dal Chand. I would also allow the costs of this appeal and the costs in the lower appellate Court to the plaintiffs as against Ram Chander, Shib Chander and Dal Chand.

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(1) A. I. R. 1930 All. 485=126 I. C. 824=52 All. 331.

(2) A. I. R. 1929 All. 12=112 I. C. 765=51 All. 454.

Before I leave this judgment it is necessary to point out a matter which has been taken by way of cross-objection by the three defendants, Ram Chander, Shib Chander and Dal Chand. They say that in constructing the building mentioned above, they have rested a beam of the new building on the wall of another building belonging to them. The object of the cross-objection was to obtain permission of the Court to remove the beam from the wall. This was a point which was mentioned in the written statement of the defendants, but no notice was taken of it by any of the Courts below. In my opinion, that is a matter which cannot be decided in this case. If defendants 2 to 7 pay up the plaintiffs' mortgage money no question of removing the beam will ever arise. If they do not pay, and if the plaintiff, after paying the prior mortgage money, brings the property to sale, it will be a question between the auction-purchaser and the defendants Ram Chander, Shib Chander and Dal Chand whether the beam will be allowed to rest on the wall of the defendants. It may be that the auction-purchaser will find some means of supporting the wall and would find it unnecessary to have the beam rest on the defendants' wall. All that the defendants are anxious about is that their claim should not be treated as res judicata in subsequent proceedings. As nobody has decided the point, and as I would leave the point undecided, no fear of res judicata will arise.

Niamatullah, J.—I regret I am not able to endorse the conclusion arrived at by my learned colleague. The facts are stated in full in his judgment; but I would mention such of them as are necessary to elucidate the reasons on which I base my own views.

Ram Charan Lal, defendant 2, was a prior mortgagee under a deed, dated 1st April 1906, executed by Bihari, defendant 1. Nannu Mal, plaintiff-appellant, is a subsequent mortgagee from the same person under a deed, dated 12th November 1913. The prior mortgagee obtained a decree for sale on foot of his own mortgage without impleading the subsequent mortgagee (plaintiff-appellant). On sale of the mortgaged property in execution of that decree a small part of it was purchased by Ram Charan and others, contesting respondents in this Court. It consisted of a chabutra adjoining their house. After the auction sale the contesting respondents raised a superstructure on the chabutra allowing the beams to rest on the wall of their own house. The plaintiff-appellant (the subsequent mortgagee) brought the suit, out of which the present appeal has arisen, for sale of the mortgaged property. It is no longer in dispute that they are entitled to treat the prior mortgage as a subsisting one, and the sale, held in execution of the decree passed on foot thereof, as a nullity, so far as their interests may be affected thereby. The only defence, which it is necessary to mention, is that the defendants-respondents (auction-purchasers) claim the right to remove the materials, leaving the chabutra as it was before the auction purchase, unless it is desired by the plaintiff-appellant or anyone who purchases the property in execution of decree for sale on foot of his mortgage, to pay the value of such materials which has been found by the lower appellate Court to be Rs. 200, a fact which is not disputed by the parties. The plaintiff-appellant, on the other hand, insists on the superstructure being treated as accession to the mortgaged property and therefore part of the security for the money due under his mortgage deed so as to be liable to be sold with the site for satisfaction of his claim. The lower appellate Court upheld the defendants' plea, directing the plaintiff-appellant to pay the sum of Rs. 200 to the contesting respondents in case they desired to sell the chabutra with the existing construction, otherwise the right of the contesting respondents "to remove the material without causing any detriment to the chabutra" is reserved to them.

The lower appellate Court has based its view on S. 63, T. P. Act, treating the contesting respondents as mortgagees in possession. That section cannot in terms apply to the facts of the present case. This is not a case "where mortgaged property in possession of the mortgagee had, during the continuance of the mortgage", received an accession. The contesting respondents may in one sense be considered to represent the prior mortgagee on the one hand and the mortgagor on the other by virtue of their auction-purchase, assuming, of course, that the proceedings on foot of the prior mortgage can be recognized against the plaintiff-appellant; but, as already stated, the prior simple mortgage has to be assumed as a subsisting mortgage, and the auction sale following the decree passed on foot thereof has to be ignored. Besides, S. 63 contemplates a case of accession to the mortgage property when the mortgagee, as such, was in possession. I think for these reasons it is not correct to invoke the aid of S. 63, T. P. Act, in affording relief to the contesting respondents.

While I do not accept the reasons on which the decree passed by the lower appellate Court proceeds, I think the conclusion reached by it is correct. The defendants' case on the face of it is so reasonable and in accord with general law that it must be allowed to prevail unless there is something positively to the contrary in any rule of law applicable to the circumstances of this case. As was laid down in a somewhat old case, which however has stood the test of time, and has never been departed from, that

> "according to the usages and the customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil";

and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess: per Sir Barnes Peacock in *Thakoor Chunder Poramanik* v. *Ramdhone Bhuttacharjee* (3). The same doctrine was enunciated in *Mill* v. *Hill* (4). These cases were followed by a Division Bench of this Court recently in *Kalyan Das* v. *Jan Bibi* (2). My learned brother thinks that S. 70, T. P. Act, was not brought to the notice of the learned Judge who decided that case and that the result would have been different if that section had not been overlooked. A case should be treated as an authority for what it decides; and if the parties, or any of them, did not, for reasons of their own, rely on S. 70, T. P. Act, the decision on the question actually heard is a good authority for the proposition enunciated therein. Besides, as will appear from the passage quoted by me at length, the view accepted in that case is in consonance with justice and common sense; and I have no hesitation in accepting it for myself.

I do not think that the action of the contesting respondents in making the constructions was otherwise than in good faith and in the belief that they had the right to do so. The expression "good faith" in this connexion is to be understood not in any technical sense but as denoting honest intention on the part of the person in possession making the construction in question. Even where the words occur in a statute they have to be understood as defined in the General Clauses Act, S. 3 (20), under which

> "a thing shall be deemed to be done in good faith where it is, in fact, done honestly whether it is done negligently or not."

The contesting respondents purchased the chabutra in question at a public sale held in execution of a decree passed by a Court of justice at whose instance the sale took place. It is true they did not search the registration office to find other incumbrances; but an omission to do so cannot make their action subsequent to the purchase otherwise than honest. The plaintiff-appellant did not take exception to any construction being made or warned them against possible consequences due to the existence of the subsequent mortgage in his own favour. Under these circumstances I hold that the action of the contesting respondents in raising the superstructure in question in this case was bona fide within the meaning of the rule already referred to.

The contesting respondents cannot be said to be trespassers during the time they were in possession of the chabutra which they purchased at the auction sale held in execution of the decree passed on foot of the prior mortgage.

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(3) 6 W. R. 228.

(4) [1851] 3 H. L. C. 828.

Their title may not altogether be indefeasible; but their possession was at least under a "bona fide claim of title." Unless therefore the plaintiff-appellant can invoke the aid of some rule of law to the contrary, I am clearly of opinion that the defendants-respondents are entitled to remove the materials if the plaintiff-appellant is not ready and willing to pay for them.

Apart from what I have said in respect of the defendants' right, it seems to me that we are, in the first instance, concerned with the plaintiff's right, if any, to the constructions made on the side which had been hypothecated to him. He desires to treat it as part of his security and to have it sold for satisfaction of his claim arising out of the mortgage in his favour. He must therefore make out his right to do so. It is not sufficient for him merely to attack the defendants' right. If he fails to establish his own present right to the superstructure in dispute in the present case, no decree for sale thereof can be passed, regardless of the question whether the defendants have an indefeasible right to it. Assuming, for the sake of argument, that the defendants were not justified in making the constructions, we cannot ignore the fact that they are in actual possession of the site which they can be deprived of only when it is sold in execution of the decree in favour of the plaintiff-appellant, who is himself a simple mortgagee. Till then it is open to them to remove their materials, unless the plaintiff can establish his right to object to the defendants doing so. Such right will depend upon the validity or otherwise of the plaintiff's claim to the superstructure on the ground that it is an accession to what had been originally mortgaged. The first question therefore which falls to be considered is whether it should be regarded as an accession, in which case, of course, the defendants cannot remove it any more than they could have done so if the construction had been made by the mortgagor and had existed at the date of the mortgage. Even if we assign the worst position to the defendants in this matter, and treat them as trespassers, the plaintiff's case, if he fails to make out a case of accession, cannot improve.

Reliance is placed on behalf of the plaintiff-appellant on the provisions of S. 70, T. P. Act, and it is contended that the superstructure in question in this case must be regarded as an accession to the mortgaged property to which the security arising from the mortgage in his favour would fasten. The word "accession" occurring in that section, and in the cognate S. 63, T. P. Act, has a technical meaning. Every addition to or improvement on the mortgaged property by whomsoever made, cannot be regarded as an "accession." An addition made to a mortgaged property by natural causes, such as the one mentioned in Illus. (a), S. 70, requires no discussion and can admit of no doubt. As regards additions or improvements due to human agency it depends upon the circumstances of each case whether the addition or improvement should be regarded as accession or otherwise. Illus. (b) to that section, which is relied on before us, refers to the case of a mortgagor building a house on the plot mortgaged. There can be no doubt that the house, as laid down in the illustration, is an accession to the mortgaged property. It has been argued that the contesting respondents being transferees of the rights of the mortgagor which they purchased at the auction sale are in the same position as the mortgagor himself as regards additions to the mortgaged property made by them. In other words, having purchased the equity of redemption they became the mortgagors with reference to the mortgaged property. The argument is, to my mind, based on an obvious fallacy.

The plaintiff-appellant has made it the very foundation of his case that the prior mortgage is a subsisting mortgage and that the prior mortgagee's suit on foot of that mortgage, the decree passed therein, and the sale in execution of such decree, should be treated as a nullity against the plaintiff-appellant. In fact he insists on the relations subsisting before the suit on the prior mortgage to be recognized as subsisting. He treats the prior mortgage as an outstanding charge and the auction sale as conveying no title so far as he is concerned. He is entitled to treat accomplished facts as fiction, but must maintain that fiction throughout. He cannot be allowed to approbate and reapprobate by first assuming that the prior mortgage still subsists, and in the next breath asserting that a sale took place in execution of a decree on foot of that mortgage under which the contesting respondents became transferees of the mortgagor and are therefore themselves the mortgagors. In deciding this case we must assume, as the plaintiff-appellant is entitled to ask us to assume, that nothing has taken place in enforcement of the prior mortgage. On that supposition we cannot assign the position of a mortgagor or his representative-in-interest to the contesting respondents. For these reasons, I hold that the constructions made by the latter are no more an "accession" to the mortgaged property than they would be if made by a third person in temporary possession honestly believing to be entitled to make them. This being so, S. 70, T. P. Act, does not apply to the circumstances of this case, and the respondents' right to the materials, according to the general law explained before, is unaffected by any equity in favour of the plaintiff-appellant, who is in no way damnified by the action of the contesting respondents. According to the decree passed by the lower appellate Court, the mortgaged property, namely the chabutra, is to be restored exactly as it was before the construction made by the respondents, unless, of course, the plaintiff-appellant chooses to compensate them, as directed by the lower appellate Court. In the view of the case that I have taken, I would uphold the decree of the lower appellate Court and dismiss the appeal with costs.

By the Court

As there is a difference of opinion among the members constituting this Bench, we refer the following point of law for decision to a Bench of three Judges, having regard to the importance of the question:

> "Is an auction-purchaser at a sale, held in execution of a decree passed on foot of a prior mortgage to which the second mortgagee was no party, entitled to remove the materials of the building erected by him on a site, included in the mortgaged property purchased by him, or is the building liable to be sold, as an accession to the mortgaged property for satisfaction of the second mortgage?"

The record will be laid before the Hon'ble the Chief Justice for orders.

Opinion

Sulaiman, J.— The facts of this case may be briefly stated as follows:

The owner of certain houses and sites including an open piece of ground in the form of a platform (chabutra) made a simple mortgage of them in favour of Ram Charan in 1906, and then again mortgaged the same properties to Behari in 1913. The prior mortgagee sued on his mortgage and, without impleading the second mortgagee, obtained a decree for sale. He put it in execution and purchased part of the properties himself, and the platform in question was purchased by the present defendants 5, 6 and 7. The purchasers of the platform put up a construction in the form of a building which has been valued by the Courts below at Rs. 200. I take it that it is not a structure of a temporary nature. The present suit was instituted by the second mortgagee. He impleaded the prior mortgagee as well as the purchasers of the platform. These latter defendants pleaded inter alia that the property could not be put up for sale without Rs. 200 being paid as compensation.

The first Court held that the construction on the platform had become part of the security and could be sold, and the defendants could not claim the compensation. The lower appellate Court has held that the position of the defendants is that of a mortgagee in possession, and they can claim compensation under S. 63, T. P. Act. In second appeal the learned Judges, who have referred the case to us, differed in their opinions. They both were inclined to the view that S. 63 does not apply to the facts of the case. Mukerji, J., however considered that the construction was an accession to the mortgaged property and could be sold as a part of the security without payment of its value. Niamatullah, J., thought that S. 70 was not applicable inasmuch as the defendants were on the same footing as a third party who is not bound; the learned Judge applied an equitable principle analogous to that contained in S. 51 and held that the defendants could remove the materials unless the plaintiff chooses to compensate them.

It may also be noted that the two learned Judges were not agreed as to whether the auction-purchasers should or should not be deemed to have constructive notice of the second mortgage. Mukerji, J., thought that it was their duty to find out from the registration office what charges there were on the property before they made the purchase and that registration was notice to all subsequent transferees. Niamatullah, J., considered that an omission to search the registration office to find out incumbrances did not make the defendant's action subsequent to the purchase otherwise than honest.

It cannot be disputed that if S. 70 were in terms applicable to the facts of the present case, no general equitable doctrine would override that statutory provision. But before I consider the phraseology of that section it would be convenient to dispose of a few points which have been urged at the Bar. Before the Transfer of Property Act, the rule was generally accepted that a building erected on any person's land under a bona fide belief of title could either be removed or compensation for it claimed: per Sir Barnes Peacock in *Thakoor Chunder Poramanick* v. *Ramdhone Buttacharjee* (3). This general doctrine has been restated by Sen and Weir, JJ., in *Kalyan Das* v. *Jan Bibi* (2).

This doctrine, in a restricted form, is now embodied in S. 51, T. P. Act, under which a transferee making an improvement, and believing in good faith that he is absolutely entitled thereto when evicted therefrom, has a right to claim the value of the improvement as compensation from the person causing his eviction. This section does not in terms apply to the present case because, in view of the provisions of S. 2, sub-S. (d), Ch. 2 in which the section occurs, it is not applicable to a transfer in execution of a decree. It is also clear that the present claim is for a decree for sale of the property and not, at least in the present case, for the eviction of the defendant, it is not possible to anticipate what will ultimately happen, i. e. whether the defendants will redeem the plaintiff, or the decree will be satisfied by the sale of the property other than the platform and the construction thereon, or whether this last item of the mortgaged property will also be sold and ultimately the auction-purchaser will dispossess the present defendants. I therefore doubt if the stage for considering any claim for compensation for the improvement, either under S. 51 or under any equitable principle analogous to it has yet arisen.

Section 63 obviously applies to the case where the accession takes place during the continuance of the mortgage when the mortgaged property is in the possession of the mortgagee. The accession goes to the mortgagor with the property. In case the accession has been acquired at the expense of the mortgagee, then if it is capable of a separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay the expenses of acquiring it; but if such separate possession or enjoyment is not possible the accession must be delivered with the property. If however the accession was necessary to preserve the property from destruction, forfeiture or sale, or was made with the assent of the mortgagor, he must pay its proper costs.

It has been held in several cases that a house standing on a site or a grove on a land is an accession capable of separate possession or enjoyment. These cases are referred to in the judgment reported in *Parmanand Pandit* v. *Mata Din Rai* (5). The same view appears to have been reaffirmed in the case of *Gopi Lal* v. *Abdul Hamid* (6), but in *Parmanand Pandit* v. *Mata Din Rai* (5) I expressed a contrary view. It seems to me unnecessary to discuss this matter at length over again. I would only add that I am still of the opinion that, when a house or a grove has become an accession to a land, the separate possession or enjoyment of the house or the grove means the possession or enjoyment of them as such, that is of the possession and enjoyment of the house as a residential building or of the grove as a garden yielding annual produce. The accession is a good deal more than the mere building materials in the one case, or the cut timber in the other. A building or a grove is an accession to the land not capable of possession or enjoyment as a building or grove separate from the land itself. It therefore follows that the mortgagor can insist on the whole accession being delivered with the mortgaged property at the time of the redemption; and the mortgagee cannot be allowed to say that he would separately enjoy the building materials or the cut timber. The right to take the accession with the mortgaged lands vests in the mortgagor and the mortgagee has no option to refuse to deliver up the accessions. He can claim compensation only in cases mentioned in the section.

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(5) A. I. R. 1925 All. 427=87 I. C. 477=47 All. 582.

(6) A. I. R. 1928 All. 381.

In the present case both the learned Judges were inclined to think that S. 63 was inapplicable. There is however this much to be said that the defendants having purchased the property in execution of a prior mortgage decree may in one sense be said to have stepped into the shoes of the mortgagee and therefore entitled to retain possession of the same until their money has been paid. A purchase at auction in execution of a prior mortgage decree, to which a subsequent mortgagee is not a party does not confer on the purchaser any right to enforce the mortgage by a suit against the subsequent mortgagee, not impleaded. It may give the former the right to redeem the latter. But where the purchaser has succeeded in obtaining actual possession, Courts in India have allowed to him the equitable right of holding up the discharge of the prior mortgage as a shield for purposes of defence. S. 74, T. P. Act, conferred the right of subrogation on subsequent mortgagees, but the equitable principle underlying that section has been applied to all subsequent transferees, on the strength of the rule of equity laid down by their Lordships of the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukh Das* (7) at pp. 1045-46 But a shield is purely a weapon of defence and not of attack.

The defendant's possession might therefore be analogous to that of a mortgagee in possession. If there were nothing else, the principle underlying S. 63 might have been applicable because the second mortgagee, when suing has been ordered to redeem them before putting up the property for sale. The section however does not apply because in my opinion the house is not capable of separate possession or enjoyment as the construction was neither made with the mortgagor's assent nor was it necessary to preserve the land from destruction, forfeiture or sale. Therefore the defendants can neither remove the materials nor claim compensation under S. 63. They must deliver the platform together with the accession.

The real difficulty in the way of the appellant is the provision contained in S. 70. It is a curious fact that, although there have been a large number of cases similar to the one before us, in none of them S. 70 was referred to or discussed. Even in *Kalyan Das* v. *Jan Bibi* (2) the counsel did not refer to the provision of this section.

Section 70 is in the following terms:

" If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession. "

Illustration (a) to the section shows that it applies to a natural accession, e. g., by alluvion. Illus. (b) shows that the erection of a house on a mortgaged plot of land is an accession within the meaning of the section. The illustration however is only of an erection made by the mortgagor himself. This section, along with a few preceding sections is under the heading " Rights and Liablities of Mortgagees. " It undoubtedly regulates the rights of the mortgagor and the mortgagee inter se and of course applies to their representatives. The words " in the absence of a contract to the contrary " also suggest that the parties who are bound by the contractual relations of the mortgagor and mortgagee are contemplated by the section. Similarly the words " for the purposes of the security " indicate that the claim to the accession is to be considered when the question of claiming the security arises. The mortgage security can be enforced against the mortgagor and his representatives only, and not against independent third parties. In view of these circumstances, I am clearly of opinion that the provisions of S. 70 apply as between the mortgagor and mortgagee or their representatives. Third parties who have nothing to do with the security and between whom and the mortgagor and the mortgagee there is no privity of contract, are not affected by this provision of the law. I therefore do not think that against third parties, who are perfect strangers, this section could be applied.

If a stranger under a bona fide but mistaken belief that he has an absolute title to the land puts up a building upon it he would be entitled to remove the materials of the building, though he may be liable to pay damages for wrongful occupation. I do not think that the mere fact that he has under a mistake put up construction or fixtures on another's land would make them, by the mere accident of their attachment to the soil, the property of the owner of the soil. This rule is not in harmony with the absolute rule of English Common law, but was held to be a general rule according to the usages and customs of the country in the Full Bench case of *Thakur Chunder* v. *Ramdhone* (3). That rule should stand as long as it is not superseded by any statute. In the same manner, I do not think that the position of such a stranger acting bona fide and in the honest belief of title is made any the worse if it so happens that the land on which he builds had been previously mortgaged to another person. This circumstance would not destroy his right to remove the materials which he has put on the land under a mistake, and the building so put up by him would not automatically become a part of the security under the mortgage of which he had no knowledge. I would therefore be inclined to hold in such a case that the mortgagee cannot claim this building as a part of his security against this stranger third party; although if the third party chooses to leave the construction on the spot the mortgagee could claim it as an accession against the mortgagor.

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(7) [1884] 10 Cal. 1035=11 I. A. 126=4 Sar. 543 (P. C.).

Although I think that S. 70 is applicable as between the mortgagor and the mortgagee only and not as against third parties, I see no reason for restricting the scope of the section to accesssions made by the mortgagor personally. The representatives of the mortgagee and the mortgagor would be governed equally by the rule, it being immaterial whether they are merely heirs or subsequent transferees. If it had been possible to do so, I would have been inclined to interpret Ss. 63 and 70 in a way to protect representatives of the original parties, who have acted in good faith and without notice of the mortgage, by saying that a building put on land, not known to be already mortgaged, is not intended to be an accession to the mortgaged property. But the expressions "the property receiving any accession" and "any accession is made to the property" do not necessarily involve any intention on the part of the person making it. Full knowledge of the mortgage, at the time of making an accession by the mortgagor or mortgagee does not seem to be necessary. Possibly the legislature intended that the representatives of the parties to the mortgage ought to know the existence of the mortgage and that want of notice in their case should be no excuse. The fact that the section is applicable even to natural accessions shows conclusively that is not confined to accessions made by the mortgagors personally nor to the existence of actual notice of the mortgage. No matter how and under what circumstances the accession has been received by the property or made to it, it is an accession to the mortgaged property, and the mortgagor cannot claim it without redeeming the property nor can he resist the mortgagee's claim to sell the accession along with the mortgaged property. At the same time, when the time for redemption comes the mortgagor can insist on its delivery along with the mortgaged property if it is not capable of separate possession or enjoyment. Of course, where only a temporary structure is put up without any intention that it should be a permanent fixture to the land, it would be difficult to call it as an accession to the mortgaged property within the meaning of either S. 63 or S. 70.

The contesting defendant purchased this platform in execution of a decree on a previous mortgage obtained without impleading the subsequent mortgagee. It seems to me that the auction-purchasers are representatives of both the prior mortgagee and the mortgagor. As representing the prior mortgagee, they are entitled to insist that the subsequent mortgagee should redeem them by paying the previous debt, or that at any rate the property should be sold subject to their lien to remain in possession until they are paid by the future purchaser.

They have also undoubtedly acquired the interest of the mortgagor in the property. No doubt the decree on the previous mortgage is not binding on the subsequent mortgagees, who had not been impleaded, to this extent that their rights under their mortgage have not been extinguished, as would have been the case if they had been impleaded and had not redeemed the prior mortgagee. But it is not correct to say that the previous proceedings are totally a nullity. As between the prior mortgagee and the subsequent mortgagees the previous proceedings are ineffective, but that does not imply that the mortgagor's interests could not have been sold by the prior mortgagee behind the back of the subsequent mortgagees; but subject to their subsequent mortgage. The mortgagor's interest in the property validly passed to the auction-purchasers no matter whether the subsequent mortgagees were parties to the suit or not. The auction-purchasers cannot be in a worse position than a private transferee from the mortgagor in this sense that the defendants are undoubtedly the representatives of the mortgagor qua the property which is now in suit. After the payment of the amount of the previous mortgage decree the subsequent mortgagees can enforce their own mortgage against them, treating them as the representatives of their mortgagor. The construction made by them after the auction purchaser would be in the capacity of either prior mortgagee's representatives or representatives of the mortgagor. I have already given reasons for holding that they cannot remove the building in their capacity as mortgagees under S. 63. The subsequent mortgagees are entitled to treat the accession as a part of the security under S. 70, treating the defendants as representatives of their mortgagor.

In the present case the two learned Judges differed as to whether the auction-purchasers may be deemed to have constructive notice. Apparently the recent pronouncement of their Lordships of the Privy Council in *Tilakdhari Lal* v. *Khedan Lal* (8) was not brought to their notice. As an auction-purchaser gets only the rights and interests of the judgment-debtor as existing at the time of the sale, his purchase is subject to all incumbrances even though not notified. But that is not the same thing as imputing to him knowledge of those incumbrances. There have been cases in this Court where a subsequent transferee by private treaty has been held to have a constructive notice of a previous incumbrance. The view taken in Calcutta was different. Their Lordships of the Privy Council seem to have ruled that registration by itself is not a general constructive notice to all subsequent transferees. Whether it is or is not a notice in any particular case is a question of fact dependent on its circumstances. It is however not necessary to enquire into this question as, in my opinion, the question of want of notice, although material for purposes of S. 51, is of no significance so far as S. 70 is concerned.

I further think that the provisions of S. 70 are in no way in conflict with the principle underlying S. 51. Under S. 70 the accession becomes a part of the security and therefore cannot be appropriated by the mortgagor or his representatives. It can be sold along with the mortgaged property and will pass to the purchaser, S. 51 does not entitle a person who has made improvements on another's land in good faith to retain the improvements or the accessions or to remove the building materials. Such constructions are deemed to vest in the owner of the land, but he is given a right to claim their value.

My conclusion is that the building being an accession has become a part of the security and cannot be removed by the defendants and can be put up for sale by the plaintiffs. My answer to the first part of the question is in the negative, and to the second part in the affirmative.

King, J.—The following question has been referred for our decision:

> "Is an auction-purchaser at a sale, held in execution of a decree passed on foot of a prior mortgage, to which the second mortgagee was no party, entitled to remove the materials of the building erected by him on a site, included in the mortgaged property purchased by him, or is the building liable to be sold as an accession to the mortgaged property for satisfaction of the second mortgage ?"

The lower appellate Court took the view that the auction-purchaser, at the sale held in execution of the decree passed upon the prior mortgage, was in the position of the prior mortgagee and that he should be regarded as the mortgagee in possession. On this view the Court held that S. 63, T. P. Act, was applicable and the auction-purchaser was entitled to claim compensation for the building erected by him on the mortgaged property or in the alternative to remove the materials. He therefore amended the decree of the trial Court by ordering that the puisne mortgagee, if he wished to enjoy the benefit of the construction made by the auction-purchaser, would have to pay a sum of Rs. 200 to the auction-purchaser before the chabutra with the structures thereon is put up for sale, otherwise the auction-purchaser would be entitled to remove the materials with out causing any detriment to the chabutra.

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(8) A.I.R. 1921 P.C. 112=57 I.C. 465=47 I.A. 239=48 Cal. 1 (P.C.).

In my opinion S. 63 has no application to the facts of this case. That section contemplates a case where a mortgaged property in the possession of the mortgagee receives an accession and provides that the mortgagor upon redemption shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession. Special rules are laid down in the section regarding accessions acquired at the expense of the mortgagee and capable of separate possession and enjoyment without detriment to the principal property.

Although the auction-purchaser is in one sense standing in the shoes of the prior mortgagee, and can set up the prior mortgage as a shield, nevertheless it is clear in this case that the auction-purchaser did not enter into possession of the property as representative of the prior mortgagee. The auction-purchaser acquired the right, title and interest of the mortgagor and entered into possession as transferee or representative of the mortgagor, since the prior mortgagee never was in possession. I think it must be held therefore that the auction-purchaser was in possession of the property as representative of the mortgagor, and not as representative of the mortgagee. It is indeed the auction-purchaser's own case that he made the constructions upon the chabutra believing himself to be the absolute owner. He obviously did not make the constructions in the capacity of mortgagee. In the view I take of the case S. 63 has no application either in terms or in principle. If it were necessary to decide whether the constructions made by the auction-purchaser upon the chabutra are capable of separate possession or enjoyment without detriment to the principal property, I would answer that question in the negative. Both the learned Judges who made this reference were of opinion that S. 63 did not apply and I agree with them.

It has been suggested that the provisions of S. 51 of the Act will apply. That section contemplates a case where a bona fide transferee of property believing himself absolutely entitled thereto makes improvements on the property and is subsequently evicted by a person having a better title. It is clear that S. 51 cannot in terms apply to the case of an auction-purchaser in view of S. 2 (d) which shows that S. 51 does not apply to a transfer in execution of a decree of a Court. It has been suggested however that although S. 51 does not apply in terms, the equitable principle underlying it may be applied to the facts of this case. In my opinion even the equitable principle of that section is not applicable. The auction-purchaser, when he made the constructions in question, was in fact the full owner of the property. There was no defect in his title. The sale proceedings under which he acquired his title have never been challenged or set aside. He may not have been aware that the property was subject to a second mortgage but the existence of the second mortgage did not constitute any flaw or defect in his title. I very much doubt whether the expression

> "believing in good faith that he is absolutely entitled thereto"

means anything more than believing that he is what is usually termed in India a "full proprietor" with a heritable and absolutely transferable estate as opposed, for example, to a person holding a life estate or a rent free grantee whose grant is liable to resumption. I do not think the phrase means that the person must believe that the property is free from all encumbrances. Apart from this, there is no question of the auction-purchaser being evicted by a person having a better title. The second mortgagee cannot be said to have a "better title" than the auction-purchaser. Moreover there is at present no question of evicting the auction-purchaser. The second mortgagee is only bringing a suit for sale of the mortgaged property and it remains to be seen whether the auction-purchaser, or the owner of the other portion of the mortgaged property, will redeem the second mortgage, or whether the second mortgagee will redeem the prior mortgage and so bring the property to sale. If the property is brought to sale it remains to be seen whether the mortgage decree will be satisfied by the sale of some other portion of the mortgaged property. If, as a matter of fact, the auction purchaser is dispossessed then it will be time to see whether there is any possibility of his claiming the value of the improvement from the person who actually evicts him from any other person. In the circumstances of this case I think even the principle underlying S. 51 has no application.

The most important question is whether the case is not governed by the provisions of S. 70 which reads as follows :

> "If after the date of a mortgage any accession is made to the mortgaged property the mortgagee, in the absence of a contract to the contrary, shall for the purposes of the security be entitled to such accession."

Illustration (b) :

> "*A* mortgages a certain plot of building land to *B* and afterwards erects a house on the plot. For the purposes of his security, *B* is entitled to the house as well as the plot."

In the present case the house was built by the auction-purchaser after the date of the second mortgage. Illus. (b) shows that a house built upon mortgaged property by the mortgagor must be held to be an accession to the mortgaged property. This section is intended to lay down the mutual rights and liabilities of the mortgagor and mortgagee inter se, but I think it is clear that it does not regulate only the rights and liabilities of mortgagors and mortgagees personally, but must regulate the rights and liabilities of the representatives or successors in interest of the mortgagors and mortgagees respectively.

Suppose the mortgagor dies and after his death his son and heir builds a house upon the mortgaged plot without being aware of the existence of the mortgage. In such a case it appears to me that S. 70 would be applicable and the mortgagee would be entitled to the house for the purpose of his security. In other words, the mortgagee would be entitled to sell the house along with the land for the purpose of recovering his mortgage money. In my opinion no question of notice or knowledge of the mortgage arises. There is nothing in S. 70 to suggest that it is only applicable to cases where an accession is made with notice of the mortgage. Suppose again the mortgagor sells the property to a person who buys it believing it to be free from encumbrances and then proceeds to build a house upon it. In such a case also I think S. 70 would be applicable and the question of the buyer's knowledge of the mortgage would be immaterial.

I think the auction-purchaser is in just the same position as the mortgagor's son or transferee in the cases which I have put, by way of example, above. The auction-purchaser is in fact the successor in interest of the mortgagor having acquired all the mortgagor's right, title and interest in the property. In the present case the auction-purchaser acquired not merely the right of ownership but the right of possession which had previously vested in the mortgagor. It appears to me that the auction-purchaser is clearly the representative of the mortgagor and if he builds a house upon the property which he purchases, then that house is an accession to the mortgaged property and the rule laid down in S. 70 is applicable. This was the view taken by Mukerji, J., with whom I agree. Niamatullah, J., took the view that S. 70 did not apply. He agreed that S. 70 would apply to a house built upon mortgaged land by a representative of the mortgagor, but he held that the auction-purchaser in this case should not be treated as the representative of the mortgagor. His reasoning was that the second mortgagee

> "made it the very foundation of his case that the prior mortgage is a subsisting mortgage, and that the prior mortgagee's suit on foot of that mortgage, the decree passed therein and the sale in execution of such decree should be treated as a nullity as against the plaintiff-appellant (second mortgagee) . . . He treats the prior mortgage as an outstanding charge and the auction sale as conveying no title so far as he is concerned. He is entitled to treat the accomplished facts as fiction, but must maintain that fiction throughout."

I think it is going rather too far to say that the plaintiff (second mortgagee) treats the decree passed on the prior mortgage and the sale in execution of such decree as a mere nullity and as conveying no title to the auction-purchaser. The plaintiff's case is that as he was no party to the prior mortgagee's suit therefore the decree and subsequent proceedings upon the basis of that decree should not affect his rights under the second mortgage. His rights were to sue the mortgagor for sale of the property, subject to the first mortgage, or in the alternative to redeem the first mortgage and then sue the mortgagor for sale on both the mortgages. The plaintiff claims that he has not lost either of those rights merely because a decree has been passed behind his back in the prior mortgagee's suit and the mortgaged property has been sold in execution of that decree. The plaintiff does not treat all these proceedings as a nullity, but claims to have the same right as against the auction-purchaser as he would have had against the original mortgagor and the prior mortgagee. If the plaintiff had attempted to treat the prior mortgage decree and the sale held in execution thereof as mere nullities he might have ignored the auction-purchaser altogether and not even have made him a party to the suit. I think the plaintiff could not, and did not attempt to, ignore the existing facts in such a thorough-going manner. The plaintiff does not seriously challenge the auction-purchaser's title:

("he expressly describes the latter in para. 6 of the plaint as a subsequent transferee,)"

but seeks the same remedy against the mortgaged property in the hands of the auction-purchaser as he would have sought against the property in the hands of the original mortgagor. In my view the contention that the auction-purchaser is the representative of the mortgagor is unanswerable, and as the auction-purchaser has made the building upon the mortgaged land as representative of the mortgagor it follows that the building must be held to be an accession and the provisions of S. 70 will apply.

I think it unnecessary to consider what the position would be if the building had been constructed by some person who did not derive title from the mortgagor. No such question has been referred to us nor does it arise from the facts and I think it is unnecessary to express any opinion on such a hypothetical question. The view which I take is supported by the decision of the Madras High Court in *Rangayya Chettiar* v. *Parthasarathi Naickar* (9). The facts of that case were very similar and it was held that the auction-purchaser was not entitled to any allowance for improvements made by him upon the mortgaged property. The Court held that the auction-purchaser was in no other position than the mortgagor himself who may choose to spend money on his property. That ruling was followed in a later ruling of the same High Court in the case of *Venkata Ramana Iyer* v. *Gompertz* (10). The ruling in *Moithensa Routhan* v. *Apsa Bin* (11) is distinguishable. That was a case of an auction-purchaser who was evicted from the property owing to some defect or irregularity in the proceedings leading up to the sale. He had made improvements upon the property with an honest belief in the validity of his title. It was found that although S. 51 did not in terms apply to the case of an auction-purchaser nevertheless the principle underlying it was applicable. In the case before us there is no question of the auction-purchaser being evicted on the ground of a defective title. That case was followed in *A.I.R.* 1926 *Nagpur* 160, which may be distinguished on similar grounds.

The only case which appears to me to support the auction-purchaser's claim for compensation for the improvements is the case of *Kalyan Das* v. *Jan Bili* (2). The facts were very similar and it must be admitted that this decision does support the auction-purchaser's contention. That decision, however, was based upon equitable principles laid down in certain rulings, and the question whether the case was not governed by S. 70, T. P. Act, was not even discussed. For that reason this ruling is not of much help to us since, if S. 70 is applicable then it is undeniable that the Courts are bound to give effect to it and are not entitled to base their decision upon any equitable principle however just or admirable it may be. In my view it is impossible to escape the conclusion that S. 70 does apply, and I would answer the question referred to us by holding that the building is liable to be sold as an accession to the mortgaged property for the satisfaction of the second mortgage.

Sen, J.—One Behari, who owned some immovable property, executed a simple mortgage of this property in favour of Babu Ram Charan Lal and Ganga Sahai under a registered instrument, dated 1st April 1906. He subsequently mortgaged the same property to Kundan Lal, plaintiff on 12th November 1913. The prior mortgagees brought a suit for enforcement of the mortgage without impleading the puisne mortgagee. They obtained a decree and in execution thereof, the property hypothecated was sold and was purchased partly by the mortgagees and partly by defendants 4 to 7, namely Babu Ram, Babu Ram Chander, Shib Chandar and Dal Chand. The property so purchased consisted of a chabutra adjoining the house of the auction-purchasers. The latter subsequently raised a superstructure on the chabutra, the beams of which they allowed to rest on the wall of their own houses. The suit, which has given rise to the present appeal, was brought by the puisne mortgagee who sought to enforce the mortgage dated 12th November 1913 by sale of the property originally mortgaged together with the super structure. The value of the superstructure has been found by the lower appellate Court to be Rs. 200.

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(9) [1897] 20 Mad. 120.
(10) [1908] 31 Mad. 425=18 M. L. J. 298.
(11) [1911] 36 Mad. 194=12 I. C. 444.

The defendant auction-purchasers contended that the plaintiff was not entitled to sell the houses put up on the chabutra without paying the value of the materials and that the defendants were, in any case, entitled to remove the materials and leave this chabutra in status quo ante. The question in issue between the parties was whether the superstructure raised could be treated as an enlargement of the mortgaged security.

The Court of first instance dealt with this part of the case under issue 8 but its findings are not free from obscurity. The lower appellate Court was of opinion that S. 63, T. P. Act was applicable:

> "The improvements made were not necessary for the preservation of the property and hence the appellants cannot compel the plaintiffs to pay the costs of the improvements. But the improvements are of a lasting nature and they have clearly enhanced the selling value of the property. The plaintiffs cannot get the benefit of the improvements without paying for the outlay. In any case the materials can easily be removed without detriment to the property and hence if the plaintiffs do not like to get the benefit of the improvements, the appellants must be allowed to remove the materials."

On appeal by the plaintiffs to this Court, the Bench hearing the appeal was clearly of opinion that S. 63, T. P. Act, did not apply to the facts of this case. There was however a difference of opinion as to the applicability of S. 70, T. P. Act. Mukerji, J., held that the construction in controversy was "an accession" to the mortgaged property within the meaning of S. 70, T. P. Act, and as such it was liable to be sold as part of the mortgage security without payment of its value. Niamatullah, J., held that the position of the auction-purchasers was not the same as, or even analogous to, that of the mortgagor; that S. 70 was not applicable; and that unless the plaintiff compensated the defendants, the latter were entitled to remove the materials. In support of this view reliance was placed upon the judgment of Sir Barnes Peacock in *Thakur Chander Poramanick* v. *Ramdhone Bhattacharjee* (3) and also upon the decision of this Court: *In re Kalyan Das* v. *Jan Bibi* (2). Mukerji, J., was further of opinion that registration amounted to a constructive notice and that the auction purchasers must be deemed to have had constructive notice of the mortgage in suit.

The following questions have been referred to this Bench for decision:

> "Is an auction-purchaser at a sale held in execution of a decree passed on foot of a prior mortgage, to which the second mortgagee was not party, entitled to remove the materials of the building erected by him on a site, included in the mortgaged property purchased by him, or is the building liable to be sold as an accession to the mortgaged property for satisfaction of the second mortgage?"

It is clear that S. 51, T. P. Act, is not in terms applicable to the facts of the present case. The applicability of this section has been discussed by me at some length in *In re Kalyan Das* v. *Jan Bibi* (2) (at pp. 456 and 457 of 51 *All.*). The principles recognized in S. 51 are based on obvious grounds of justice, equity and good conscience. These principles have been set forth in *Stock* v. *Starr* (12) and *Bright* v. *Boyd* (13), and these cases have been cited with approval in *In re Kandarpanath Ghosh* v. *Jogindr nath Ghose* (14) (12 *L. J.*, 391) and in *Moitheensa Routhan* v. *Apsa Bivy* (11). It is settled law that S. 51, T. P. Act, is inapplicaale to a purchaser at a Court sale. The provision of S. 2 (d), T. P. Act, is conclusive on the point:

> "But nothing therein contained shall be deemed to affect . . . . (d) save as provided by S. 57 and Ch. 4 of this Act, any transfer by operation of law or by or in execution of a decree or order of a Court of competent jurisdiction."

The matter therefore need not be pursued any further.

I am in entire agreement with the learned Judges who made the reference that S. 63, T. P. Act, is not applicable to the circumstances of the present case. Assuming that the construction in controversy amounts to an accession Cl. 1 is not applicable because it was a case of a simple mortgage and the mortgaged property was not in the possession of the mortgagee. Cl. (2) is equally inapplicable because "such accession" has not been acquired at the expense of the mortgagee. Equally, the accession was not necessary to preserve the property from destruction, forfeiture or sale, that it was not made with the consent of the mortgagor and was not capable of separate possession.

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(12) [1870] 1 Sawyer 15.
(13) 4 Fed. Cases 127.
(14) [1910] 6 I. C. 141.

The puisne mortgagee in the present case had made no outlay to enhance the value of the mortgaged security. Also the original mortgagor had spent not a single pice for the enlargement or betterment of the security. Apart from statute, if statute there is to favour the plaintiffs in the present case, there are clearly no equities in their favour which *ex necessitate rei* will justify the inclusion of the constructions in dispute in the mortgaged security.

It has been argued that S. 70, T. P. Act, is applicable to the circumstances of the case in hand. A clear provision of statute has to be followed and given effect to and it cannot be displaced by a mere equitable principle however wholesome it might be. The provision of this section is mandatory and runs as follows:

> "If, after the date of the mortgage, any accession is made to the mortgaged property the mortgagee, in the absence of a contract to the contrary, shall for the purposes of the security be entitled to such accession."

Section 70, T. P. Act, is one out of several sections under the heading "Rights and Liabilities of Mortgagees." The words of the section are general, but the words "in the absence of a contract to the contrary" and "for the purposes of the security" are indicative of the fact that the section was primarily intended to apply to persons in whom there existed a privity of contract. It may also be conceded that the section is to be availed of not only by the parties to an original contract but their successor-in-interest by inheritance or by voluntary transfer. Illus. (b) clearly contemplates an accession made by the mortgagor himself. No case has been cited to us and I am not aware of any in which the section has been applied to the case of the auction-purchasers like defendants 4 to 7. In *Rangayya Chettiar* v. *Parthasarathi Naikar* (9) the facts are not dissimilar to those of the present case, but S. 70, T. P. Act, has neither been relied on nor applied. This case therefore is no authority for the proposition that S. 70, T. P. Act, is applicable to persons situated like defendants-respondents. The relevant portion of this judgment may be reproduced here:

> "The claim for alleged improvements said to have been effected by the first mortgagee since his purchase cannot, we think, be allowed. In this respect he is in no better position than the mortgagor himself who may choose to spend money on his property. We cannot accede to the view that the improvements were made by the mortgagor in the character of mortgagee, for in that capacity he is not shown to have been entitled to possession."

It appears that it was contended in this case that the legal position of the auction-purchaser was that of a mortgagee in possession. The point urged in the present case however is that he is the legal representative not of the mortgagee, but of the mortgagor himself. In *Comgayam Venkataramana Iyer* v. *Henry James Golley Gompertz* (10) it was held that where the prior mortgagee obtained a decree for sale without making the second mortgagee a party, and himself purchased the property in execution, a purchaser of the property from him could not claim the value of improvements from the second mortgagee under S. 51, T. P. Act, in a suit by the second mortgagee to enforce the rights under the mortgage. Here again there is not even a bare mention of S. 70, T. P. Act, in the judgment. Their Lordships observed:

> "There is no doubt that the plaintiff is entitled to, as a matter of law, to sell all the buildings. . . . . For defendants 9 and 11 it is contended that, if the plaintiff sells the new buildings, they should be compensated under S. 51, T. P. Act, as for the improvements made by them in the belief that they were the owners of the land; but S. 51 does not apply to the facts and *Rangayya Chettiar* v. *Parthasarthi Naikar* (9), by which we are bound seems to be on all fours with the present case."

Further comments upon this case are unnecessary. The ruling in *Buddhi Lal* v. *Administrator-General of Madras* (15) is not very instructive. Not only S. 70 was not applied, but the entire decision exhausts itself in the following three sentences:

> "They also claim the amount spent by the auction-purchaser on improvements as payable before the plaintiff could bring the property to sale. As to the last contention we have not been referred to any rule of law under which the auction-purchaser could make such a claim. It has been decided in the negative by the Madras High Court in the case of

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(15) A. I. R. 1922 All. 104=65 I. C. 841=44 All. 418.

Comjayam Ventakaramana Iyer v. *Henry James Colley Gompertz* (10)."

It may be noticed in passing that in the aforesaid case it was not considered whether it was open to the auction-purchaser to remove the materials of the buildings put up by them.

There is no escape for the plaintiff from the hard logic of facts. According to him the earlier mortgage dated the 1st April 1906 subsists against him in its integrity. He was no party to the suit instituted by the prior mortgagees, and not bound by the decree or by the result of the execution proceedings. He is entitled to treat the decree in the former suit and the auction purchase in favour of defendants 4 to 7 as a nullity. He expressly says so in the plaint. For the purpose of this case, the position of defendants 4 to 7 could not be as legal representatives of the mortgagors because they happened to be the auction-purchasers under the decree on the prior mortgage. If the mortgage in favour of defendants 2 and 3 subsists, Behari still continues to be the mortgagor. It will be nothing short of an anomaly to treat the auction-purchasers as legal representatives of the original mortgagor Behari. The logic of the situation is inexorable and I am entirely in accord with the following reasoning of Naimatullah, J.:

> " The plaintiff-appellant has made it the very foundation of his case that the prior mortgage is a subsisting mortgage, and that the prior mortgagee's suit on foot of that mortgage, the decree passed therein and the sale in execution of such decree should be treated as a nullity against the plaintiff-appellant. In fact, he insists on the relations subsisting before the suit on the prior mortgage to be recognized as subsisting. He treats the prior mortgage as an outstanding charge and the auction sale as conveying no title so far as he is concerned. He is entitled to treat accomplished facts as a fiction but must maintain that fiction throughout. He cannot be allowed to approbate and reprobate by first assuming that the prior mortgage still subsists and in the next breath asserting that a sale took place in execution of a decree on foot of that mortgage under which the contesting respondents become transferees of the mortgagor and are therefore themselves the mortgagors."

This view is obviously based on a long current of authorities including some Privy Council cases though they have not been cited and on the allegations contained in the plaint in this case. The precise questions which made it necessary to determine the rights and obligations of a puisne mortgagee who was not made a party to the suit of the prior mortgagee were (1) whether it was open to him to treat the decree and sale in such a suit as a nullity so far as he is concerned and (2) if so, and having done so, whether it was open to him to treat them as subsisting for any other purpose. In all these cases he sought to avoid the decree and sale thereunder and to treat the prior mortgage as subsisting but attempted to take advantage of the decree for limiting the contractual rate of interest only up to the date of the decree and to escape liability to pay interest at the rate stipulated for in the deed of prior mortgage for the priod intervening between the decree and his own suit. He was not allowed to take such inconsistant positions even though he would not have been liable to pay interest at that rate after the decree if he had been impleaded in the suit of the prior mortgagee. In *Umes Chander Sircar* v. *Zahur Fatima* (16) at p. 181 which was a suit of that kind their Lordships of the Privy Council observed:

> " The decree can only operate between the parties to the suit and those who claim under them. The plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the plaintiff in this case comes to take away the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of it. His case is that as to him Zahur is still but a mortgagee and if so she should be allowed such benefit as her mortgage gives her. If Zahur had not got a decree and the plaintiff had come to redeem the mortgage he must have paid whatever interest her contract entitled her to, and the Court would have had no jurisdiction to cut it down, and that is the position in which the parties are placed by the decree in this suit."

Zahur was the prior mortgagee who purchased in execution of his own decree on foot of a prior mortgage. The plaintiff of that case was a puisne mortgagee who had not been made a party. It should be noted that the case arose before the Transfer of Property Act was passed. In cases to which that Act applied it was held that the effect of the proviso to S. 89, T. P. Act, was that on a decree on foot of a prior mortgage being passed the mortgage would be extinguished even though the puisne mortgagee was not a party: see *Het Ram* v. *Shadi Ram* (17) and *Matru Mal* v. *Durga Kunwar* (18) . .
. . . . This proviso was omitted

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(16) [1891] 18 Cal. 164=17 I.A. 201=5 Sar. 507 (P.C.).

(17) A.I.R. 1918 P.C. 34=45 I.C. 798=45 I.A. 130=40 All. 407 (P.C.).

(18) A.I.R. 1920 P.C. 79=55 I.C. 969=47 I.A. 71=42 All. 364 (P.C.).

from the provisions corresponding to S. 89 when the Civil Procedure Code of 1908 was enacted : (see O.34, R. 5, Civil P. C.). Accordingly the Privy Council held in a subssquent case that :

> " now the words (Proviso to S 89) being gone, their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act 1882."

In *Dip Narain Singh* v. *Hira Singh* (19) (at p. 529) a Division Bench of this Court held that :

> " as the plaintiffs (puisne mortgagees) were not joined as parties to the defendants suit for sale, as required by S. 85, Act 4 of 1882, they are, notwithstanding the sale in execution of the defendant's decree in the same position in which they would have been, and have still the same rights which they would have had, if they had been made parties to that suit, that is to say their right to redeem the prior mortgage of the defendant is saved to them."

In the Full Bench case of *Wahidunnissa* v. *Gobardhan Das* (20), Blair, J. observed at p. 400 :

> " That Bansidhar had notice, actual or constructive, that he was purchasing a defeasible title must be taken for granted. He must be taken to have known that the sale at which he bought was voidable at the will of the second mortgagee, who had only to redeem the first mortgage to enable him to put up the property for sale in satisfaction of both incumbrances. As against the second mortgagee he had acquired absolutely no title."

Burkitt, J., who was one of the three Judges composing the Full Bench concurred in these as in other remarks. Stanley, C. J., substantially took the same view in a separate judgment.

In *Jnanendra Nath Singh* v. *Shorashi Charan Mitra* (21) (at p. 644 of 49 *Cal.*) a Division Bench of the Calcutta High Court held that :

> " so far as the plaintiff (puisne mortgagee) is concerned the mortgage of the defendant subsists and that the plaintiff should not be allowed to approbate and reprobate the decree in the previous suit and he can only be allowed to redeem on the terms of the mortgage and on payment of interest at the rate payable under the mortgage up to the date of redemption to be fixed in this case."

In *Thenappa Chettiar* v. *Marimuthunandan* (22) it was held that :

> " when in a suit by a prior mortgagee a decree for sale is passed which fixes the rate of interest after the date for redemption, the rate so fixed is not binding as between the prior mortgagee, who was not made a party to the suit. In a suit by such puisne mortgagee for redemption against the prior mortgagee, the mortgage will be considered as subsisting and interest will be awarded on the footing of the mortgage without reference to the decree in the prior suit."

It is clear to my mind that if the puisne mortgagee who was not made a party to the suit of the prior mortgagee elects to treat the decree in that suit, and what followed it, as not binding on him they have to be treated as nullity, not in the sense of being void ab initio but so far as his rights may be affected thereby. If he does so elect, the whole case shall have to be dealt with as if the prior mortgage is subsisting in which case, as already stated, no question can arise as to whether anyone became a purchaser at an auction sale held in execution of a decree passed on foot of the prior mortgage which ex hypothesi is subsisting.

We should next consider how the plaintiff has treated the decree in the prior mortgagee's suit and the sale held thereunder. In this connexion para. 5 of his plaint is conclusive and runs thus:

> " Defendant, second party, had not made the plaintiff a party to the suit. Hence all the proceedings taken in the suit by him, defendant second party, are null and void as against the plaintiff, but the plaintiff has in order to avoid dispute and for final settlement makes defendant second party and all the purchasers a party to his suit so that the Court might settle all the points in one attempt."

Paragraph 5 of the plaint cannot lend itself to any construction other than what is obvious from its language ; and the significance of this paragraph cannot be overlooked. It is obvious that the plaintiff repudiates the position of the respondent as auction-purchaser in execution of the decree passed on foot of the prior mortgage and impleads him only to avoid future disputes. He is perfectly within his rights to do so but he should not be allowed to do otherwise if it suits him for deriving some other advantage. He cannot be permitted to turn round and treat him as an auction-purchaser so as to make him the representative of the mortgagor and to claim improvements made by him as accessions to the mortgaged property. The legal position of the defendants-respondents is therefore that of third persons in temporary possession who put up constructions in the honest belief that they were entitled to make the constructions.

It ought to be borne in mind that mere registration of a mortgage under the Registration Act is not per se constructive notice of the mortgage:

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(19) [1897] 19 All. 527=(1897) A.W.N. 147.
(20) [1903] 25 All. 388=(1903) A.W.N. 86.
(21) A.I.R 1922 Cal. 23=69 I.C. 759=49 Cal. 626.
(22) [1904] 31 Mad. 258=18 M.L.J. 344.

Tilukdhari Lal v. *Khedan Lal* (9). No legal obligation was cast upon the auction-purchaser to search the registry before his bid at auction.

"Good faith" as defined in S. 3, Cl. (20), General Clauses Act (Act 10 of 1897), is equivalent to honesty of dealing and did not entail upon the auction-purchaser the necessity of searching the registry. Even assuming that there were facts indicative of negligence in investigating title, that by itself is not predicative of a lack of bona fides. It may be incidentally mentioned that Niamatullah, J., does not base his view upon the doctrine of notice but upon the broader ground of structure being put up in good faith. I am of opinion that the questions for determination have to be answered upon the principles laid down by Sir Barnes Peacock in 6 *Weekly Reporter*, p. 228. My answer therefore to the first part of the reference is in the affirmative and to the second part of the reference is in the negative.

By the Court.—The answer to the first part of the question is in the negative and to the second part in the affirmative.

S.N./R.K. *Reference answered.*

✲ A. I. R. 1931 Allahabad 294
Full Bench

MUKERJI, SEN AND BENNET, JJ.

Radha Mohan Datt, Silk Merchant—Applicant.

v.

Abbas Ali Biswas and *others*—Opposite Parties.

Civil Revn. No. 273 of 1929, Decided on 3rd February 1931, against decree of Munsif, Benares, D/- 16th July 1929.

✲ **(a) Civil P. C. (1908), S. 105 (1)—Order setting aside ex parte decree cannot be made ground of objection.**

Under S. 105 (1) the propriety of the order setting aside an ex parte decree cannot be set forth as a ground of objection in the memorandum of appeal from the decree ultimately passed in the suit, but any error, defect or irregularity in the said order affecting the decision of the case on merits may be set forth. [P 297 C 1]

(b) Interpretation of Statutes—Rule.

In construing a statute, it is not permissible to import into its text any words of limitation unless the text requires those words by necessary implication. [P 297 C 1]

(c) Interpretation of Statutes—Words—Construction with reference to earlier statute.

Where words or expressions in a statute are plainly taken from earlier statutes in pari materia, which have received judicial interpretation, it must be assumed that legislature was aware of such interpretation and intended it to be followed in later enactments. The rule is especially applicable in the case of consolidatory Codes. [P 299 C 1]

(d) Civil P. C. (1908), S. 115—Order setting aside ex parte decree not of same character as order that Court has jurisdiction in pending suit to try suit.

An order setting aside an ex parte decree is not an order of the same character as a finding of the Court in a pending suit that it has jurisdiction to try the suit. [P 301 C 1]

(e) Civil P. C. (1908), S. 115—Order setting aside ex parte decree is case.

An order setting aside an ex parte decree is a case and not merely an interlocutory order during the pendency of the suit. [P 301 C 2]

✲ **(f) Civil P. C. (1908), O. 9, R. 13—Order setting aside ex parte decree passed in defiance of provisions of O. 9, R. 13, can be revised.**

In a case where the order setting aside a decree has been passed by a Court in defiance of the provisions of O. 9, R. 13, Civil P. C., the matter is a case decided under S. 115, Civil P. C., and High Court is entitled to interfere in revision: **66 I. C. 509 and A. I. R. 1922 All. 341, Overruled.**; 14 *I. C.* 221 and 107 *I. C.* 395, *Foll.* [P 302 C 1]

(g) Civil P. C. (1908), O. 9, R. 13—Court has no jurisdiction to restore unless conditions in rule exist.

The Court has no jurisdiction under O. 9, R. 13, to set aside an ex parte decree against a defendant unless the conditions, viz. (1) that the summons was not duly served and (2) that he was prevented from appearing on sufficient cause. [P 296 C 1]

(h) Civil P. C. (1908), S. 115—"Appeal" contemplates first or second appeal from decree or from interlocutory order under S. 104 or O. 43—Civil P. C (1908), S. 104 and O. 43.

The provision that revision is not entertainable where an appeal lies to the High Court, contemplates a case where no appeal lies either in the form of a first appeal or a second appeal from a decree or from an interlocutory order under S. 104 and O. 43: 10 *All.* 119, *Ref.* [P 296 C 1]

(i) Civil P. C. (1908), S. 105 (1)—"Affecting the decision of the case" means on merits.

The word "affect" predicates that the error, defect or irregularity in the order has influenced the conclusion in such a way that an unjust result has been arrived at in the decision of the case on the merits and therefore the words "affecting the decision of the case" mean affecting the decision of the case on merits: *A. I. R.* 1927 *Rang.* 150, *Diss. from*; *A. I. R.* 1925 *All.* 610, *Foll.*; (*Case law discussed*). [P 297 C 1]

(j) Civil P. C. (1908), S. 105—Appeal against order is not same thing as ground about error, irregularity or defect in order.

An appeal against an order is not the same thing as advancing a ground of appeal about error, defect or irregularity in the said order. [P 298 C 1, 2]

(k) Civil P. C. (1908), O. 9, R. 13—Defendants represented by pleader with instruction to present application—Application rejected and suit proceeded on and decreed—Only pleader withdrew—Held suit was not decided ex parte.

Where some of the defendants were represented by a pleader who presented an application for examination of witnesses on commission, which was rejected by the Court as being unnecessary, and therefore the pleader withdrew as having no instructions to proceed with the case, and the case proceeded on merits, decreeing the claim against the defendants.

Held: that suit could not be said to be decided ex parte. [P 301 C 1]

(l) Civil P. C. (1908), O 9, R. 13—No appeal against order setting aside decree.

An order setting aside an ex parte decree is not an appealable order. [P 296 C 2]

B. Malik—for Applicant.

A. P. Bagchi—for Opposite Parties.

Judgment—The facts of the case which have occasioned this reference to the Full Bench lie within a narrow orbit and may be briefly indicated. Radha Mohan Datt brought a suit in the Court of the Munsif of Benares against several defendants for recovery of Rs. 3,500. Defendant 1, remained absent throughout and did not contest the suit. Defendants 2 to 4 were represented by counsel. They appear to have raised certain objections with regard to commission. Defendants 5 to 7 repudiated all connexion with the transaction which had given rise to the claim and impugned their liability in toto. The case was fixed for final disposal on 4th April 1929. On this date, defendants 2 to 4 through their pleader asked for grant of an instalment decree. Defendants 5 to 7 also appeared through a pleader and prayed for a postponement of the case to enable them to have certain witnesses examined on commission. This petition was rejected. Their counsel intimated that he had no instructions to proceed with the case and withdrew from the proceedings. The case proceeded to trial on the merits. An issue was framed anent the liability of defendants 5 to 7. Witnesses were examined by the plaintiff. These witnesses were believed and the Court came to the conclusion that all the defendants were liable. The result was that on 4th April 1929 a decree was passed on the merits against all the defendants. No appeal was preferred by defendants 1 to 4.

On 29th April 1929 defendants 5 to 7 lodged an application in Court, which purported to be under O. 9, R. 13, Civil P. C. Paras. 1 and 2 of this application are material:

> "(1) That on 4th April 1929, the opposite party No. 1 obtained an ex parte decree against the applicants for Rs. 3,500 odd, (2) That the applicants were prevented from appearing in the Court on that date as they failed to catch the train and they then sent a telegram to that effect to their pleader, which was received here at a late hour."

On these allegations, they prayed that the ex parte decree be set aside and that the suit be restored to its original number. This application was supported by an affidavit of Rahmat Ullah Biswas, who was a defendant in the action.

The application was resisted by the plaintiff on the ground that it was misconceived, that the decree passed against the applicants was not an ex parte decree, that the suit had been determined and decided on the merits and that there was no sufficient cause for discharging the decree and restoring the suit. Reliance was placed on the explanation appended by this Court to O. 17, R. 2, Civil P. C. which runs as follows:

> "Explanation.—No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application."

The learned Munsif by his order, dated 16th July 1929, allowed the application of the defendants, set aside the decree and restored the suit on the condition of the applicants paying Rs. 100 as damages to the plaintiff within two weeks.

It is not clear whether the Munsif treated the application as one under O. 9, R. 13, Civil P. C. The opening sentence of his order is indicative of some doubt in his mind:

> "This is an application for setting aside a decree dated 4th April 1929 described as an ex-parte decree passed by this Court."

There were no grounds before him for entertaining the application as one under O. 9, R. 13, of the Code, or for allowing the same, and the ground for his decision appears to us to be extremely curious. He states:

> "The conduct of the applicant however betrays gross negligence and carelessness even if his allegation be accepted as true. He started by the very last train and then he did not take care that he should not miss it. I think that the application should be allowed only on payment of adequate damages. In fact the application deserves to be rejected, but I think the law is supposed to be laxly applied in such matters."

If O. 9, R. 13, applied to the case, the applicants had to satisfy, the Court (1) that the summons was not duly served, or (2) that they were prevented from appearing for sufficient cause. Neither of these conditions having been fulfilled, the Munsif had no jurisdiction to set aside the decree and restore the suit. It is clear however that O. 9, R. 13, did not apply to the facts of the case. The decree passed against the applicants was not an ex parte decree. An issue was framed relating to their liability and that issue was decided on the merits. The defendants having appeared in the suit through their counsel, they could not in law be deemed to have failed to appear in the action. Explanation to O. 17, R. 2 which we have set out above is clear and conclusive on this point.

Aggrieved by the order of the Munsif dated 16th July 1929, the plaintiff filed a civil revision to this Court under S. 115, Civil P. C. Defendants 5 to 7 resisted the application on two grounds: (1) that the revisional jurisdiction of the High Court could not be exercised in favour of the plaintiff, because he could impugn the correctness of the order passed by the Munsif as a ground in the appeal which might be preferred from the decree which might be passed in the suit; and (2) that the proceedings terminating in the order, dated 16th July 1929, was not a "case decided" within the meaning of S. 115, Civil P. C.

It has been held by this Court in a number of cases, notably in *Sheo Prasad Singh* v. *Kstura Kuar* (1) that the revisional powers of the High Court under S. 115 (corresponding to S. 622, Act 14 of 1882) should not be exercised except as a last resort for an aggrieved litigant. The section itself provides that revision is not entertainable where an appeal lies to the High Court. This clearly contemplates a case where no appeal lies either in the form of a first appeal or a second appeal from a decree, or from an interlocutory order under Ss. 104 and O. 43, Civil P. C. It has been contended however that although the order is not exposed to a frontal attack in the shape of a direct appeal to the High Court, it can be impugned as a ground of objection in the memorandum of appeal from the decree which may be eventually passed in the suit itself. Reliance has been placed upon S. 105 of the present Civil P. C., which corresponds to S. 591, Act 14 of 1882. Cl. (1) of the section runs as follows:

> "Save as otherwise expressly provided no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

It has been argued that the order of the learned Munsif setting aside the decree is one affecting the decision of the case. There is a preponderance of authority that the words "affecting the decision of the case" mean "affecting the decision of the case on the merits." The authorities on this point however are not uniform. As there is a conflict of authority on the points in issue the following questions have been referred to the Full Bench:

> "1. Whether an appeal indirectly lies under S. 105, Civil P. C., from an order setting aside an ex parte decree?
>
> 2. Can the High Court interfere in revision to set aside an order passed by a Subordinate Court of first instance purporting to exercise its powers under O. 9, R. 13?"

In dealing with the questions under reference, we must remember that a right of appeal is the creature of statute. An order granting an application under O. 9, R. 13, Civil P. C., is not a decree within the meaning of S. 2 (2) of the Code and is not appealable as such. Certain interlocutory orders are appealable under S. 104 and O. 43, Civil P. C., but this is not one of them. But a right of appeal has been expressly provided from an order refusing to set aside an ex parte decree. This provision was in the old Code. This provision is not to be found in the Civil Procedure Code now in force. Now this could never have been a mere freak on the part of the Legislature to provide for an appeal in the one case and not to provide for an appeal in the other case; nor could this matter be regarded as a casus omissus. We have every reason to believe that the act of the legislature was deliberate and there was an undoubted intention to give a finality to an order setting aside an ex parte decree under O. 9, R. 13, Civil P. C. It may not be useful to probe into and discuss the policy underlying the text, but it is obvious that the legislature has a marked leaning for a procedure, promotive of the decision of a case upon the merits, and therefore it is natural that express provisions should have been made to ensure the attainment of that end.

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(1) [1888] 10 All. 119=(1888) A.W.N. 26.

Under S. 105 (1), the order setting aside an ex parte decree cannot be set forth as a ground of objection in the memorandum of appeal, but any error, defect or irregularity in the said order may be set forth. This is the natural and grammatical construction of the text. The section is no warrant for the proposition that the order itself can be open to challenge in the appeal preferred from the decree passed in the suit itself.

It has been argued that the words "affecting the decision of the case" cannot be construed to mean "affecting the decision of the case on the merits." The legislature did not intend to provide for a rule in S. 105 with reference to any error, defect or irregularity at variance with the rule laid down in S. 99 of the Code. In the latter section, it has been provided that no decree shall be reversed or substantially varied etc. in appeal on account of any error, defect or irregularity in any proceeding in the suit not affecting the merits of the case. In both these sections the legislature appears to have had the same objective in view. In construing a statute, it is not permissible to import into its text any words of limitation unless the text requires those words by necessary implication. We are however, not importing any new words into the text, but we are construing the words "affecting the decision af the case." The word "affect" predicates that the error, defect or irregularity in the order has influenced the conclusion in such a way that an unjust result has been arrived at in the decision of the case on the merits. We respectfully dissent from the view of Heald, J., in *M. S. Mahomad* v. *Collector of Tomigue* (2). We are not importing into the text any words which are foreign to it. Here the words were in by necessary implication and we are only construing the text.

Karamat Husain, J. in *Nand Ram* v. *Bhopal Singh* (3) has observed much to the same effect as Heald, J. :

> "There were no words in S. 622, Civil P. C., 1882, nor are there any in S. 115, Civil P. C., 1908, limiting a right of attack to such words only as are affecting the decision of the case. With reference to its merits, and in the absence of any such limitation, the Court has no power to read such limitation into the section."

If the context requires that the words should be supplied, we do not offend against any known canon of construction by supplying those words. We agree with the view of Lindsay, J. in *Ram Sarup* v. *Gya Prasad* (4) at p. 59 (of 24 *A. L. J.*) that

> "although these words are not to be found in the subsection, they must be supplied by necessary implication if the context so requires and a use of the word "affect" does in my opinion, render it necessary that the word "decision" should be taken to mean decision upon the merits."

We do not think that where the legislature did not intend to provide for an appeal from an order setting aside an ex parte decree, it could have intended to produce the same result in an indirect way by allowing the propriety of the order to be questioned in an appeal from the decree ultimately passed in the case. We have already noticed, and we do emphasise upon the fact, that upon its grammatical construction S. 105 does not favour the contention of the respondents, for that which can be made a ground of appeal is not the order itself but any error, defect or irregularity in the order. Moreover it is not possible to conceive how the error, irregularity or defect in the order setting aside the ex parte decree could affect or influence the merits of the case. The trial of the case could not commence till the ex parte decree had been discharged. The setting aside of the ex parte decree was, therefore, a condition precedent to an enquiry or trial into the merits of the claim and the retrial may be described as a second stage in a history of the case, but the two stages are distinct and independent. The second stage does not begin till the first stage has closed.

It may not be profitable to review in detail the entire case law on the subject. In *Gulab Kunwar* v. *Thakur Das* (5) a Bench of this Court accepted the interpretation put by the Calcutta High Court in *In re Chintamani Dasi* v. *Raghunath Sahu* (6) and held that the meaning of the words in S. 591 (of Act 14 of 1882) "affecting the decision of the case" was that it must be shown that the error, defect or irregularity had affected the decision of the case on the merits. The same view was taken in *Tasadduq Husain* v. *Hayatunnissa* (7). In *Puran Mal* v. *Tarif* (8) the same question came up before a Bench of this Court after the passing of Act 5 of 1908, and it was held that the propriety of the order setting aside the ex parte decree could not be questioned in the appeal from the decree in the suit, and S. 105 (1), Civil P. C., did not apply. Richard C. J., observed as follows:

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(2) A.I.R. 1927 Rang. 159=102 I.C. 379=5 Rang. 80.

(3) [1912] 34 All. 592=16 I.C. 1.

(4) A.I.R. 1925 All. 610=90 I.C. 180 (F.B.).

(5) [1902] 24 All. 464=(1902) A. W. N. 136.

(6) [1895] 22 Cal. 981.

> " No appeal is given by the Court from order setting aside an ex parte decree. It cannot be taken exception to later on in a regular appeal because it did not affect the merits of the case. This has been repeatedly held by this Court."

In *Niddha Lal* v. *the Collector of Bulandshahr* (9), the same matter came up before a Bench of this Court but in another form. The suit having abated by reason of the death of the plaintiff it was dismissed. Subsequently the suit was restored under O. 22, R. 9 (2), Civil P. C., and was eventually decreed on appeal. The question raised was as to whether the order restoring the suit could be made a ground of attack in an appeal from the decree passed in the suit. It was held that the words "error, defect or irregularity" in S. 105, meant error, defect or irregularity affecting the decision of the case on the merits, and any question as to the propriety of an order setting aside the abatement under O. 22, R. 9 (2), Civil P. C., could not be questioned under S. 105. In *Babu Ram* v. *Banke Behari Lal* (10) a Bench of this Court of which one of us was a member, held that the words "affecting the decision of the case "used in S. 105, of the Code are equivalent to affecting the merits of the case. The words were interpreted in the same sense by Lindsay, J., in *Ram Sarup* v. *Gaya Prasad* (4) which has already been referred to. Sulaiman J. did not feel that he was called upon to express a definite opinion on the interpretation of the controversial text. Daniels, J., was of opinion that the order in question was such that it must be taken to have affected the ultimate decision.

We would repeat that an appeal against an order is not the same thing as advancing a ground of appeal about error, defect or irregularity in the said order, a distinction which has not always been kept in view.

The Calcutta High Court has consistently construed the words "affecting the decision of the case" to mean "affecting the decision of the case with reference to the merits of it." *Chintamani Dasi* v. *Raghunath Sahoo* (6) and *Krishna Chander Goledar* v. *Mahesh Chandra Saha* (11). We respectfully adopt the following observation by Woodroffe, J., at p. 587:

> "The reason why an order made under S. 108 has been held not to affect the merits is that the order does not determine the merits but merely ensures a rehearing on the merits."

In *Shyama Bibi* v. *Modusudan Mahonto* (12) a Bench of the Calcutta High Court held that an order setting aside abatement allowing substitution of parties passed in a final decree in a mortgage suit could not be questioned in appeal from the decree, where such order was passed before or simultaneously with the decree, as it did not affect the decision of the case on the merits within the purview of S. 105, Civil P. C.

A similar view was taken by the Bombay High Court in *Balabai* v. *Ganesh* (13). In *Dhondu* v. *Bawan Govind* (14) the same view was reiterated and a Bench of the Bombay High Court refused to follow the decision of this Court to the contrary in *In re Nand Ram* v.*Bhopal Singh* (3). On a line with these decisions are the pronouncements of the Lahore High Court in *In re Fazel* v. *Hashmati* (15) and *Sundar Singh* v. *Nighiya* (16).

Upon a consideration of the authorities we find that S. 591, Act 14 of 1882, had been the subject of judicial construction. The text of that section has been retained in S. 105, Act 5 of 1908. This circumstance is indicative of the fact that the interpretation put upon the earlier statute has been accepted by the legislature. We would refer to the following passage in Halsbury's Laws of England, Vol. 27, p. 142:

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(7) [1903] 25 All. 280=(1903) A.W.N. 39.
(8) [1915] 30 I. C. 2.
(9) [1916] 35 I. C. 209.
(10) A. I. R. 1925 All. 426=87 I. C. 211=47 All. 555.
(11) [1905] 9 C. W. N. 584.
(12) A. I. R. 1925 Cal. 766=52 Cal. 472.
(13) [1903] 27 Bom. 162=4 Bom. L. R. 980.
(14) A. I. R. 1927 Bom. 455=103 I. C. 262=51 Bom. 495.
(15) [1916] 40 P. R. 1916=31 I. C. 914.
(16) A. I. R. 1925 Lah. 466=88 I. C. 920=6 Lah. 94.

> "Where words or expressions in a statute are plainly taken from earlier statutes in pari materia, which have received judicial interpretation, it must be assumed that Parliament was aware of such interpretation and intended to be followed in later enactments . ' . . . . The rule is especially applicable in the case of consolidatory codes."

It is apparent from the above that the general trend of decisions is in favour of the proposition that the words "affecting the decision of the case" mean "affecting the decision of the case on its merits."

There are some cases however in which the above interpretation has not been accepted. In *Gopala Chetty* v. *Subbier* (17) a decree for money having been passed against two defendants, defendant 2 alone applied under S. 108, Act 14 of 1882, corresponding to O. 9, R. 13 of the present Code, for the setting aside of the decree on the ground that he had not been duly served with the notice of the suit. The Munsif set aside the decree not only against this defendant but in its entirety. When appealing against the final decree the plaintiff raised the objection that the decree should not have been set aside as against defendant 1. This plea was sustained by the Madras High Court. The learned Judges observed:

> "There being no appeal against such an order it is open to the appellant in appealing against the final decree in the case to object to such order as contrary to law. He accordingly contends that the decree passed ex parte should be restored as against defendant 1. In our opinion the contention is well founded under the circumstances of the case."

We may observe that S. 591, Civil P. C., has not been referred to or discussed in the judgment, and ex facie the ruling does not proceed upon a construction of the text. Neither any rule of statute nor any authorities have been cited in support of the view, and we find it difficult to understand upon what principle the conclusion was arrived at in this case. This decision was followed in *Athamsa Rowther* v. *Ganeshan* (18). This was a very special case. It was held that an order setting aside an ex parte final decree in a mortgage suit, while retaining the ex parte preliminary decree therein, is an order affecting the decision of the case:

> "And the propriety of such an order could be challenged in an appeal against the decree finally passed in the suit."

The ratio for the decision has been set out in these terms:

> "It seems to us that the present case is another in which an order setting aside an ex parte decree may be properly attacked. It is clear that, when the result of setting aside of the order has been the hearing of the suit de-novo on its merits, no injustice would be done to anyone by the decision of the case and the final result is not affected; but in the present case the result would be very different. The defendant has deliberatly, no doubt for good reasons from his own point of view, refrained from opening the whole suit and only wants the final decree to be reopened, because he thinks he has a good point of limitation which will enable him to render the preliminary decree futile. So far from courting a decision on the merits, he is trying to burk such a decision altogether. In such circumstances, we cannot but hold that an order setting aside the ex parte final decree, while retaining the ex parte preliminary decree, is an order affecting the decision of the case."

It is patent therefore that, according to this view, an order setting aside the ex parte decree is not in all cases an order affecting the merits. The view of Wallach J., in this case has been followed by the same Court in *Paidapati Venkatanarasu* v. *Vikram Kotayya* (19). In this case the District Munsif returned the plaint for presentation to the revenue Court. On appeal the District Judge held that the suit was triable by the Munsif and the claim was remanded. The Munsif decreed the suit. The Subordinate Judge on appeal confirmed that decree. On second appeal to the High Court the decrees of the two Courts below were set aside and the order of the original Court directing the return of the plaint for presentation to the revenue Court was restored. A Letters Patent appeal was preferred from the order of the High Court directing the remand. This was heard by Phillips and Madhavan Nair, JJ. They quote a passage from the judgment of Wallach, J., in the last mentioned case and observe as follows:

> "It seems to us that these observations made with reference to an order setting aside ex parte decrees may well be applied as tests in considering whether a remand order of the nature we are dealing with affects the decision of the case."

Within the meaning of S. 105, Cl. (1), Civil P. C., does the order in question lead to an enquiry and investigation of the case as a result of the enforcement, or does it prevent such an enquiry? In the former case, the final decision of the case is not affected merely by reason of the enquiry held by one Judge rather than another, whereas in the latter the result is different. In arriving at a decision as to whether an interlocutory order affects the decision of a case within the meaning of S. 105, Cl. (1), Civil P. C., "the nature of the order in relation to the facts of the particular case has to be considered."

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(17) [1903] 26 Mad. 604=13 M. L. J. 308.
(18) A. I. R. 1924 Mad. 890=85 I. C. 808.
(19) A. I. R. 1926 Mad. 900=97 I. C. 790.

By allowing the interlocutory order to stand or by setting it aside the consequences which ensue are manifest. In the first case the enquiry is prevented. In the second case, the order setting aside the interlocutory order opens the door to an enquiry. In the sequence of events the first step is the setting aside of the order and the second step is the enquiry. If however the order is maintained and not set aside, the door to further enquiry is closed and no decision on the merits is possible. But in either of these two cases, the decision remains unaffected and uncontrolled by any question affecting the merits of the order itself.

In *Nand Ram* v. *Bhopal Singh* (3), which was heard by Knox and Karamat Husain, JJ., the principal judgment was delivered by Karamat Husain, J., and he ruled that an application under S. 115, Civil P. C., could not be entertained in the case of those interlocutory orders against which no immediate appeal lay. A remedy was supplied by S. 105 which provided that they might be made a ground of objection in appeal against the final decree and that an order under O. 9, R. 13 setting aside an ex parte decree was not open to revision, for the propriety of that order could be attacked in an appeal from the final decree. It is curious that no reference was made by the learned Judge to the earlier decisions of this Court in *Gulab Kunwar* v. *Thakur Das* (5) and *Tasadduq Husain* v. *Hayatunnissa* (7) which were decisions directly in point and which were in the teeth of the view which commended itself to the learned Judge. He noticed that there was a conflict of opinion between the Calcutta High Court and the Madras High Court. He agreed with the learned Judges who decided the case in *Gopala Chetty* v. *Subbier* (17). The text of S. 105, Civil P. C., was not examined and the entire fabric rests upon the following sentences:

"There were no words in S. 622, Civil P. C. of 1862; nor are there any in S. 115, Civil P. C. of 1908, limiting the right of attack to such orders only as are "affecting the decision of the case" with reference to its merits, and in the absence of any such limitation a Court has no power to read such a limitation into the section."

It is submitted with respect that the rule of construction laid down here is too narrow. The material question for consideration was what is the idea connoted by the use of the word "affect." We are of opinion that "with reference to its merits" is necessarily involved in the connotation of the word "affect" having regard to the context which follows. We have dealt with this aspect of the case in the earlier part of our judgment, and we do not think it necessary to canvass the matter any further. It may be observed that Knox, J., agreed in rejecting the application but did not associate himself with his learned colleague in his treatment of S. 115 of the Code.

In *Sheikh Kallu* v. *Nadir Bux* (20), Walsh and Wallach, JJ., were emphatic in their view that the order of the Munsif setting aside the ex parte decree was one without jurisdiction, as the conditions laid down in O. 9, R. 13, Civil P. C. did not occur in the case:

"This is an order, in our view, entirely without jurisdiction, an order which no Judge ought ever to make and which there is nothing in the Code to justify."

The learned Judges however found themselves unable to interfere with the order in revision, because they considered that the case was governed by the decision in *In re Nand Ram* v. *Bhopal Singh* (3), which according to them had by implication been approved by a Full Bench in the recent case of *Buddhoo Lal* v. *Mewa Ram* (21). In the last mentioned case, the question which arose was as to whether the finding of the Munsif on one out of several issues, that he had jurisdiction to try a suit, was open to revision under S. 115, Civil P. C. It was held by the majority of the Full Bench that no revision lay inasmuch as the order against which the application in revision had been filed was merely a finding by the trial Court on one out of seven issues arising in a suit which was still pending in that Court. No question relating to the construction of S. 105 was raised or was necessary. The whole argument appears to have hinged upon the connotation of the term "case" in

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(20) A. I. R. 1922 All. 441=66 I. C. 509.

(21) A. I. R. 1921 All. 1=63 I. C. 15=43 All. 564 (F. B.).

S. 115. *Nand Ram* v. *Bhopal Singh* (3) was not cited before the Full Bench; nor was that decision relevant for the purpose of that case. We are of opinion that this case has no bearing upon the first question referred to us. We are of opinion that it has a bearing upon the second question. But we are not prepared to endorse the proposition that an order setting aside an ex parte decree is an order of the same character as a finding of the Court in a pending suit that it has jurisdiction to try the suit.

Upon a consideration of the text of the statute, and of the principal authorities bearing upon the same, we have no doubt that the propriety of an order setting aside an ex parte decree cannot be set forth as a ground of objection in a memorandum of appeal from the decree, ultimately passed in the suit under S. 105, Civil P. C. Our anwer therefore to the first question under reference is in the negative.

We have already held that an order setting aside an ex parte decree was not an appealable order. We have also held that the propriety of the said order could not be challenged in an indirect way in an appeal from the final decree under S. 105, Civil P. C. We have no doubt that the decree against defendants 5 to 7 was not an ex parte decree and that the said defendants had failed to establish that the conditions necessary under O. 9, R. 13, Civil P. C., existed in the case. The Munsif therefore had no proper grounds to set aside the order, and there being no legal warrant for his view, that "the law is supposed to be rather laxly applied in such matters," he acted with material irregularity in the exercise of his jurisdiction. Where the language of the law is clear, as it is in the present case, there was no room for speculation, and the learned Munsif was under an obligation to administer the law *literatim ad verbatim*. It has been strongly contended however that the proceedings culminating with the order in controversy was not a "case" within the meaning of S. 115, Civil P. C. The term "case" has not been defined in the Code. It may indeed be doubted if the term is capable of an exhaustive definition. In *Bala Krishna Udayar* v. *Vasudeva Aiyar* (22) (at p. 269 of 45 *I. A.*) the Judicial Committee observed as follows:

> "No definition is to be found in the Code of the word "case." It cannot in their Lordship's view, be confined to a litigation in which there is a plaintiff who seeks to take a particular relief in damages or otherwise against the defendant who is before the Court, It must, they. think, include an ex parte application such as that made in this case, praying, that persons in position of trustees or officials should perform their trust or discharge their official duties."

Their Lordships concurred therefore with the High Court in thinking that the matter adjudicated upon was a "case" with in the meaning of S. 115 of the "Code." From this it would appear that the term "case" had a wider denotation thon the term "suit."

In *Muhammad Ayab* v. *Muhammad Ahamud* (23) (at p. 625) Chamier, J., was not prepared to subscribe to the view that no proceedings could be a "case" unless it terminated in a decree. In *Hevanchal Kunwar* v. *Kanhai Lal* (24) (at p. 413) the learned Judges are reported to have observed as follows:

> "Where there are independent proceedings arising out of a case, such as a proceeding to restore a case dismissed in default, or to set aside a decree ex parte, for which the legislature has provided an independent remedy or different procedure, such proceeding may be a case within the meaning of the section."

This passage was quoted with approval by Lindsay, J., in *Ram Sarup* v. *Gaya Prasad* (4). We hold that an order setting aside an ex parte decree is a case and is not merely an interlocutory order during the pendency of the suit. As soon as an ex parte decree was passed, the curtain was run down upon the suit itself. There was no pending suit before the Court. Proceedings in the suit could not be revived till the ex parte decree had been set aside. The proceedings leading up to the setting aside of the ex parte decree were proceedings distinct from and independent of the proceedings constituting the suit. This was the view taken by Lindsay, J., in *Ram Sarup* v. *Gaya Prasad* (4) and we agree with this view. These proceedings were in the order of sequence anterior to the proceeding in the suit itself which did not commence till after the ex parte decree had been discharged. From the very nature of things, therefore these could not be treated as interlocutory proceedings in the suit. We ought not to lose sight of the fact that the order under O. 9, R. 13. merely ensures the retrial of the suit upon the merits and is not an order in the suit itself. In *Bhola Nath* v. *Raghunath* (25) it was held by a Bench of this Court that the word "case" did not necessarily mean "suit" but could mean a proceeding and where a proceeding in a suit is terminated, it certainly was a case within the meaning of S. 115.

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(22) A. I. R. 1917 P. C. 71=40 I. C. 650=44 I. A. 261=40 Mad. 793.

(23) [1910] 32 All. 623=6 I. C. 831.

(24) [1909] 12 O. C. 405=4 I. C. 878.

We have no doubt that we have before us a proceeding distinct from the suit itself which commenced by an application to set aside the ex parte decree and which terminated by an order discharging the said decree. We are therefore of opinion that in a case where the order setting aside a decree has been passed by a Court in defiance of the provision of O. 9, R. 13, Civil P. C., the matter is a "case decided" under S. 115, Civil P. C., and this High Court is entitled to interfere in revision. We respectfully dissent from the view of the learned Judges in *Kallu* v. *Nadir Bux* (20). We may point out that our view as indicated above is fortified by the decision of Mr. Lindsay and Mr. Rafiq in *Habib* v. *Rai Debi Bux* (26) and *Abdul Aziz* v. *Punjab National, Bank Ltd., Lahore* (27).

Our answer to the second question under reference is in the affirmative.

V.B./R.K. *Reference answered.*

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(25) A. I. R. 1329 All. 743=122 I. C. 685=51 All. 1010.

(26) [1912] 14 I. C. 221.

(27) 107 I. C. 395.

A. I. R. 1931 Allahabad 302

SULAIMAN AND YOUNG, JJ.

Ratan Singh—Defendant—Appellant.

v.

Pirbhu Dayal—Plaintiff—Respondent.

Second Appeal No. 428 of 1928, Decided on 23rd December 1930, against decision of Sub-Judge, Cawnpore, D/- 13th December 1927.

(a) Negotiable Instruments Act (1881), S. 4—Mere mention of interest—No undertaking to pay—Instrument held not pro-note.

Where a document, described in the body as a pro-note, recites the fact that Rs. 2,341 are due from the defendant to the plaintiff and thereafter records the fact that as the defendant was at that time unable to pay the amount he agreed to pay the interest specified in the document, it merely amounts to an acknowledgment of debt coupled with an agreement to pay interest. It is not a promissory note as it contains no unconditional undertaking to pay a certain sum of money.

The mere fact that any person chooses to give a certain title to a document by no means makes it that document. [P 303 C 1]

(b) Stamp Act (1899), S. 36 — Instrument admitted in first Court cannot be challenged in appeal.

Where a document has been admitted in evidence in the first Court, its admission cannot be challenged in appeal on the ground that it is not sufficiently stamped. [P 302 C 2]

G. Agarwala—for Appellant.

K. N. Katju—for Respondent.

Sulaiman, J.—The plaintiff in this case sued for recovery of money due on accounts. The sum due from the defendants to the plaintiff was the sum of Rs. 2,341. That this sum was due and owing by the defendant to the plaintiff is not disputed. But the defendant relied upon the statute of limitation and alleged that the last debited entry in the account was dated 22nd February 1923 and the account was settled on 27th of the same month, and that therefore time began to run from the latter date. The suit was brought on 18th January 1927, so limitation would have expired except for an unconditional acknowledgment by the defendant intervening. The plaintiff alleged that there was such an acknowledgment which was dated 25th June 1924, and if the plaintiff's contention on this point is correct, the suit of course would be within time. The learned Judge in the Court below has come to the conclusion that this is an acknowledgment which saves limitation. He has repelled the contention of the defendant that the document relied on was in reality a promissory note, that it was not stamped properly and therefore was inadmissible in evidence.

It has been contended by the appellant here that the proper construction of the document would make it a promissory note and that therefore it cannot be relied upon by the plaintiff as an acknowledgment, as it is not properly stamped. There are several difficulties in the way of the appellant. The document has, in fact, been admitted in the lower appellate Court, and therefore S. 36, Stamp Act applies, which reads as follows:

> "Where an instrument has been admitted in evidence, such an admission shall not, except as provided in S. 61, be called in question at any stage in the same suit or proceeding on the ground that the instrument has not been properly stamped."

There can be no doubt therefore that the appellant's argument on this point is without force. The wording of the section is perfectly clear and is not open to any doubt.

The point discussed above would, of course, only apply if the construction put upon the document relied upon as an acknowledgement made it a promissory note in fact. The definition of a promissory note is set out in S. 4, Negotiable Instruments Act. A promissory note is there defined as an

> "instrument in writing, not being a bank note or a currency note, containing an unconditional undertaking signed by the maker to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instrument."

The actual document in this case reads as follows:

> "On 25th June 1924, Rs. 2,341 were found due from me to Parbhu Dayal about bahikhatta dated 27th February 1923, and as the money cannot be given at present, hence it has been agreed upon that I would pay interest at 1 per cent per mensem. Therefore this pro-note, payable on demand, (*ruqqu indal talab*) has been executed, so that it may serve as evidence and may be useful in time."

It is argued on behalf of the appellant that the use of the words "this (promissory) note (payable) on demand" makes this document a promissory note. The mere fact that any person chooses to give a certain title to a document by no means makes it that document. For instance, a person might well describe a document as a sale deed in the body of the document, when in fact it was a mortgage. We have therefore got to look at the whole document to see whether it is a promissory note or not within the meaning of S. 2, Stamp Act read with S. 4, Negotiable Instruments Act. It is clear when we read the document in question that there is no "unconditional undertaking to pay a certain sum of money" to be found in the four corners of the document. The document recites the fact that Rs. 2,341 are due from the defendant to the plaintiff, and thereafter records the fact that as the defendant was at that time unable to pay the money, he agreed to pay the interest specified in the document. It is perfectly clear, in our view, that this merely amounts to an acknowledgement of debt coupled with an agreement to pay interest. It therefore is not a promissory note within the meaning of the statutes referred to. There is no reason therefore why it should not be admitted in evidence, and once it is admitted in evidence, it is a clear unconditional acknowledgement of a debt due by the defendant to the plaintiff. The appeal therefore must be dismissed with costs, including fees in this Court on the higher scale.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 303

NIAMATULLAH, J.

Abdul Wahid—Applicant.

v.

B. Ram Krishna and *another*—Opposite Parties.

Execution Second Appeal No. 400 of 1930, Decided on 12th January 1931, against decision of Dist. Judge, Ghazipur, D/- 12th December 1929.

Civil P. C. (1908), O. 21, R. 89—Transferee from judgment-debtor depositing required amount in office of Collector who sold property—Money transferred to civil Court account —Intimation sent to civil Court before 30 days of sale—Deposit is good.

It is true that the rule requires the judgment-debtor, or any person deriving title from him, who desires to have the sale set aside on depositing the decretal amount and 5 per cent on the purchase money to deposit it in "Court," which means "the Court executing the decree" and not the sale office. But where the transferee of the judgment-debtor deposits the amount required in the office of the Collector who had sold the property and intimation is sent to the civil Court that the money had been transferred to the civil Court account within 30 days of the date of sale, the deposit is good and the provisions of the rule are complied with: 40 *All.* 425, *Dist.* [P 304 C 2]

Gopi Nath Kunzru and *Tirbhuwan Nath Agha*—for Appellant.

K. Verma—for Opposite Parties.

Judgment.—Certain zamindari property belonging to the respondent Chandrika Ram was to be sold in execution of a decree of a civil Court. The property was not ancestral, but Government revenue was payable in respect thereof. If it had been ancestral, the execution of decree itself would have taken place in the Collector's office. In case of revenue paying property which is not ancestral, execution proceedings have to take place in the Court which passed the decree but the sale has to be made by the Collector. This is what happened in the case before me, and the Collector sold it on 20th July 1929, declaring the appellant Abdul Wahid as the auction-purchaser for a sum of Rs. 700. On 3rd August 1929 Ram Krishna, the transferee of the judgment-debtor deposited Rs. 735 under O. 21,

R. 89, Civil P. C., for payment to the decree-holder and the auction-purchaser and for setting aside the auction sale. The sum included the decretal amount together with 5 per cent on the purchase money as compensation to the auction-purchaser. On 8th August 1929 he applied to the civil Court for sale being set aside under O. 21, R. 89, intimating that a sum of Rs. 735 had been already deposited. On 12th August 1929, an intimation was received by the civil Court from the Collector's office that the sum of Rs. 735 deposited by Ram Krishna under O. 21, R. 89, had been transferred to the account of the civil Court. The office of the civil Court required Ram Krishna to pay an additional sum of Rs. 7 for poundage, which he paid on 17th August 1929. It should be noticed that all the dates so far mentioned fall within 30 days after the auction sale. On the case coming up for disposal before the Munsif on 7th September 1929, the application under O. 21, R. 89, was dismissed, and the sale confirmed, the view taken being that the deposit required by the aforesaid rule should have been made in the civil Court and not in the Collector's office. Reliance was placed on *Fazal Rab* v. *Manzoor Ahmad* (1).

An appeal to the learned District Judge from the order of the first Court refusing to set aside the sale was successful. The auction-purchaser has preferred the present second appeal questioning the correctness of the view taken by the learned District Judge.

A preliminary objection is taken by the learned advocate for the respondent that no second appeal lies. Reference is made to S. 104 (2), Civil P. C. which provides that no second appeal shall lie from any order passed in appeal from an order. The argument assumed that the appeal to the lower appellate Court was under O. 43, R. 1 (j), i. e., an appeal from order. The learned advocate for the appellant has, on the other hand, argued that in so far as an auction-purchaser is a representative of one or both of the parties to the suit, the question raised by the appeal is one under S. 47, Civil P. C., and that an order passed on such application is a decree. He argues therefore that the present appeal should be considered as a second appeal from a decree.

Having heard the learned counsel on both sides on the merits, I prefer to dispose of the appeal not on the preliminary point raised but on the merits.

It is not disputed that Ram Krishna was competent to make an application under O. 21, R. 89, Civil P. C. The only question on which the decision of the case hinges is whether the deposit made in the Collector's office and not in the civil Court was a good deposit for the purpose of an application under O. 21, R. 89. It is true that the rule requires the judgment-debtor, or any person deriving title from him, who desires to have the sale set aside on depositing the decretal amount and 5 per cent on the purchase money, to deposit it in "Court." which means "the Court executing the decree" and not the sale office. Under the peculiar circumstances of this case, I am of opinion that the provisions of O. 21 R. 89, were complied with. When a deposit is made in a civil Court, only a tender is filed in the civil Court and the deposit in cash is actually made in the local treasury. In this case money was actually deposited in the Treasury on 3rd August 1929. Besides the intimation sent by the Collector's office on 12th August 1929 to the effect that the money had been transferred to the accouut of the civil Court, the application under O. 21. R. 89, contained an allegation of payment required by O. 21, R. 89. The civil Court called upon the applicant Ram Krishna to make a further payment of Rs. 7, which he did. The proceedings referred to are in my opinion tantamount to a tender made in the civil Court and deposit made in the treasury to the account of the civil Court within 30 days of the date of sale. The case of *Fazal Rab* v. *Manzoor Ahmad* (1), relied on by the Court of first instance, is easily distinguishable. The learned Judges who decided it in revision felt handicapped by the provisions of S. 115, Civil P. C., which narrowed down the issue to the question whether the lower Court, in refusing to set aside the sale, had acted without jurisdiction, or failed to exercise its jurisdiction, or acted illegally or with material irregularity in the exercise of its jurisdiction. They observed that :

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(1) [1918] 40 All. 425=45 I. C. 773.

"It was somewhat difficult to say whether the Court was not technically right in holding unfortunate though the judgment debtors may have been, in strictness that the money was not deposited in Court within 30 days or on 11th November, which was the first date the Court opened. It was not until December following that the money was accepted in the civil Court by ordering the transfer of the deposit to the civil Court account."

It should be noticed that in that case the money deposited in the Collector's office was not transferred to the account of the civil Court till long after the expiry of 30 days from the date of the sale. In the case before me, as already mentioned, it was done within 30 days. Under these circumstances I do not think that *Fazal Rab* v. *Manzoor Ahmed* (1) is applicable to the case before me. Indeed, I think that that case is not an authority for the general proposition that under no circumstances money deposited in the Collector's office and not in the civil Court can be considered to be a deposit made in "Court" within the meaning of O. 21, R. 89, Civil P. C.

I am clearly of opinion that the lower appellate Court took a correct view of the case. I accordingly dismiss this appeal with costs, including counsel's fee in this Court on the higher scale.

Mr. Kunzru, who appears on behalf of the appellant, applies for leave to appeal under the Letters Patent. Having regard to the nature of the controversy, I think it is a fit case in which leave should be granted. I accordingly do so.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 305

MUKERJI AND BENNET, JJ.

Hikmatullah Khan—Objector—Appellant.

v.

Mt. Sakina Begum and *others*—Applicants—Respondents.

First Appeal No. 104 of 1930, Decided on 20th November 1930, from order of Dist. Judge, Meerut, D/- 3rd February 1930.

(a) Criminal P C. (1898), S. 476 (B)—Only one appeal lies under S. 476 (B).

Only one appeal lies under S. 476 (B). So when an appellate Court makes a complaint under that section on appeal or refuses to make a complaint, no further appeal lies to the High Court: *A.I.R.* 1928 *Cal.* 281; *A.I.R.* 1929 *Cal.*172; *A.I.R.* 1928 *Cal.* 237; *A.I.R.* 1925 *Lah.* 322; *A.I.R.* 1927 *Rang.* 313; *A.I.R.* 1924 *Bom.* 347 and *A. I. R* 1928 *Mad.* 506, *Rel. on*; *A. I.R.* 1926 *Pat.* 81, *not Foll.* [P 306 C 1]

(b) Penal Code (1860), S. 210—Application to execute decree for sum not due—Order of attachment obtained—Case comes under S. 210.

Where a fraudulent application is made to execute a decree for a sum not due and there is an order of attachment passed which was set aside on objection being made, the case comes under S. 210: 23 *Cal.* 971, *Dist.* [P 306 C 2)

S. D. Sinha— for Appellant.

M. H. Faruqi— for Respondents.

Bennet, J.—This purports to be a first appeal from order made by one Hikmatullah Khan against an order of the learned District Judge of Meerut, dated 3rd February 1930, directing, under S. 476 (B), Criminal P. C., that a formal complaint under S. 210, I. P. C., be made against the appellant Hikmatullah Khan. A preliminary objection was taken that no appeal lies to this Court.

The facts are that the opposite party, Mt. Sakina Begum and others, applied to the Munsif for a complaint under S. 476, Criminal P. C., and the Munsif refused to make a complaint. Mt. Sakina Begum and others then appealed, under S. 476-(B), Criminal P. C., to the District Judge and he has made a complaint. The question is whether any appeal lies to this Court from that order of the District Judge making a complaint on an appeal to him under S. 476 (B).

The learned counsel for the appellant relied on a ruling of the Patna High Court reported in *Ranjit Narain Singh* v. *Ram Bahadur Singh* (1), but there are rulings of no less than five High Courts to the effect that if an appellate Court decides to make a complaint on appeal, no second appeal lies to the High Court: see *Ahamadar Rahman* v. *Dwip Chand Chowdhury* (2), *Mohim Chandra Nath* v. *Emperor*, *A.I.R.* 1929 *Cal.* 172; *Kanai Lal Saha* v. *Makhan Lal Saha*, *A. I. R.* 1928 *Cal.* 237, *Muhammad Idris* v. *Emperor* (3), *Ma On Khin* v. *N. K. M. Firm* (4), *Somabai Vallavbhai* v. *Aditbhai Parsottam* (5) and *Moideen Rowthen* v. *Miyassa Pulavar* (6). We are also of opinion that the natural construction to place on the words of the section in question, viz. 476 (B), is that only one appeal should lie, and that, when an appellate Court has made a complaint under this section or has refused to make a complaint, no further appeal should lie to the High Court. But it has been urged by the learned counsel for the applicant that we should treat this matter as a revision. At first he contended that the appellate Court had no jurisdiction to pass the order in question, because he argued that the appellate Court acted as a Court of Session. The actual application to the lower appellate Court was headed: "In the Court of the District Judge of Meerut," and in the body of the application it was stated "the appellant above-named appeals to the Court of the District and Sessions Judge. Meerut." Apparently the office of the District Judge made the mistake of heading the proceedings as "In the Court of the Sessions Judge of Meerut" and gave a number as "Criminal Appeal No. 403 of 1929," but the learned District Judge himself subscribed his signature with the words "District Judge" below it, and it is clear therefore that he acted as District Judge on appeal from an order of the Munsif and he had jurisdiction under S. 476 (B).

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(1) A. I. R. 1926 Pat. 81=94 I. C. 593=27 Cr. L. J. 641=5 Pat. 262.

(2) A. I. R, 1928 Cal. 281=106 I. C. 711=29 Cr. L. J. 119=55 Cal. 765.

(3) A. I. R. 1925 Lah. 322=88 I. C. 528=26 Cr. L. J. 1168=6 Lah. 56.

(4) A. I. R. 1927 Rang. 313=105 I. C. 457=28 Cr. L. J. 937=5 Rang. 523.

(5) A. I. R. 1924 Bom. 347=81 I. C. 947=25 Cr. L. J. 1123=48 Bom. 401.

(6) A. I. R. 1928 Mad. 506=111 I. C. 114=29 Cr. L. J. 786=51 Mad. 777

It was next argued that, on the facts found by the District Judge, no criminal complaint would lie under S. 210, Criminal P. C., and reference was made to *Shama Charan Das* v. *Kasi Naik* (7). This argument was addressed to us under S. 115, Civil P. C. as a Court of revision, and we proceed accordingly to consider this matter as a Court of revision. The ruling in *Shama Charan Das* v. *Kasi Naik* (7) lays down that, where there was an application to execute a decree, and an objection was made to the application to the effect that the decree had been satisfied by payment out of Court and the application was therefore dismissed, then no complaint under S. 210, I. P. C., would lie for making an application which was fraudulent. But in the present case the facts are different, because on the application made by Hikmatullah there was an order of attachment passed against the property of Mt. Sakina Begum and her children. It was then that they made an objection and the order of attachment was set aside. Now, in execution there are two proceedings, first attachment and then sale. We consider that the case would come under S. 210, because Hikmatullah did obtain an order of attachment against the property of Mt. Sakina Begum for a sum which was not due from her. The wording of S. 210 "whoever fraudulently obtains an order against any person for a sum not due" would accordingly apply. But, as the matter has been brought before us in revision, we think that a second section, S. 209, I. P. C., ought to be added, and we direct that S. 209, I. P. C., be also added to the complaint made by the District Judge to the Magistrate. Otherwise we dismiss this appeal with costs.

P.N./R.K. *Order accordingly.*

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(7) [1896] 23 Cal. 971.

A. I. R. 1931 Allahabad 306

MUKERJI AND BENNET, JJ.

Chaube Madho Rao—Applicant.

v.

Chaube Gur Narain—Opposite Party.

Execution First Appeals Nos. 45 of 1930 and 418 of 1930, Decided on 13th January 1931, against decision of Sale Officer, Etawah, D/- 4th December 1929.

Civil P. C. (1908), S. 50—Word "dies" does not include civil death.

The word "dies" is used in its natural sense and there is nothing in the section or any other portion of the Code which indicates that the word is intended to include civil death. Where therefore in execution of a decree against the father, some property is attached, the fact that he became sanyasi before attachment would not render S. 50 applicable as that section is not intended to apply to the case of civil death. [P 307 C 1]

R. K. Malaviya—for Applicant.

Baleshwari Prasad—for Opposite Party.

Bennet, J.—These are two execution appeals by one Chaube Madho Rao whose objection to execution proceedings has been dismissed by the lower Court.

The facts are that a decree-holder, Chaube Gur Narain obtained two decrees for arrears of profit against one Chaube Binayak Rao, one of 22nd February 1928, which had been taken up in appeal to this Court, and another of 30th May 1926 which was not taken up in appeal. Subsequent to this apparently, the judgment-debtor Binayak became a sanyasi and on 18th August 1928 he made an application to the Collector asking that his son should be entered for all his property, and accordingly mutation was granted in favour of his son, the present appellant Madho Rao. The decree-holder made an application on 20th July 1928 for the execution of the decree, that is, his application was prior to the application of the judgment-debtor for the substitution of the name of his son on 23rd August 1928. The attachment was granted. On 25th July 1929, the appellant Madho Rao made an application objecting to execution on the following grounds: He stated in his objection that he was now the absolute owner of the property in question and without his being made the heir of his father the execution proceedings could not proceed according to law and he claimed that the property had been wrongly attached. That objection has been dismissed by the execution Court on the grounds that as his father was alive it would be necessary for the property to be transferred by way of gift or by conveyance or by a decree of the civil Court.

In appeal the learned counsel has based his argument on S. 50, Civil P. C., which states.

> "Where a judgment-debtor dies before the decree had been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased."

The learned counsel was not quite certain whether his client would claim in the capacity of legal representative of his father or not but finally decided that he would adopt that position. The learned counsel sustained his argument by reference to various well-known doctrines of Hindu law to the effect that when a man becomes a sanyasi he becomes dead for purposes of succession and inheritance and the persons entitled succeed to his property. That doctrine however is in regard to devolution of the rights of the person who becomes a sanyasi. The question before us is the converse and deals with the liabilities of this person. Further, the question before us is one of procedure under the Civil Procedure Code. Now S. 50 uses the word "dies" apparently in its natural sense and there is nothing in the section or any other portion of the Code which indicates that this word is intended to include civil death. Civil death is in some ways different from natural death and learned counsel has not been able to show any authority for his proposition that the civil death will come under S. 50, Civil P. C.

Further, in regard to this question we may observe that in the present case it is not shown that on any definite date the judgment-debtor Binayak Rao did become a sanyasi. Learned counsel points to his application of 18th August 1928 made before attachment in which he says that he had become a sanyasi, but no definite date is given and from the mere fact that he made that application it is clear that he had not at that time ceased to take an interest in the affairs of this material world and therefore he cannot at that time be said to have properly become a sanyasi or to have undergone a civil death.

We consider therefore that in the present case it is not proved that the judgment-debtor did become a sanyasi, whether before or after attachment, or at all. These, we may mention are some of the difficulties which would arise if this doctrine of civil death were held to come under S. 50, but on the general point of law we consider that S. 50 is not intended to apply to the case of civil death and accordingly we dismiss these appeals with costs.

We note that in this case the decree-holder does not admit the fact that the judgment debtor has become a sanyasi and as observed, it is not proved that he did become a sanyasi.

K.N./R.K. *Appeals dismissed.*

A. I. R. 1931 Allahabad 307

SULAIMAN AND YOUNG, JJ.

Mt. Saidunnisa—Plaintiff—Appellant.

v.

Mt. Ruqya and *others*—Defendants—Respondents.

First Appeal No. 366 of 1926, Decided on 26th November 1930, from decision of Sub-Judge, Ghazipur, D/- 27th March 1926.

(a) **Guardians and Wards Act (1890), Ss. 27, 29 and 33—There is no prohibition against guardian to refer a dispute in which minor's property is involved to arbitration—When it is private arbitration it is however prudent to take advice of District Judge.**

There is no doubt that a Muslim mother who assumes the position of a de facto guardian of her minor child has no power to transfer his property and such a transfer is not only voidable but is void. But under Ss. 27 and 29, Guardians and Wards Act, there is no prohibition against the guardian's referring a dispute in which the minor's property is involved to arbitration. But where such a dispute is referred to the arbitration of private individuals the result of which might be to cause serious prejudice to the minor and jeopardize his property, it is always prudent to ask for the opinion of the District Judge on the matter: *A.I.R.* 1918 *P.C.* 11, *Ref.*; 47 *Cal.* 713; *A. I. R.* 1928 *Oudh* 449 and *A.I.R.* 1929 *Oudh* 134, *Dist.* [P 309 C 1, 2]

(b) Civil P. C. (1908), O. 32, R. 7—Omission to appoint proper guardian ad litem—Reference to arbitration without permission of District Judge—Decree as per award—Such decree is only voidable and is not a nullity—Minor—Decree against.

There was an irregularity in the appointment of a guardian-ad-litem, who did not properly represent the minor and a decree had been passed as per award in an arbitration which had been referred to the arbitrators without any authority from the District Judge and which decree was subsequently challenged by the minor.

Held: that in the above circumstances, the decree could not be a nullity, but was only voidable owing to the aforesaid irregularity. Such a voidable decree could be set aside by the minor provided she came to Court within three years of her attaining majority and provided that she satisfied the Court that her interest had been prejudiced: 30 *Cal.* 1021, *Ref.* [P 310 C 1]

(c) Evidence Act (1872), S. 35—Birth registers—When entry therein is sufficient.

A mere entry in a birth register that a daughter was born to a certain, Ali Husain without stating that he was the Vakil of Fyzabad which might have indentified him, is wholly insufficient to prove the birth date of particular woman. [P 311 C 1]

(d) Evidence Act (1872), S. 35—District Judge issuing certificate of guardianship—Such certificate is not admissible in evidence to prove minority of ward.

A certificate of guardianship issued by a District Judge under the High Court rules is no evidence of the minority of the "ward," as there is no investigation by the Judge as to the exact date of birth of the minor and it cannot also be admitted in evidence under S. 35, because there is no official register kept by the Judge to record the copies of such certificates the entries wherein are to be made by a public servant in discharge of his official duty, after having been satisfied as to their correctness: 17 *Cal.* 849 and 18 *All.* 478, *Ref.*; *A. I. R.* 1926 *Oudh* 28 and *A. I. R.* 1929 *Oudh* 134, *Expl.*; 5 *Pat. L. J.* 460; 38 *Cal.* 182 and *A. I. R.* 1928 *Cal.* 893, *Rel. on.* [P 312 C 1, 2]

(e) Advancement—There is no presumption of advancement in India—Justice, equity and good conscience.

It was shown that the money advanced for the purchase of certain property was advanced by the guardian and not by the minor wards, but it had not been shown that the guardian intended that it should not belong to him but should belong to the minors.

Held: that there was no presumption of advancement in India and it was for the minors to show by independent and reliable evidence that it had been acquired for their benefit. [P 313 C 2]

P. L Banerji and *Mushtaq Ahmad*—for Appellant.

Zafar Mahdi, *Haidar Mahdi* and *S. Majid Ali*—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for recovery of possession of 28 out of 160 sihams in the estate of her deceased father. She is one of the daughters of the late Syed Ali Hussain Khan, who died on 8th March 1926. The deceased had his legally wedded wife Valan Bibi from whom he had two daughters who survived him. He also had a muta wife, Bandi Bibi, from whom he had one son and one daughter. Admittedly the plaintiff's share in his estate would be 28 out of 160 sihams.

Mt. Walan Bibi applied to the District Judge for being appointed the guardian of the persons and properties of her two children. The District Judge by an order dated 9th May 1908 appointed her the certificated guardian. A certificate was issued to her in due course.

On 2nd March 1909 an agreement for reference to arbitration of three persons was signed by the widow Mt. Walan Bibi on her behalf and as guardian of her minor daughter and also by Nurul-Hasan, the brother of the deceased, as well as other heirs. The arbitrators delivered their award on 4th March 1909 under which the estate was divided among the various claimants, a share being assigned to the plaintiff Mt. Saidunnisa, who had been impleaded under the guardianship of her own mother. This award was followed by an application for its being filed on 6th March 1909 accompanied by an application for permission to file it on behalf of the minor. The Court granted the permission to file the award stating that it was for the benefit of the minor. The award was duly filed and made a decree of the Court on the same day.

The plaintiff instituted the present suit on 20th November 1924 on the allegation that she had been born in June 1903 and attained majority well within three years of the suit, and that in any case according to the certificate of guardianship that was granted by the District Judge she attained majority on 19th December 1921, which would also bring her suit within time. She sought to avoid the decree passed on the basis of the award on the ground that Nurul-

Hasan had obtained the agreement for reference to arbitration fraudulently by exercising undue influence on her mother and that the award delivered by the arbitrators was illegal and prejudicial to the rights of the plaintiff and was ineffectual. In substance she sued to recover possession of her share by avoidance of the decree dated 6th March 1909.

The claim was resisted principally by Nurul Hasan on the ground that the plaintiff had attained majority more than three years before the suit and her claim was barred by time. It was also pleaded that her mother had full authority to refer the dispute to arbitration, and the award and the decree based upon it were binding on the plaintiff. It was further pleaded that part of the property claimed by the plaintiff, is, being a portion of the assets of the deceased, did not belong to Sayed Ali Husain at all.

The learned Subordinate Judge has found that the plaintiff attained majority more than three years before the suit and her claim was therefore barred by time. He has further found that the reference to arbitration was justified as there was a bona fide dispute between the parties based on an oral will of the deceased which had been set up by Nurul-Hasan. As regards most of the items of the properties he has found that they were part of the assets of the deceased, but as regards some items his conclusion is that they did not belong to him. As regards one item, viz, Taluqa Suri, his finding is that the property had been purchased with the money belonging to Sayed Ali Hussain, but that it was purchased for the benefit of the two minors in whose names the sale deed stood.

The plaintiff has come up in appeal challenging the findings of the learned Subordinate Judge.

There can be no doubt that a Muslim mother who assumes the position of a de facto guardian of her minor child has no power to transfer his property and such a transfer is not only voidable but void: *Imambandi* v. *Mutsaddi* (1). The learned advocate for the appellant contends that the same principle applies to a reference by a Muslim mother to arbitration and relies on the cases of *Mohsinuddin Ahmad* v. *K. Ahmad* (2); *Muhammad Jamil Ata* v. *Mohammad Hafiz Ata* (3) and *Ameer Hasan* v. *Mohammad Ejaz Husain*, *A. I. R.* 1929 *Oudh* p. 134. In none of these cases however the mother who referred the dispute to arbitration was the certificated guardian duly appointed by the Court, nor does it appear that she was the legal guardian of the minor under the Mahomedan law. In these casss there was a further distinguishing feature that the award had not terminated in a decree of the Court to which the minor had been made a party.

Conceding that a Muslim mother is disqualified from dealing with the property of her minor child, there can be no doubt that certain powers have been conferred upon her under S. 27, Guardians and Wards Act, when she is duly appointed a certificated guardian. Under S. 27 a guardian is entitled to deal with the property of the minor as a man of ordinary prudence would deal with it if it were his own and may do all acts which are reasonable and proper for the realization, protection or benefit of the property.

Section 29 however contains an exception which restrict shis power by compelling the guardian to obtain the previous sanction of the Court before mortgaging, charging, transferring by sale, gift, exchange or otherwise any part of the immovable property of the ward or leasing it for a term exceeding five years. There is no prohibition against the guardian's referring a dispute, in which the minor's property is involved, to arbitration. In this sense it could be said that Mt. Walan Bibi was not disqualified from signing the agreement for the reference to arbitration as the guardian of her minor daughter. At the same time she could have approached the District Judge and asked for his opinion, advice or direction on this matter under S. 33 of the Act. We think that it was the most prudent, reasonable and proper course for her to adopt when the minor's property was in dispute. It was an unwise act on her part to submit to the arbitration of private individuals, the result of which might be to cause serious prejudice to the minor and jeopardize her property. Although therefore Mt. Walian Bibi had authority to represent the minor as her guardian she did not act in a prudent manner in referring the dispute to private arbitration without previous reference to the District Judge. In this way there was an irregularity.

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(1) A. I. R. 1918 P. C. 11=47 I. C. 513=45 I. A. 73=45 Cal. 878 (P.C.).

(2) [1920] 47 Cal. 713=57 I. C. 945.

(3) A. I. R. 1928 Oudh 449=112 I. C. 522.

When the award was filed in Court permission was obtained from the Court that the award should be filed inasmuch as it was for the benefit of the minor, but in that proceeding the present plaintiff was represented by her mother acting as her guardian ad litem. The plaintiff is now impugning the act of her own mother and challenging her authority to refer the dispute to arbitration. She was therefore not properly represented in the proceeding for the filing of the award, when the only person who could look after her interest was her own mother whose act she is challenging. The attention of the Court does not appear to have been expressly directed to the fact that no previous permission of the District Judge had been obtained for the reference. We therefore think that there was an irregularity in the appointment of the guardian at the time, who did not properly represent the minor.

The learned advocate for the appellant contends that the decree was a nullity because the reference was unauthorized We are not prepared to accede to this contention. The decree is at most only voidable on account of the irregularity, in the omission to appoint a proper guardian. Such a voidable decree can be set aside by the minor provided she comes within three years of the attainment of her majority and provided further that she satisfies the Court that her interest has been prejudiced: *Walain* v. *Banhe Behari Pershad Singh* (4). The learned advocate for the respondents has urged that inasmuch as limitation for Mt. Walan Bibi's claim for dower was about to expire she was compelled to refer the dispute to arbitration. It is also urged that the oral gift set up on behalf of the minor was doubtful as there was no registered document in evidence and there had been no mutation of names. As against this it may be said that the oral will set up by the defendant was invalid for want of consent of the minor heirs. The claim for dower was a personal claim of the lady herself which did not directly concern the minor. We therefore think that the mother did not act prudently in referring the dispute to arbitration without previously approaching the District Judge.

It follows that the plaintiff would be entitled to have the case reopened provided she can show that she has come to Court within three years of her attaining majority and that she has been really prejudiced by the award.

The finding of the Court below on the question of minority is against the plaintiff. The case put forward in the plaint was that she was born in June 1903. This case was adhered to at the trial. On the other hand the defendant took up the position that she had been born in April 1900. Both parties adhered to their respective cases at the trial. Oral as well as documentary evidence was adduced on both sides. On behalf of the plaintiff there was the evidence of the plaintiff herself and her mother Mt. Walan Bibi as well as her witnesses Muhammad Azhar, Abdul Aziz, Muhammad Raza, Abdul Abbas, Abdul Haq, Saiyed Hasan and Wari Husain. As against this oral evidence the defendant Nurul Hasan examined himself and also produced Zulfiqar Husain, Hasan Askari, Kazim Husain, Ali Muhammad and Muhammad Husain. The learned Subordinate Judge who heard the plaintiff's witnesses has rejected their testimony. Both the plaintiff and her mother are interested and not independent witnesses. The other witnesses are not near relations. We find it difficult to believe that these witnesses were able to remember the exact year of the birth of a girl who was the younger daughter of a friend or acquaintance. There are various discrepancies in their evidence, but as we are agreeing with the Court below that their testimony is not worthy of credit it is not necessary for us to examine their evidence in detail afresh. It is quite sufficient for our purpose to say that we are not prepared to hold that by this oral evidence the plaintiff has succeeded in establishing that she was born in 1903.

We shall refer presently to one piece of documentary evidence which, in concurrence with the Court below, we accept, and which destroys the case that she was born in 1903.

A similar criticism may be made against the oral evidence produced on behalf of the defendant. The defendant Nurul Hasan himself is an interested person and his other witnesses are in the same position as the plaintiff's witnesses and would not be able to estimate correctly the exact age of the plaintiff.

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(4) [1903] 30 Cal. 1021=30 I. A. 182=8 Sar. 512 (P.C.).

Both parties produced copies of entries in birth registers showing that on certain dates daughter was born to Ali Husain. In the evidence it was disclosed that there were several persons of the name of Ali Husain in Mohalla Moghalpura in the city of Fyzabad. The same may be said as regards the ancestral village. We therefore find it very difficult to accept such entries in the birth registers as establishing the identity of Ali Husain named therein with the father of the plaintiff. A mere entry that a daughter was born to a certain Ali Husain, without stating that he was the vakil of Fyzabad which might have identified him, is wholly insufficient to prove the birth of the plaintiff. It is on this ground that we reject the extracts produced by the plaintiff as well as by the defendant from the birth registers, one showing that she was born on 4th June 1903, and the other that she was born on 2nd April 1900. In our opinion these birth registers are inconclusive.

There is however a sheet containing an account of expenses which is printed on p. 145, which is said to be in the handwriting of Abdul Hasan who died long ago. It has been accepted by the Court below as a genuine document. It was suggested that there was some difference in the ink, pen and writing appearing on this paper. We however do not find anything which can show that this evidence is a forgery. In fact no suspicion attaches to it. We agree that this must be accepted as a genuine slip of account of certain articles which were purchased at the time of the marriage which took place about February 1902. In this, at no less than three places, it is stated that some articles were purchased for Saddan Bibi.

The plaintiff's pairokar fully realized the signifiance of these entries and put forward the case that the plaintiff was never known by the name of Saddan, said to be her pet name. The plaintiff herself stated that she was never called by the name of Saddan; she said that Saddan was the pet name of a relation of hers named Safdari. The plaintiff's mother, Mt. Walan Bibi, said the same thing. But we find that in a document dated 14th July 1910, executed by the plaintiff's own mother for herself and as the guardian of her minor daughter, the present plaintiff, she described her daughter as Mt. Saddan (p. 247). We also find that Muhammad Husain and Imtiaz Ali, witnesses for the defendant, pleaders have also stated that the pet name of the younger daughter of Saiyed Ali Husain was Saddan. It is therefore obvious to us that the story put forward on behalf of the plaintiff was false and that the girl referred to in this account was the plaintiff Saidunnissa herself for whom some clothes were made in February 1902. This demonstrates that the entry in the birth register of 1903, cannot possibly refer to her. We have already mentioned that we are satisfied that this is a genuine document and therefore destroys the plaintiff's case.

The burden of proving that the plaintiff attained her majority within three years of the suit undoubtedly lies on her. The only evidence that remains for consideration is the certificate of guardianship issued by the District Judge to Mt. Walan Bibi when she was appointed the plaintiff's certificated guardian. The application of Mt. Walan Bibi is printed on p. 192, the certificate in original is on p. 197. According to the application she was born on 19th December 1900 and was about eight years of age on 5th February 1908. The certificate also states that her minority would continue till 19th December 1921.

The question before us is that first, whether this certificate of guardianship is by itself admissible in evidence; and secondly whether it is of any value so as to discharge the burden.

It was held in *Satish Chandra Mukhopadhya* v. *Mahendra Lal Pathak* (5) that, as the Guardians and Wards Act did not require the District Judge to draw up a certificate, such a certificate was no evidence of minority under S. 35, Evidence Act. This case was followed by this High Court in the case of *Gunjra Kuar* v. *Ablakh Pande* (6). Since then there has been no reported case of this High Court where a certificate of guardianship has been held to be admissible.

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(5) [1890] 17 Cal. 849.

These cases have recently been criticized adversely by the Oudh Chief Court in *Maqbul Husain* v. *Estate of Ch. Shafiq-uz-zaman*, *A. I. R.* 1926 *Oudh* 28, and *Ameer Hasan* v. *Mohammad Ejaz Husain*, *A. I. R.* 1929 *Oudh* 134. It was supposed by the learned Judges of Oudh that in the previous cases referred to above it was overlooked that there were High Court rules under which the District Judge was directed to issue certificates of guardianship. What was overlooked by the learned Judges themselves was that these cases were cases under Act 40 of 1858 and not under the Guardians and Wards Act of 1890, and in the former Act there was no provision similar to that contained in S. 50 of the later Act under which the High Court can make rules directing the District Judge to issue such certificate.

The view taken by the learned Judges in Oudh is that inasmuch as the rules require the District Judge to issue a certificate of guardianship, such certificate is a public or official record within the meaning of S. 35, Evidence Act, and is therefore admissible in evidence.

The question has recently come up for consideration before the Patna and the Calcutta High Courts, and they have adhered to the opinion previously expressed that such a certificate is not admissible: *Harihar Prasad Singh* v. *Babu Edul Singh* (7) and *Gur Pershad Singh* v. *Dhori Rai* (8). *Ambika Charan Kundu* v. *Kumud Mohun Chaudhury*, *A. I. R.* 1928 *Cal.* 893. Although the District Judge issues a certificate of guardianship there is no rule requiring him to maintain any official book, register or record containing a copy of this certificate. It is well known that there is no investigation by the Judge as to the exact date of the birth of the minor and all that he is to be satisfied with is that the minor who is alleged to be a minor is in fact a minor. If there was any public or official book, register or record only a certified copy of it would be issued to the guardian and the original maintained by the Judge. This is not the case. The original certificate itself was issued to the guardian, and it is the original certificate which has been produced in the present case which embodies the order passed by the District Judge for the grant of the certificate. We therefore find it very difficult to hold that this was a public or official record in which an entry was made by a public servant in the discharge of his official duty, within the meaning of S. 35, Evidence Act. We agree with the view expressed by the Calcutta and Patna High Courts that in spite of the fact that such certificates are now issued under the authorities of the rules framed by the various High Courts, they are nevertheless inadmissible in evidence because they are not public or official book, register or record in which an entry is made by a public servant in discharge of his official duty. What S. 35 apparently contemplates is that an entry should have been made by an officer whose duty it is to make such an entry after having been satisfied as to its correctness. We therefore hold that the certificate by itself is not admissible in evidence.

We are however of opinion that even if the certificate of guardianship were admissible as a piece of evidence it is of no value. As pointed out above, the plaintiff's case was not that she was born in December 1900 but that she was born in 1903. That case has broken down; furthermore the plaintiff's mother was examined in this case and she also stated that the year of her daughter's birth was 1903. She has thus attempted to destroy the effect of the year of her birth given by her in her application for the appointment of a guardian. On the case put forward by the plaintiff herself the date 19th December 1900 as entered in the certificate was wrong. She therefore cannot turn round and rely upon it. But even if she were allowed to do so her admission that the date of her birth was the 6th of Rabiulawal would again stand in her way. The plaintiff has stated that there is a birthday ceremony of hers performed every year and it is on account of this annual ceremony that she remembers that she was born on 6th Rabiulawal. The statement of her mother also corroborated her. It is thus clear that although there can be a mistake as regards the exact year of her birth there can be no mistake as regards the date of the lunar month. According to her it was the month of Rabiulawal. A reference to the calendar shows that Rabiulawal in the year 1900 fell in June and not December. There is therefore every reason to believe that the 19th December which was put down as the date of her birth in the application and which was repeated in the certificate, was put down approximately without any regard to strict accuracy.

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(6) [1896] 18 All. 478=(1896) A. W. N. 158.
(7) [1920] 5 Pat. L. J. 460=57 I. C. 334.
(8) [1911] 38 Cal. 182=7 I. C. 806.

In order to bring her claim within time the plaintiff has to prove that she was not born earlier than November 1900. The margin is too small. If she was born in Rabulawal she was undoubtedly born before that month. We also note that as the exact age of a minor is not so important at the time, particular care is not taken to put it down accurately in the application for guardianship. In view of all these circumstances, we are unable to hold that the plaintiff can be said to have discharged the burden of proof that lay on her by the production of this certificate of guardianship.

We accordingly confirm the finding of the Court below that the suit was brought more than three years after the attainment of her majority. In this view of the matter the suit was rightly dismissed.

We may however point out that we are not satisfied with the finding of the Court below as regards taluka Suri. It was not the defendants' case in the written statement that this property had been purchased by Saiyed Ali Husain out of his own money for the benefit of the two minors Abbas Husain and Muhibul Hasan in whose names the sale deed was taken. On the other hand, it was expressly pleaded in para. 22 of the written statement that these minors were the real purchasers themselves and that Saiyed Ali Husain never had any connexion with all these properties. The learned Subordinate Judge has found that the money for acquiring these properties came from the funds of Saiyed Ali Husain, that the incumbrances were discharged by Saiyed Ali Husain out of his own income and that Government revenue is shown to have been paid by the same man out of his own funds. He is therefore right in concluding that, in the absence of proof that the money was supplied by the minors, it was established that Saiyed Ali Husain had purchased Suri property. He has gone on to hold that the property was acquired for the benefit of the two minors. Abhas Husain was the minor son of Ali Husain who had daughters also and Muhibul Hasan was Ali Husain's brother's son. The only evidence in support of the theory that the purchase was made for the benefit of these minors from the very outset is the statements of witnesses who are not independent. Nurul Hasan is the defendant who says so and Kazim Husain, the maternal uncle of Muhibul Hasan, has also said the same thing. There is also the statement os Mr. Imtiaz Ali that the deceased stated to him that the property belonged to these minors. This evidence in our opinion is not strong enough to establish that at the time when the property was purchased Ali Husain intended that it should not belong to him but should belong to the minors; and there is no presumption of advancement in India and the defendant has not established by any reliable and independent evidence that the property was acquired for the benefit of the minors. As pointed out above no such case was put forward in the written statement and a new case should not have been made out by the Court below.

We would therefore have been inclined to decree the plaintiff's claim with regard to this item, if her suit were within time.

The result is that the appeal is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 313

MUKERJI AND BENNET, JJ.

Swarath Dhobi—Plaintiff—Appellant.

v.

Mt. Ghurki and *others*—Defendants—Respondents.

Second Appeal No. 680 of 1928, Decided on 26th January 1931, against decision of Second Addl. Sub-Judge, Jaunpur, D/- 4th February 1928.

Hindu Law—Joint family—No nucleus of ancestral joint property—Acquisition of particular member is not joint family property.

Where there is no nucleus of ancestral property or where there is no nucleus of joint property possessed by the members of the family any acquisition of a particular member cannot be treated as joint family property in which other members of the family have a right to share.: 33 *All.* 677, *Rel. on* and 35 *All.* 564, *Expl*

[P 315 C 2]

Harnandan Prasad—for Appellant.

Haribans Sahai—for Respondents.

Mukerji, J.—This second appeal has been referred to a Bench of two Judges because the learned Judge before whom it came thought that there was some conflict between two cases decided by this Court, namely *Ram Kishan Das* v. *Tunda Mal* (1) and *Kundan Lal* v. *Shankar Lal* (2).

The facts of the case as found by the Court below are these: One Ghurao was a tenant holding the fixed rate tenancy, one-half of which is in dispute in this suit. On 26th July 1913 he made a gift of one-half of it to the plaintiff-appellant Swarath, who was a son of his wife's brother. The other half he gave to his daughter Mt. Lotania. The daughter's half-share went by inheritance to her son and on the death of the son the property was inherited by the father the husband of Mt. Lotania, Jhinguri. On 13th June 1919, Jhinguri sold this half-share in the tenancy to plaintiff's brother Gobardhan, the late husband of respondent 1 Mt. Ghurki. The other defendants in the suit are transferees from Mt. Ghurki. The plaintiff-appellant claimed the half-share in dispute on the ground that his brother Gobardhan died joint with him and by right of surviviorship he is entitled to the property in question. The defence was that Gobardhan died separate and the property in suit was his self-acquisition.

The Court of first instance decreed the suit. On appeal the learned Subordinate Judge dismissed it. The learned Subordinate Judge found that although the two brothers Swarath and Gobardhan lived together there was no nucleus either of ancestral property or of joint family property and that therefore there was no presumption that the property acquired by Gobardhan was joint family property in his hand. The learned Judge also found that Gobardhan used to go out to Calcutta to earn a living and it was possible that with the savings he was able to purchase the property in question.

In this Court it has been contended that the learned Subordinate Judge has overlooked the presumption of Hindu law that the property held by a member of a joint Hindu family is joint property and that if this presumption be given its proper effect to, the suit should be decreed.

The learned counsel for the appellant has further contended that there is a real conflict between the two cases quoted at an earlier part of this judgment and he has asked that if we are also of the same opinion we should refer the case to a larger Bench.

We are of opinion that there is no conflict at all between the two cases, one reported in *Ram Kishan Das* v. *Tunda Mal* (1) and the other reported in *Kundan Lal* v. *Shankar Lal* (2). Indeed the learned Judges who decided the later case expressed the opinion that they were not in any way differing from the earlier case. At p. 568 of the Report *Kundan Lal* v. *Shankar Lal* (2), Richards, C. J. is reported to have said :

> "It seems to me however that it is unnecessary in the present case to express any view on the correctness of the decision in *Ram Kishan Das* v. *Tunda Mal* (1) because I think that in the present case it is necessary for the plaintiff . . . . . ."

We are also of the same opinion. Mayne in his Hindu Law, 9th Edition, in the footnote, at p. 377, says :

> "The decision in *Kundan Lal* v. *Shankar Lal* (2) is not really in conflict with the proposition in the text ; for in that case it was assumed that the property though acquired in the name of a particular member was in the possession of the joint family."

The case before us is apparently governed by the decision in *Ram Kishan Das* v. *Tunda Mal* (1) which lays down a law which has never been dissented from in this Court.

It will be interesting to look at the original texts in order to find out whether the rule that has been laid down in *Ram Kishan Das* v. *Tunda Mal* (1) is in any way in conflict with them. Vijnaneshwara in his Commentary on the Mitakshara in Ch. 1, S. 4 Placitum 118. (Colebrook's Fr.) says :

> "The author explains that may not be divided whatever else is acquired by the coparcener himself without detriment to the father's estate

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(1) [1911] 33 All. 677=10 I. C. 543.

(2) [1913] 35 All. 564=21 I. C. 13.

as a present from a friend or a gift at nuptials does not appertain to the coheirs."

Then he explains:

"That which has been acquired by the coparcener himself without any detriment to the goods of his father or mother or which has been received by him from a friend . . . . . shall not be given up to the brethren or other co-heirs the person recovering it shall taken such property." *Ibid.*

The opinion recorded by the author of the Mitakshara is really based on a text of Manu which may be translated as follows :

"Whatever one has earned by his own labour without impairing the paternal estate one may not give a share of the self-acquired property to another if he so desires it"

अनुपधनं पितृद्रव्यम् श्रमेण यदुपार्जयेत ।
स्वपभीहित लवघम तन्नावासा दातुमर्हति ॥

"(Translated by M. N. Dutta (Shastri) M. A., and published by Elysium Press, Calcutta: see Manushmhita, Ch. 9, Sloka 288."

A similar idea is expressed by the next sloka in which it is laid down by Manu as follows :

"A son who has managed to recover an ancestral property which his father had failed to do in his lifetime must not divide the same among his own brothers if he does not so desire it."

It appears to us that the use of the word "joint" family has been to some extent responsible for the conception that there can be no joint family without joint property. The word that has been actually used in the Sanskrit texts, especially by the author of the Mitakshara is "abibhakta" which means "undivided." A family in which the members are living together may be called an undivided family, for the simple reason that they have not separated. Where the idea of mere living together has to be expressed, the expression that has been used by Manu is "Sahajiwantas." In Ch. 9, Sloka 210, Manu lays down that when divided members of a family "live together and they decide to separate again" the eldest member of the family cannot claim the eldest member's share. The word "joint" implies, though not necessarily, possession of some property which may be regarded as owned by all the members of the family. The word "undivided" need not necessarily carry any such idea. Dr. Gour, in his "Hindu Code," Edn. 3, at p. 590, in Art. 1174 says :

"The strength of the joint family lies in the joint family property. Without such property a joint family is conceivable, but then its jointness would have no meaning, since such family may possess certain family rights in common, but they are comparatively of little account. The importance of the joint family therefore lies in the fact that it possesses all its property in common, as such members have mutual rights and obligations with reference to it. But while Hindu law postulates and presumes the existence of a joint family, it does not either postulate or presume the existence of joint family property . . . . . ."

Indeed the law is now too well established to be disturbed at this late hour and it is to this effect that where there is no nucleus of ancestral property or where there is no nucleus of joint property possessed by the members of the family, any acquisition of a particular member cannot be treated as joint family property in whith other members of the family have a right to share. The result is that the appeal cannot succeed and it is hereby dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 315

MEARS, C. J. AND SEN, J.

Kundan Lal—Applicant.

v.

Emperor—Opposite Party.

Civil Revn. No. 299 of 1929, Decided on 16th December 1930 from order of Dist. Judge, Saharanpur, D/- 2nd April 1929.

Legal Practitioners Act (amended by Act 15 of 1926), S. 36 — Resolution of Bar Association asserting person to be tout—No evidence called in rebuttal as to sweep away legal effect of resolution — High Court will not in revision set aside order declaring that person to be tout.

Where there is a resolution of the Bar Association declaring a person to be a tout and the Courts act and gives effect to the resolution and there is no evidence called in rebuttal which was believed by the lower Court as sweeping away the legal effect of the resolution, the High Court will not in revision set aside the order declaring a person to be a tout. [P 316 C 2]

A. Sanyal—for Applicant.

U. S. Bajpai—for the Crown.

Mears, C. J.—Kundal Lal applies in revision against an order of Mr. Badhwar who on 2nd April 1929, declared Kundan Lal to be a tout. It appears that the Bar Association of Dehra Dun appointed an enquiry committee and eventually passed a resolution giving the names of seven persons who were asserted to be touts. We note from the resolution which was eventually submitted to Mr. Ansari and considered by him, that two members of the association voted in favour of Kundan Lal on the ground that he was not a tout but 18 voted against him. When the matter came up before Mr. Ansari, Kundan Lal called certain witnesses as to character, whose evidence cannot have been believed by Mr. Ansari nor by Mr. Badhwar when this matter came before the latter Judge. It transpired that between 1923 and 1926 Kandan Lal had been in trouble over an embezzlement of moneys belonging to the client of a lawyer and he had also been sentenced to eight months' imprisonment, apparently for abduction. Those two matters were discussed by Mr. Ansari who regarded Kundan Lal as an undesirable person. That may be true, he may be a dishonest, undesirable person, but it did not carry the question of whether he was, in fact, a tout any further. The convictions may have clouded both the judgments of Mr. Ansari and Mr. Badhwar.

Another ground of complaint taken is that a witness, Gajpat Saran, was called, who spoke to conversations held with Kundan Lal six years before, i e., as far back as 1923. The evidence is rather vague but no doubt was intended to convey to the mind of the Judge that Kundan Lal was hoping to have made touting arrangements with Gajpat Saran. The complaint of Kundan Lal is that that evidence was received last of all and after he had given evidence and he wanted to rebut and, in fact, destroy the evidence by proving from the records of the criminal cases that he had not been in Dehra Dun at the time spoken to by Mr. Gajpat Saran. Mr. Gajpat Saran was, in fact, very vague as to the date of the interview. We have allowed counsel considerable latitute in this matter, but it seems to us that it would not have been of advantage to Kundan Lal to call for the record. All that it would have proved would have been that Kundan Lal was not at Dehra Dun at certain months in the year 1923. It would by no means exclude the possibility of his having been there in the early part of the year or in the first half of the year. Moreover, in the application to summon this record Kundan Lal did not say, as any man would have said, that he had never at any time in his life had an interview with Mr. Gajpat Saran such as Gajpat Saran was fastening on to him. We therefore think that although there may have been an irregularity in that matter it was not such an irregularity which in fact operated to the detriment of Kundan Lal. The real difficulty in Kundal Lal's way are the provisions of S. 36, Act 18 of 1879 and the amendment which was made by Act 15 of 1926. S. 36 (a) gives to various Courts power to publish lists of persons proved to their satisfaction by evidence of general repute or otherwise habitually to act as touts.

Now, prior to 1926 the only way in which one could get evidence of general repute .was by putting witnesses into the box who would speak as to what they believed to be the general repute of an alleged tout. But after the amendment of Act 18 of 1879 by Act 15 of 1926 a Bar Association had the power to pass a resolution by a majority of their members at a meeting specially convened for the purpose to declare certain persons as touts and on that declaration being duly made and it being duly proved that that resolution had been passed, any Court could accept that finding as evidence of general repute, which is the phrase used in S. 36 of the Act of 1879. The practical result therefore is that nowadays whilst a Court can still proceed under S. 36 in the old way and call evidence it can also avoid the calling of these witnesses once a resolution is presented to it which satisfies the requirements of Act 15 of 1926, that is to say, the Court accepts that the resolution does prove that a person whose conduct has been enquired into by them is a tout by evidence of general repute. Therefore there being in this case a resolution of that character, both Mr. Ansari and Mr. Badhwar had a legal foundation upon which to proceed, and unsatisfactory as was the evidence of Gajpat Saran, nevertheless, in our opinion, we have no power to say that on a revisional application of this kind the order of Mr. Badhwar must be set aside. Mr. Ansari and Mr. Badhwar both acted and gave effect to the resolution and there was no evidence called in rebuttal by Kundan Lal which was believed by the lower Court or by Mr. Badhwar as sweeping away the legal effect of the resolution. This application in revision is therefore dismissed with costs and fees on the higher scale.

P.N./R.K. *Revision dismissed.*

A. I. R. 1931 Allahabad 317

SULAIMAN AND YOUNG, JJ.

Amjad Ali Khan—Plaintiff — Appellant.

v.

Saadat Begum and *another* — Defendants—Respondents.

Second Appeal No. 1972 of 1928, Decided on 10th January 1931, against decision of Sub Judge, Moradabad, D/- 19th June 1928.

(a) Agra Pre-emption Act (1922), S. 3 (1)—Application.

The Agra Pre-emption Act is not applicable to the city of Moradabad. [P 318 C 1]

(b) Agra Pre emption Act (1922), S. 3—Proviso—Application.

Proviso to S. 3 applies to areas to which the Act applies but in which there is no right of pre-emption under S. 5. [P 318 C 1]

(c) Agra Pre-emption Act (1922), S. 16—S. 16 does not contemplate exercise of right in areas to which the Act is not applicable.

Section 16 is intended to be applicable to area to which the Act is applicable. It does not contemplate the exercise of a right in area to which the Act is expressly made not applicable. [P 318 C 1]

Certain shares of a zamindari property in a village were sold along with a house in the city of Moradabad. *A* brought a suit to pre-empt the zamindari property by virtue of his right under the Pre-emption Act and to pre-empt the house property under Mahomadan law. It was found that he had made no demands which would entitle him to succeed under the Mahomedan law so far as the house was concerned.

Held: that *A* did not lose his right to pre-empt the property in the village to which the Pre-emption Act applied simply because he had failed to exercise his right under the Mahomedan law in respect of the house in the city of Moradabad. [P 318 C 1]

M. L. Agarwala—for Appellant.

Mushtaq Ahmad—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for pre-emption. Certain shares of zamindari property in a village, along with a house in the city of Moradabad, were sold under one sale deed to the defendants. The plaintiff brought his suit to pre-empt the zamindari property by virtue of his right under the Pre-emption Act and to pre-empt the house property under the Mahomedan law. He alleged that he had made the necessary demands required by Mahomedan law. Both the Courts below have come to the conclusion that he failed to prove that he made the demands which would entitle him to succeed under the Mahomedan law so far as the house was concerned. The first Court dismissed the claim with regard to the house, but decreed it as regards the zamindari property. On appeal the lower appellate Court has dismissed the entire suit. Following the case of *Abdul Khan* v. *Shakira Bibi* (1) the lower appellate Court has held that having lost his right to pre-empt the house the plaintiff's suit as regards the zemindari property also failed on the ground of partial pre-emption.

The plaintiff has come up on appeal, and on his behalf it is contended that the view ef the lower appellate Court is not right,

Section 16, Agra Pre-emption Act has been amended since the pronouncement of the judgment quoted above, and the amendment indicates the mind of the legislature. But it being an amending Act and not a declaratory one the addition of the words " under this Act " at the end of S. 16, would not have a retrospective effect. We have therefore to apply S. 16 as it stood before the amendment

In the case quoted above the Bench reluctantly came to the conclusion that the previous interpretation of the common law had remained unaffected. That was however a case in which both the zamindari property and the house property were situated within a village which was a rural area to which the Pre-emption Act applied. The Bench thought that because the proviso to S. 3 left the Mahomedan law intact where there was no right of pre-emption under S. 5, the claim to pre-empt the house was in accordance with the provision of S. 3. At another place in the judgment it was remarked that the enforcement of such a right under the Mahomedan law would also be a pre-emption under the Act. This last expression was certainly inaccurate, but that was a case to which the Act in its entirety was applicable.

The learned advocate for the appellant distinguishes the present case from the reported case on the ground that here the house is situated not in the village to which the Act applies, but in the city of Moradabad to which the Act does not apply. S. 1, sub-S. (3) of the Act expressly lays down that the Act does not apply to any area included within the limits of a municipality. It

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(2) A. I. R. 1928 All. 121=108 I. C. 573=50 All. 348.

is therefore obvious that the Act is not applicable to the city of Moradabad at all It follows that no section of the Act is applicable to the city of Moradabad, nor is any proviso to a section. Of course it does not follow from this that the law which stood in the areas to which the Act does not apply has in any way been superseded; the Act merely does not touch such laws or rights. There would be no necessity to lay down a proviso in respect of an area to which the Act is expressly not made applicable. It is therefore reasonable to construe the proviso to S. 3 as applying to areas to which the Act applies, but in which there is no right of pre-emption under S. 5. In the same way it follows that S. 16 must have been intended to be applicable to areas to which the Act was made applicable. Under that section no suit shall lie for enforcing a right of pre-emption in respect of a portion only of the property which the plaintiff is entitled to pre-empt. In view of the opinions expressed in the earlier cases we assume that the expression "entitled to pre-empt" would be wide enough to cover the case where there was an initial right to pre empt although it was lost on account of the failure to make the demands. But we think that there is force in the contention that the legislature would not have intended to include within this expression any right to pre empt which the plaintiff may possess in areas to which the Act is not applicable. A statutory right to pre-empt the zamindari property has been conferred on the plaintiff under Ss. 5, 11 and 12 of the Act. That statutory right cannot be taken away by any common law outside the Act. The only way to defeat such a right would be by applying S. 16 if it were applicable. We see no reason for holding that S. 16 contemplates the exercise of a right in areas to which the Act is expressly made not applicable. It therefore seems to us that the present case is distinguishable from the reported case, and in the case before us we cannot hold that simply because the plaintiff did not properly exercise his right under the Mahomedan law in respect of the house in the city of Moradabad, to which the Act is not applicable, he has also lost his right to pre-empt the property within the village to which the Act applies.

We therefore think that the decree of the Court of first instance was right. We accordingly allow this appeal and, setting aside the decree of the lower appellate Court, restore that of the Court of first instance. The plaintiff will have the costs of the appeal preferred by the defendant in the lower appellate Court and the costs of the appeal in this Court from her, who will bear her own costs. The defendant will get from the plaintiff the costs of the cross-objections in the lower appellate Court. The costs of this Court will include fees on the higher scale. In case the plaintiff has either not deposited the proportionate amount of the pre-emption money, or has taken it out after deposit we would allow him thirty days from this date to re-deposit the amount in the lower appellate Court. In case the plaintiff fails to deposit the amount within the time fixed the suit shall stand dismissed with costs in all Courts including in this Court fees on the higher scale.

R.M./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 318

DALAL, J.

Balmakund and *another*—Applicants.

v.

Seth Piyare Lal and *another*—Opposite Parties.

Civil Revn. No. 350 of 1930, Decided on 21st November 1930, from order of Munsif, Hathras, D/- 25th April 1930.

Civil P. C., S. 149—Court cannot extend time for payment of court-fee after decree is passed.

The discretion to be exercised at any stage means a stage of the judicial proceedings and not after a final decree has been passed and the Court is divested of jurisdiction with respect to that suit. Once a decree is passed a Court is deprived of its jurisdiction to extend the time for payment of court-fee.[P 319 C 1, 2]

Where the trial Court on 28th March 1930 passed a decree by which it ordered possession in favour of the plaintiff with this proviso that if the deficient court-fee was not paid within two days of 28th March 1930, the suit shall stand dismissed, but subsequently on plaintiffs application it granted him extension on 25th October 1930 and accepted court-fee stamp:

Held: that the order was without jurisdiction and that an application for its revision was maintainable: 40 *All.* 579, *Foll.*; *A. I. R.* 1929 *All*, 118 and *A. I. R.* 1929 *P. C.* 147, *Dist.*; *A. I. R.* 1923 *Cal.* 612 and *A. I. R.* 1928 *Mad.* 154, *Ref.* [P 319 C 2]

M. A. Aziz—for Applicants.

Panna Lal—for Opposite Parties.

Judgment. — The trial Court has brought the proceedings into a knot by passing orders without understanding their effect. On 28th March 1930 he passed a decree by which he ordered possession in favour of the plaintiff with this proviso : that if the deficient court-fee was not paid within two days of 28th March 1930 the suit shall stand dismissed. The decree was a complete decree and on 30th March 1930 on non-payment of the court-fee, the result of the decree was that the suit stood dismissed with costs. Subsequently on 1st April 1930 the plaintiff applied for extension of time for the filing of deficient court-fee and on 25th October 1930 the Court allowed the application and accepted the court-fee stamp. The defendant has come here in revision and argued that the order of 25th April was passed by the Munsif without jurisdiction. I have looked through the record. There has been no subsequent amendment of the decree and the decree as it stands at present directs dismissal of the suit even after the passing of the order of 25th April. The first objection taken was on behalf of the plaintiff that no application for revision lay. A Bench judgment of this Court in *Chhakkan Lal* v. *Kanhaiya Lal* (1) was quoted. In that case no question of jurisdiction arose because the Court had directed a certain amount of court-fee to be paid during the proceedings in suit prior to the decree. The second case quoted was the Privy Council one, *Faizullah Khan* v. *Mauladad Khan, A. I. R.* 1929, *P. C.* 147. Here also the question was not of an extension of time granted under a decree. Their Lordships held that the case was one where judicial authority should exercise discretion under S. 149, Civil P. C. The proceedings there also were in suit or at subsequent stages of appeal and not subsequent to a final decree.

It is argued on behalf of the plaintiff that the Court had jurisdiction under S. 149 to extend the time for the payment of court-fee. I do not agree with this opinion. The discretion to be exercised at any stage means a stage of the judicial proceedings and not after a final decree had been passed and the Court was divested of jurisdiction with respect to that suit. There are several rulings of this Court to indicate that once a decree was passed a Court was deprived of its jurisdiction to extend the time for payment of court-fee. The case exactly in point is the one of *Sajjadi Begam* v. *Dilawar Husain* (2). In that case there was a condition embodied in the decree that the plaintiff was to pay up within a week the deficiency of Rs. 20 in court-fees and that in default thereof the suit would stand dismissed with costs. After the period had expired the plaintiff made an application stating that she had not been informed that the requisite amount was Rs. 20 and praying for an extension of time under S. 148, Civil P. C., in order to enable her to pay in the remaining amount of the court-fee. Their Lordships in this Court observed :

> " But there seems to be a more formidable objection to the present application namely that once the term about depositing the Rs. 20 was embodied in the decree, the Court itself, even if it desired, had no jurisdiction to alter its own decree save on an application for review of judgment under S. 114, read with O. 47, R. 1."

Their Lordships referred to pre-emption suits and then went on to observe :

> " The ground for these decisions has always been that the Court has no jurisdiction to interfere with its own decree save in the manner we have mentioned above. There is no distinction between a pre-emption decree and any other decree which embodies certain conditions and provides for the suit being dismissed if those conditions are not complied with. The only exception is that of mortgage decrees : time can be extended in mortgage decrees by virtue of the provisions of O. 34."

This ruling was followed by a Bench of the Calcutta High Court in *Habibulla* v. *Gola Asmotar Khatun, A. I. R.* 1923 *Cal.* 612. The Madras High Court has also been of the some opinion in *S. S. Balakrishna Iyer* v. *Parvathammal* (3). One of the learned Judges composing the Bench laid down that the test to determine in cases of this nature whether power still exists to extend time is whether the proceeding in which time was originally granted is still pending or has been disposed of. Their Lordships pointed out that in cases of this nature no further order was necessary and that the matter was disposed of when the original order was passed and the Court had been deprived of its jurisdiction. The order of 25th April 1930 was passed by the Munsif without jurisdiction and

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(1) A. I. R. 1923 All. 118 =69 I. C. 921 = 45 All. 218.

(2) [1918] 40 All. 579=47 I. C. 4.

(3) A. I. R. 1928 Mad. 154=105 I. C. 124.

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is hereby discharged. No order is made as to costs.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 320 (1)

SULAIMAN AND KING, JJ.

Mohammad Sulaiman and *another*—Defendants—Appellants.

v.

Sh. Mazhar and *others* — Plaintiff and Defendants—Respondents.

Civil Revn. No. 9 of 1930, Decided on 23rd January 1931, against order of 2nd Addl. Sub Judge, Azamgarh, D/- 7th Setember 1929.

(a) Power-of-Attorney — Construction — Power held to authorize to appoint pleader.

From the fact that a person holding power-of-attorney is directed to appear in person and to appoint a substitute for himself it follows that he is given power to appoint a pleader. [P 320 C 2]

(b) Civil P. C. (1908), Sch. 2, R. 1—Party's signature is not necessary on application for reference.

The actual signature of a party Is not necessary on the application for reference to arbitration provided he agrees to it. [P 320 C 2]

Iqbal Ahmad, Mukhtar Ahmad and *Mansur Alam*—for Appellants.

U. S. Bajpai and *G. S. Pathak* — for Respondents.

Sulaiman, J.—This is an application in revision from an order of the Court below directing that a decree be prepared in terms of an award. The only point urged in revision is that the reference to arbitration was not signed by a vakil duly appointed on behalf of the applicants Muhammad Sulaiman and Muhammad Usman. The applicants were defendants in the suit and on their behalf their pairokar Muhammad Akbar who held a general power-of-attorney appeared. It was Muhammad Akbar who had signed the vakalatnama by which Mr. Abdul Ali was appointed their pleader. The agreement for reference to arbitration was signed by this pleader. The Court below after examining the general power-of-attorney, has come to the conclusion that Muhammad Akbar had full authority to appoint a pleader to act for the defendants.

It may be doubtful whether a revision would lie on the ground that the Court below has misinterpreted this document. The only way in which the learned advocate for the applicants urges that a revision would lie is by saying that this error of law amounts to a material irregularity in accepting a reference not consented to by all the parties. In the view which we take of the merits of the revision it is not necessary to decide this preliminary objection.

In the first place we agree that the Court below is right in holding that the general terms of the power-of-attorney are wide enough to include authority to appoint a pleader. Muhammad Akbar was authorized to appear in Court on behalf of the defendants and to prosecute or defend a suit; he was also authorized to appoint substitutes for him and to 'enter into contracts or agreements for effectuating any of the purposes mentioned in the power-of-attorney.' He was also given express authority to submit disputes to arbitration and to compromize all actions. He therefore had authority to appear in person and also to appoint a substitute for himself. It follows that he was given authority to appoint a pleader.

Apart from this it is also quite clear that as he held a power-of-attorney authorizing him to make and do such appearances, applications and acts on behalf of the two defendants he was their recognized agent as defined in R. 2 (a) O. 3. A pleader appointed by 'a 'recognized agent has authority to appear for the defendants and to act on their behalf under R. 4 of the same order.

The circumstance also shows that Muhammad Akbar although he did not sign the application for reference to arbitration had agreed to it. The actual signature of a party is not required by Sch. 2 to R. 1. The application is therefore dismissed with costs.

S.N./R.K. *Application dismissed.*

A. I. R. 1931 Allahabad 320 (2)

MUKERJI AND BENNET, JJ.

S. Marahmat Husain — Judgment-debtor—Applicant.

v.

Oudh Commercial Bank Ltd. and *others* —Decree-holders and Judgment-debtors Opposite Parties.

First Appeal No. 100 of 1930, Decided on 5th November 1930, from decision of Sub-Judge, Azamgarh, D/- 21st December 1929.

(a) Civil P. C., S. 68—Powers of executing Court do not pass to Collector but remain with that Court.

Section 68 merely states that the execution of the decree shall be transferred to the Collector.

It does not state that the Collector shall become the Court executing the decree and the Court which sends the decree for execution to the Collector. The powers conferred by the Civil Procedure Code on the Court executing the decree remain with that Court and do not pass to the Collector. [P 323 C 1]

(b) Civil P. C. (1908), Ss. 42 and 50 (1)—Application to substitute names of legal representatives can be made to Court to which decree is transferred for execution.

Section 50 (1) does not give an exclusive jurisdiction to the Court which passed a decree for the purposes of substituting the names of legal representatives for a deceased judgment-debtor, and an application may be also made to and orders passed by a Court to which a decree has been transferred for execution: 22 *Cal.* 558; *A I.R.* 1928 *P.C.* 162, *Foll.*; 18 *Bom.* 224; 17 *All.* 431; 28 *Mad.* 466 and 11 *O.C.* 112, *not Foll.* [P 322 C 2]

N. Upadhiya—for Applicant.

K. N. Katju and *Shabd Saran*—for Respondents.

Bennet, J.—This is an appeal by a judgment-debtor against an order in execution passed by the learned Subordinate Judge of Azamgarh. This order was passed in course of execution of a decree which had been passed by the learned Subordinate Judge of Fyzabad in Suit No. 5 of 1913. (The Oudh Commercial Bank against Mt. Saleha Bibi and her husband Syed Riasat Husain judgment-debtors.) The procedure of the Court of Azamgarh has given rise to several objections which have been dismissed by that Court and which have been the subject of various grounds of appeal. The first objection which is taken is that on 24th November 1924 a certificate which is not before us as it is not on the record is said to have been issued by the Court at Azamgarh to the Court at Fyzabad. This certificate was apparently in printed Form 5 of App. E or possibly Form 4. Both are forms under O. 21, R. 6. According to the lower Court on this certificate the words were written in regard to this execution proceeding: "Send to the Collector for execution." The argument of the learned counsel for the appellant judgment-debtor is that this is a certificate of the result of the execution proceedings under S. 41, Civil P. C., and that after sending that certificate the Azamgarh Court had no further jurisdiction in these execution proceedings. Now S. 41 states as follows:

> "The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same, the circumstances attending such failure."

This section clearly contemplates either that execution should take place or that the Court to which the decree has been transferred should certify that it has failed to execute the decree. But the words "send to the Collector for execution" do not come under any of the words in S. 41. It is neither certified that execution has taken place nor that there has been a failure to execute. Accordingly we consider that the use of this form did not amount to the issue of a certificate under S. 41 and therefore that the jurisdiction of the Court in Azamgarh was not at all affected by that matter.

The next point which was argued before us was in regard to an application made by the decree-holder on 29th November 1924 that execution should continue and that the names of three persons Khairunnissa, Khurshed Husain and Banne Bibi should be added as judgment-debtors. On this notice was issued and a "rubkar" was sent to the Collector that these names be added and the application was granted. Now the reason for adding these names was that both the original judgment-debtors Mt. Saleha Bibi and Syed Riasat Husain had died. There was an application made in the Azamgarh Court on 1st December 1921 for execution of decree against ten persons including the present appellant Marahmat Husain in place of the deceased judgment-debtors, and that application was granted and at that time Marahmat Husain made no objection that the Azamgarh Court had no jurisdiction. The present objection indeed is only taken against the order of 29th November 1924 that three other persons should be added as legal representatives The chief point on which the argument is based is that in various rulings it has been held that under S. 50, sub-S. 1, only the Court which passed a decree has power to order that the decree should be executed against the legal representatives of a deceased judgment-debtor. That section does no doubt clearly direct that the application may be made to that Court. The question broadly which has been argued before us is whether that section gives an exclusive jurisdiction to the Court which passed a decree for the purposes of substituting the names of legal representatives for a deceased judgment-debtor, or whether an application may also be made to and orders passed by that Court to which a decree has been transferred for execution. S. 42, Civil P. C., provides that

> "the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself."

For the judgment-debtor appellant it was argued that although S. 42 gave jurisdiction to the Court to which a decree was transferred for purposes of execution that jurisdiction does not include the particular jurisdiction given by S. 50, sub-S. 1, exclusively to the Court which passed the decree. Now if that were so, a very remarkable result would arise, because S. 47, sub-S. 3, states that a Court executing a decree shall determine all questions which arise as to whether any person is or is not the representative of a party. In this subsection the language used is imperative and the subsection states that that Court shall determine that class of question. There is little distinction to be drawn between the questions to be determined by S. 47, sub-S. 3 and the questions to be determined by S. 50, sub-S. 1. In the Full Bench ruling of the Madras High Court on which the appellant relies *Swaminath Ayyar* v. *Vaidyanath Sastri* (1), one of the Judges stated that there was a direct contradiction between these two sections, that is Ss. 244 and 234, Civil P. C. of 1882.

The appellant has relied on *Hirachand Harjivan Das* v. *Kasturchand Kasidas* (2), *Seth Shapurji Nana Bhai* v. *Shankar Dat Dube* (3), (single Judge ruling) and *Swaminath Ayyar* v. *Vaidyanath Sastri* (1) and *Nazhatuddaula Abbas Khan* v. *Prince Wala Kadar Husain Ali Mirza* (4). No doubt these rulings are in favour of the narrow interpretation of the Code put forward by the appellant, but we note that in none of these rulings is there any consideration of the question which is argued before us as to whether S. 42 gives the Court to which a decree is transferred the same powers as that Court has under S. 50 or not. In fact in the ruling of the Full Bench of the Madras High Court in *Swaminath Ayyar* v. *Vaidyanath Sastri* (1) S. 228 (now S. 42) is dismissed in a single line with the remark that it is not inconsistent with the construction of S. 234 and S. 248 which the learned Judges adopted. Now in *Sham Lul Paul* v. *Madhu Sudan Sircar* (5), it has been held that the Court to which a decree is transferred for execution has full jurisdiction to deal with the question of substitution of the legal representatives of a deceased judgment-debtor. It was further held that even assuming that an application under S. 234 to the Court which passed the decree was a necessary preliminary to proceedings under S. 248 by the Court executing the decree, the omission to make it was only an irregularity which did not affect the merits of the case, and under S. 578 the order of the Court of first instance should not have been reversed on account of such irregularity. Now there is a recent authority of the Privy Council reported in *Jang Bahadur* v. *Bank of Upper India, Ltd.* (6) The question before their Lordships was the validity of an order bringing legal representatives of the deceased judgment-debtor on the record which was passed by the Court at Hardoi to which a decree had been transferred from Lucknow for execution. On p. 320 their Lordships stated:

> "The question is: was the effect of the introduction of those words to confer an exclusive jurisdiction on the Court which passed the decree in the matter of substitution or merely to lay down a rule of procedure as to which of the two Courts an application for substitution should be made."

Their Lordships held that S. 50 merely lays down a rule of procedure and that it does not confer exclusive jurisdiction to deal with this matter on the Court which passed the decree. Their Lordships stated at p. 322:

> "After consideration of all the circumstances of the case under appeal, their Lordships come to the conclusion that the Hardoi Court had jurisdiction to deal with the matter of the execution transferred to it; that the exercise of such jurisdiction as against the appellant, though irregular in the first instance, was submitted to for a considerable time by him He cannot now be heard to object to the exercise of such jurisdiction, and it would be to permit a gross abuse of procedure if he was allowed to do so."

Now applying that ruling to the present case we find that the appellant cannot make any valid objection to the exercise of such jurisdiction in addition of other three persons for the deceased judgment-debtor by the order of 29th November 1924. We also note that the three persons whose names were to be substituted by the order of 29th November 1924 made no objection to the addition of their names, nor has any objection ever been made by them although six years have elapsed. One point remains which was brought forward by the appellant, and this was to the effect that when the decree was transferred under S. 68, Civil P. C. to the Collector, then the Collector became the Court executing the decree and that no jurisdiction remains in the Court of the Subordinate Judge of Azamgarh. S. 68, Civil P. C., does not use language which supports this allegation of the appellant; that section merely states that the execution of the decree shall be transferred to the Collector. It does not state that the Collector shall become the Court executing the decree. We consider that the Court executing the decree remains the Court which sends the decree for execution to the Collector and that the powers conferred by the Civil Procedure Code on the Court executing the decree remain with that Court and do not pass to the Collector. We consider therefore that this appeal fails and we dismiss it with costs.

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(1) [1905] 28 Mad. 466=15 M.L.J. 116 (F.B.).

(2) [1894] 18 Bom. 224.

(3) [1895] 17 All. 431=(1895) A.W.N. 74.

(4) [1908] 11 O.C. 112.

(5) [1895] 22 Cal. 558.

(6) A.I.R. 1928 P.C. 162=109 I.C. 417=55 I.A. 227=3 Luck. 314 (P.C.).

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 323

KENDALL, J.

Alopi and *others* — Defendants—Appellants.

v.

Gajadhar Prasad and *another*—Plaintiffs—Respondents.

Second Appeals Nos. 2045 and 2046 of 1928, Decided on 16th December 1930, from decision of Dist. Judge, Allahabad, D/- 17th September 1928.

(a) Adverse Possession--Over twelve years' uninterrupted possession of house in abadi, without payment of rent to landlord of house site, gives possessor absolute ownership of site.

A person who is neither an agriculturist tenant nor a village handicraftsman, but who is in possession of a house in the abadi, which he and his predecessors-in-title have held for considerably more than twelve years without paying rent or acknowledging in any way the title of the landlord to the site upon which it is built, acquires an absolute ownership of the house site. The fact that the present occupier has not been in actual possession of the house for the whole of the period of adverse possession, but that he has acquired the house by a deed of gift from a person whose title to it has not been proved, does not make any difference if his predecessor's possession was also adverse to that of the landlord: 34 *I. C.* 952, *Dist.*; 29 *All.* 133 and 33 *All.* 757, *Rel. on.* [P 324 C 1, 2]

(b) Adverse Possession—Inference of adverse possession may be drawn from long possession and want of agreement or want of proof of license.

An inference of adverse possession may be drawn from circumstances, such as long possession and the absence of any proof of license or agreement between the person in possession and the landlord, even in a village, which is largely agricultural or even where the disputed land is situated within the Municipal area: 33 *All.* 757, *Rel. on.* [P 325 C 1]

(c) Civil P. C. (1908), S. 100 — Adverse possession—Question of actual possession is question of fact—Whether that had been adverse is mixed question of fact and law.

The question whether a person had been in possession, actual or constructive, of the disputed land is a pure question of fact. The question whether that possession had been adverse or not is a mixed question of fact and law. [P 324 C 2]

Damodar Das and *Ambika Prasad*—for Appellants.

Shiva Prasad Singh, *Gadadhar Prasad* and *Jwala Prasad Bhargav*—for Respondents.

Judgment.—This second appeal arises from a suit brought by Pundit Gajadhar Prasad and others who are unquestionably the part owners of a muhalla in Allahabad City. They sued the present appellants on the allegations that the appellants had been permitted by them to occupy a certain site in the muhalla but had recently made some encroachments on land of the plaintiffs in the neighbourhood in consequence of which the plaintiffs no longer wished to permit them to occupy the land in dispute. The defendants-appellants denied the plaintiff's title, and their defence amounted to an assertion of title by adverse possession. Both the Courts below have decreed the plaintiffs' suit.

The findings of fact have not been so clearly stated as they might have been, and the present suit was disposed of by the lower appellate Court in a judgment governing other appeals in which the circumstances were somewhat different. The learned District Judge however definitely found that while the plaintiff was a cosharer of the proprietary interest in the land on which the house in suit stands, yet that house had been in the "actual or constructive possession of the defendant Alopi and his predecessors-in-interest for a number of years" He then went on to discuss the question of whether the possession of the appellants had been that of a licensee as claimed by the plaintiff or whether it was adverse. There was no direct evidence to show in what manner the appellants' possession had started, and the Judge after discussing the case law on the question of whether in these circumstances possession could be held to be adverse or not came to a decision, which was based on the case of *Anand Sarup* v. *Chawwa* (1) that the possession was not adverse. A plea which appears to have been raised in the lower appellate Court in the alternative that possession was by license and the license could not be revoked because the appellants had a permanent structure on the land in dispute was also disallowed on the ground that it was not proved that the appellants had ever received a license to build.

It has been argued that the decision of the lower appellate Court in regard to adverse possession is incorrect. In the case of *Bhaddar* v. *Khairuddin* (2) it was held by a Bench of this Court that a person who was neither an agricultural tenant nor a village handicraftsman, but who was in possession of a house in the abadi which he and his predecessors-in-title had held for considerably more than twelve years without paying rent or acknowledging in any way the title of the zamindar to the site upon which it was built, had acquired an absolute ownership of the site. Sir John Stanley in his judgment remarked that the reasonable inference from the long uninterrupted possession and enjoyment of the property by Bhola and his predecessors-in-title was that they had acquired the absolute ownership either by a grant or by adverse possession. The property there was within the Municipal limits of the city of Allahabad, as it is in the present case, and no doubt this passage in the judgment suggested to the appellants their alternative plea of a license to build, which was no part of their original defence. In a later decision in *Incha Ram* v. *Bande Ali Khan* (3) a Full Bench of this Court held that in a village which was not a purely agricultural village the defendants, who were inn-keepers and tobacco sellers who had not paid rent to the zamindar or acknowledged his title in any way, had been in adverse possession and had acquired a title. It has been sought in argument to distinguish both these cases from the present one. The case of *Bhaddar* v. *Khairuddin* (3) appears however to have been very similar. There appears to have been no definite evidence either that a license had been given by the zamindar or that the defendant had specifically denied the zamindars' title. It is true that in the present case the appellants themselves had not been in actual possession of the property for the whole of the period for which they have been found to have been in constructive possession, because they acquired the house by a deed of gift from a person whose title to it has not been proved; but if their predecessors' possession was adverse this fact will make no difference.

The case on which the plaintiff-respondent relies, and on which the lower appellate Court has based its decision, is however clearly distinguishable, for the defendant and his predecessors-in-title had been in the habit of paying certain dues and rendering services to the zamindar : *Anand Sarup* v. *Chawwa* (1). It was therefore impossible to hold that the defendant's possession was without the permission of the zamindar and was in defiance of his title. In the present case, as I have already said there is no evidence whatever of any agreement between the zamindars and the defendants or their predecessors in regard to the terms on which this plot should be occupied.

It has been pointed out that the lower appellate Court has only found that the possession of the appellants over the plot in dispute had been "for a number of years." In this part of the judgment the Judge has unfortunately somewhat confused the two questions of whether the appellants had been in possession, and of whether that possession had been adverse or not. The first was a pure question of fact. The second was in the circumstances a mixed question of fact and law. The evidence on which the Judge relied consisted of certain papers and entries relating to the years 1892 to 1897 and 1910 to 1918, and it is perfectly clear therefore that the finding to which the Judge meant to come was that the appellants or their predecessors had been in possession for considerably over twelve years. If that possession was adverse to the proprietors their title has therefore matured.

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(1) [1916] 34 I. C. 952.

(2) [1906] 29 All. 133=(1906) A. W. N. 305=3 A. L. J. 760.

(3) [1911] 33 All. 757=11 I. C. 52 (F.B.).

I think that in the circumstances of this case the possession must be held to have been adverse. In the Full Bench decision to which I have referred, *Incha Ram* v. *Bande Ali Khan* (3), it was held that an inference of adverse possession may be drawn from circumstances even in a village which was largely agricultural, and in the earlier case such an inference was drawn where the disputed land was within a Municipal area. The circumstances which justify the inference in either case were long possession and the absence of any proof of a license or agreement between the person in possession and the proprietor of the land. In my opinion therefore the inference should have been drawn in the present case that the defendants-appellants' possession was adverse.

It is not necessary to discuss the further argument about S. 60, Easements Act; if the appellants had failed to prove adverse possession it might have been necessary to remit an issue on the nature of the structure erected by the appellants on the plot in suit. As it is on the finding that the appellants' possession has been adverse and that their title has matured I must allow the appeal with costs in all Courts and direct that the plaintiff's suit be dismissed.

Certified that the case is a proper one for a Letters Patent appeal.

B.V./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 325

DALAL AND BENNET, JJ.

(*Chaudhary*) *Rajdhar*—Plaintiff—Appellant.

v.

Mohan and *others*—Plaintiffs—Respondents.

Second Appeal No. 1112 of 1929, Decided on 9th December 1930, against decision of Sub-Judge, Jhansi, D/- 7th June 1929.

Contract Act (1872), S. 62—Simple money bond taken in satisfaction of prior mortgage—Suit on money bond dismissed as plaintiff made material alterations in it—Plaintiff cannot sue on original mortgage

Where a subsequently executed bond, which substitutes a new contract for the original one though valid at the time of execution, is rendered invalid after the execution on account of some material alterations made in it by the plaintiff and a suit on the new bond fails on that ground, the original contract, which came to an end, is not revived and the plaintiff cannot sue on the original contract: *A. I. R. 1916 P. C* 68, *Dist.* [P 326 C 1]

Haribans Sahai and *Sri Narain Sahai*—for Appellants.

G. Agarwala—for Respondents.

Bennet, J—This is a second appeal by the plaintiff against an appellate order dismissing his suit. The plaintiff sued to enforce a mortgage bond of 12th December 1919 executed by the defendants. Subsequent to this transaction on 9th December 1922 there was a simple bond executed by the defendants in favour of the plaintiff for Rs. 650 balance then owing after some payment had been made by the defendants. The question before us is whether the execution of this bond of 9th December 1922 was a novation of contract between the parties within the meaning of S 62, Contract Act. A suit was brought No. 1454 of 1924 by the plaintiff on the basis of this bond of 9th December 1922, and it was held in that suit that the suit should be dismissed because the plaintiff had made certain interpolations in regard to interest and in regard to instalments after the bond had been executed by the defendants. On account of this forgery by the plaintiff the Courts held that the plaintiff was unable to sue on this bond at all. The plaintiff has now come into Court relying on his original mortgage bond of 12th December 1919, and he claims that because he is unable to sue on his bond of 9th December 1922 he should be allowed to sue on his original bond of 12th December 1919. The plaintiff relies on a ruling of their Lordships of the Privy Council reported in *Harchandi Lal* v. *Sheoraj Singh* (1). In that case there was a suit brought on a mortgage of 13th November 1876. This mortgage was handed back to representatives of the mortgagor when they executed two fresh mortgages in September and October 1887. These representatives were the widow and the nephew of the mortgagor. Subsequently it was held that the widow was not bound by these two mortgage deeds of 1887 as fraud had been practised on her by the predecessor-in-title of the plaintiff and it was doubtful if she had executed the deeds at all. Under these circumstances their Lordships held that in equity the plaintiff should be allowed to sue on his original mortgage of 13th November 1876. There is however a clear distinction to be drawn between this ruling and the facts of the present case. In that ruling the facts were that it had been held between the parties that the mortgage deeds of 1887 were invalid ab initio as regards the widow. In the present case however it is clear that the bond of 9th December 1922 was a perfectly valid bond at the time of its execution. It was undoubtedly intended to substitute a new contract for the original contract, and therefore under S. 62, Contract Act, the original contract need not be performed. This alteration in the original contract took effect from 9th December 1922. At some date subsequent to 9th December 1922 the plaintiff by his own action rendered the bond of 9th December 1922 invalid. But we do not see how under any principle of law the fact that the plaintiff by his own act rendered the bond of 9th December 1922 invalid could have the effect of reviving the mortgage deed of 12th December 1919 which had come to an end by the novation of contract on 9th December 1922. We consider therefore that the order of the lower appellate Court was correct and we dismiss this appeal with costs.

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(1) A. I. R. 1916 P. C. 68=39 I. C. 343=44 I. A. 60=39 All. 178 (P.C.).

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 326

SEN AND BENNET, JJ.

(*Siri*) *Narain Tewari* and *another* —Appellants.

v.

Brij Narain Rai and *another* — Respondents.

Execution Second Appeal No. 1186 of 1929, Decided on 10th January 1931, against decision of 2nd Addl. Dist. Judge, Gorakhpur, D/- 22nd June 1929.

(a) Limitation Act (1908), Arts, 181 and 182—Decree executable on fulfilment of certain conditions — Art. 181 applies and not Limitation Act (1908), Art. 182.

Where a decree is not immediately executable and the right to apply for execution depends upon the fulfilment of certain contingencies provided for in the decree, Art. 182 is inapplicable and the only article governing the execution is the residuary Art. 181: *A. I. R.* 1921 *P. C.* 31, *Rel. on.* [P 327 C 1]

(b) Limitation Act (1908), Arts. 181 and 182—Right under decree-contingent on payment of money by decree-holder to defendant—Case is governed by Art. 181 and not Art. 182 and right accrues immediately on passing of decree — Limitation Act (1908), Art. 182.

Where under the terms of a decree the right of the decree-holder to recover some property in the hands of the defendants is contingent upon the decree-holder paying a certain sum of money to the defendants but no date for payment is specified, the decree-holder is entitled to pay the money on the date when the decree was passed and to ask for possession immeditely after the payment had been made. The right accrues to the decree-holder immediately and at once and the decree-holder is not entitled to prolong the date of payment by inaction or laches. The case is governed by Art. 181 and not Art. 182. [P 327 C 2]

K. Verma—for Appellants.
M. L. Agarwala—for Respondents.

Sen, J.—This is an appeal by the decree-holders and the only question raised in the appeal is one relating to limitation.

Mt. Jokhna Tewarin obtained a decree against a number of persons from the Court of the Additional Subordinate Judge of Gorakhpur in Suit No. 198 of 1911 on 28th August 1912. Amongst the defendants to the action were Raja Bahadur Brij Narain Rai and Rai Jagdish Narain Rai. The decree passed against them was for delivery of possession of a one anna seven pie and 10 chhatak zamindari share of a village called Kat Kuian. The decree was not unconditional. It provided that the right to possession was contingent upon Mt. Jokhna depositing in the Court to the credit of Brij Narain Rai and Jagdish Narain Rai a sum of Rs. 2,499-15-0. No date for payment of this sum was specified in the decree.

Mt. Jokhna died. She did not fulfil the condition in her lifetime; nor did she apply for the execution of the decree. The present application for execution was made by her sons and heirs on 31st July 1928. The application was presented in a certain Court in Gorakhpur. That Court returned the application to the decree-holders for presentation to the proper Court on the ground that the original Court which had passed the decree in favour of Mt. Jokhna had been abolished. Thereupon the application was presented by the representatives of the original decree-holder in the Court of the Subordinate Judge of Gorakhpur on 13th September 1928. Money was deposited to the credit of Raja Bahadur Brij Narain Rai and Jagdish Narain Rai on 30th September 1928.

The application was resisted on the ground that it was barred by limitation. This contention prevailed with the first Court which held that the claim was barred by the application of Art. 182, Lim. Act. The lower appellate Court has confirmed the decree of the trial Court, but has differed as regards the specific article which is applicable to the facts of the case. The lower appellate Court came to the conclusion that the article applicable to the case was Art. 181 and not Art. 182. It has been contended by the learned advocate for the decree-holders that in view of the matter the application for execution is not time-barred, and reliance has been placed upon a ruling of a Divisional Bench of this Court in *Re. Mt. Rukmina Kuar* v. *Sheo Dat Rai* (1).

We have already noticed that a conditional decree for possession of mauza Kat Kuian was passed in favour of the original decree-holder. This decree for possession however was not capable of execution on the date on which it was passed and required a further application fulfilling the condition contained in the decree. Art. 182, Lim. Act, therefore did not apply to a decree of this discription. The article applicable was Art. 181. Limitation would run from the date on which the right to apply accrued under Col. 3, Sch. 2, Lim. Act. The right to apply for possession did not accrue till the money was paid to the credit of the persons concerned, but the right to apply that the money be deposited to the credit of Brij Narain Rai and Jagdish Narain Rai accrued at once. The decree-holder had the right to apply that the money be deposited to the credit of defendants 8 and 9 on the very day that the decree was passed, and there was nothing to preclude her from depositing the amount and asking for possession. Where a decree is not immediately executable and the right to apply for execution depends upon the fulfilment of certain contingencies provided for in the decree, Art. 182 is clearly inapplicable and the only article governing the execution is the residuary Art. 181. This view receives support from the decision of this Court in *Rukmina Kuer's* case (1), which has already been adverted to and also from the decision of the Privy Council in *Rameshwar Singh Bahadur* v. *Homeshvar Singh* (2). Where under the terms of a decree the right of the decree-holder to recover possession of some property in the hands of the defendants is contingent upon the decree-holder paying certain sums of money to the defendants but no date far payment is specified the decree-holder is entitled to pay the money on the date when the decree was passed and to ask for possession immediately after the payment had been made. The right accrues to the decree-holder immediately and at once, and the decree-holder is not entitled to prolong the date of payment by his or her inaction or laches. We hold therefore that the application having been made more than three years from the date when the decree was passed is clearly time-barred under Art. 181.

We have considered the case in all its aspects. We think that the view taken by the Court below is right. We therefore dismiss this appeal with costs including in this Court fees on the higher scale.

R.M./R.K. *Appeal dismissed.*

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(1) [1919] 51 I. C. 576.

(2) A. I. R. 1921 P. C. 31=59 I. C. 636=48 I. A. 17 (P. C.).

A. I. R. 1931 Allahabad 327

BANERJI AND KING, JJ.

Lachhmi Narain — Plaintiff—Appellant.

v.

Beni Ram—Defendant—Respondent.

First Appeal No 30 of 1929, Decided on 17th December 1930, from decision of 1st Sub-Judge, Cawnpore, D/- 18th September 1928.

(a) Contract Act (1872), S. 247—*H* partner of *B* in equal share dying leaving minor son—*B* carrying on business under old name with partnership funds—*H's* son alleging that he was admitted to benefit of partnership—He cannot be so admitted as no partnership existed after *H's* death.

B and *H* were partners in equal shares of a confectionery business. *H* died in 1920 leaving a minor son. After *H*'s death *B* carried on the business under the old name and style with the partnership funds which he retained in his hands. Plaintiff alleged that after his father's death, he was admitted to the benefit of the partnership.

Held: that the plaintiff could not be admitted to the benefit of the partnership as no partnership existed after the death of *H*; nor could he, being a minor, enter into a contract with *B* to form partnership: *A. I. R.* 1924 *P. C.* 93, *Foll.*
[P 328 C 2]

(b) Trusts Act (2 of 1882), S. 88—Partner on death of another partner, retaining partnership fund and using it in business—He is

bound to render accounts of profits—Partnership.

Where a partner, on the death of another partner retains the partnership capital in his hands and employs it in trade, he is bound to render an account of the profits of the partnership to the other partner's son from the time of the death of that partner up to the date when the final decree is made: 42 *Cal.* 914, *Foll.*
[P 329 C 2]

S. N. Seth and *D. P. Saksena*—for Appellant.

K. N. Katju, *U. S. Bajpai*, *M. Kaul* and *G. S. Pathak*—for Respondent.

Banerji, J.—This is a plaintiff's appeal in a suit for dissolution of partnership and rendition of accounts.

The plaintiff came into Court on the allegation that his father Hoti Lal and the defendant Beni Ram entered into a partnership to carry on a confectionery business in Cawnpore and opened a shop styled "Beni Ram Hoti Lal" about the year 1900. The defendant, he alleged, was taken by Hoti Lal as a partner in consideration of his services and invested no capital and that they were partners in equal shares. Hoti Lal died in 1920 but the firm continued to work as before in partnership of the plaintiff and the defendant. The plaintiff finding that a considerable sum was due to him which the defendant would not pay and the defendant refusing to render accounts, seeks dissolution of partnership and a decree for the sum that may be due upon accounting.

The defendant in his written statement controverted the facts as to the constitution of the partnership and stated that Hoti Lal invested no funds in it and was given a four annas share which was subsequently increased to a 2/5ths share in consideration of his services, that after the death of Hoti Lal in 1920 an account was settled of the partnership and no partnership was entered into between the plaintiff and the defendant.

Various issues were raised in the Court below. The Subordinate Judge passed a decree in favour of the plaintiff declaring that the partnership between Hoti Lal and the defendant was dissolved on the death of the father of the plaintiff, and that the share of Hoti Lal was one-half. He directed account to be taken for one year previous to the death of Hoti Lal and if any money was found due to the plaintiff he was entitled to that amount as if it were a loan, in accordance with S. 241, Contract Act, with interest at six per cent.

The plaintiff has challenged the findings of the Court below and the defendant has filed cross objections under O. 41, R. 22 against the decree passed by the learned Subordinate Judge in favour of the plaintiff.

It is contended by the learned advocate for the appellant that under the provisions of S. 247, Contract Act, a person could be admitted to the benefits of a partnership and that the plaintiff had been admitted to the benefit of the partnership business known as Beni Ram Hoti Lal after the death of Hoti Lal, when the partnership was dissolved by the death of Hoti Lal. We are of opinion that the learned Subordinate Judge was right in holding that the plaintiff who was a minor at the date of the death of his father, was not admitted as a partner, nor could he under the provisions of S. 247, be admitted to the benefit of the partnership as no partnership existed after the death of Hoti Lal. The plaintiff being a minor could not enter into a contract with Beni Ram to form partnership. There being no partnership in existence the provisions of S. 247, Contract Act cannot apply to a case like the present.

We have been taken through the whole of the evidence in the case by the learned advocates for the parties. It is unnecessary to discuss that evidence as we have come to the conclusion that the findings arrived at by the learned Subordinate Judge are correct. We hold that the evidence in the case does not prove that there was any complete accounting between the parties to the suit after the death of Hoti Lal, nor was there a fresh agreement between the parties to continue the partnership. We further hold that on the evidence the plaintiff is entitled to call for accounts for the period of one year before his father's death in respect of which no proper accounting had been done between the plaintiff's father Hoti Lal and Beni Ram. There only remains the question whether the decree passed by the learned Subordinate Judge directing the accounting for one year only should be affirmed.

The learned advocate for the plaintiff contends that the accounting should not be confined to one year before the death of Hoti Lal but that the plaintiff was entitled to ask the defendant to give him a share in the profits of the business which may have accrued subsequent to the death of Hoti Lal. We may note that the name of the firm continued as Beni Ram Hoti Lal until about two years before suit and that even now there are some plates in the shop of the defendant in which the name of Hoti Lal is engraved. The firm was a firm for the manufacture of confectionery and must have had a reputation to be a successful confectionery shop, if it was a successful, and further must have depended upon the personal skill of the person who was conducting the business, namely the defendant, after the death of Hoti Lal.

The contention of the learned advocate for the appellant is that the plaintiff being a minor at the date of the death of his father and the defendant, instead of winding up the affairs of the partnership retained all the assets in the business, the defendant must account to the plaintiff for the profits arising from Hoti Lal's share of the capital. He has referred to the provisions of S. 88, Trusts Act (2 of 1882) and Illus. (f). He has further referred to the case of *Haji Hedayatulla* v. *Mahomed Kamil* (1), where their Lordships of the Privy Council have accepted the principle contended for by him. The judgment of the Calcutta High Court in the above case is to be found in *Mahomed Kamil* v. *Hadayatulla* (2). Mukerji, J., at p. 909 (of 48 *Cal.*) says as follows:

> " The plaintiffs have argued that as the business has been carried on since the death of Fazil, the defendant who has carried on the business is bound to account for the profits made and to share them with the plaintiffs. In support of this position, reliance has been piaced upon the judgment of the Judicial Committee in *Ahmed Musaji Saleji* v. *Hashim Ibrahim Saleji* (3). In our opinion the plaintiffs are entitled to share in the profits made out of the business since the death of Fazil. The principle applicable to cases of this character was enunciated by Lord Eldon in *Brown* v. *D. Tastes* (4). There, on the death of one partner, the surviving partner retained the capital and employed it in the trade. He was ordered to account for the profits derived from it and to make proper allowance for the management of the business. A similar view was adopted by Hall, V. C., in *Yates* v. *Finn* (5), where he stated the correct principle to be applied (in the absence of special circumstances affecting the rights of the deceased partner on the one hand and the surviving partner on the other) in the following terms: " The representatives of the deceased partner are entitled to say to the surviving partner: " You have been using our testator s money in trade, and making profits by the use of it, and we are therefore entitled to an account of the profits you have made by continuing that money in the concern and trading with it." The profits may well be regarded as accretions to the property which has yielded them and ought to belong to the owner of such property, in accordance with the maxim *accessorum secuitur suum principale*, the necessary right follows the principal; see *Crawshay* v. *Collins* (6) and *Heathcote* v. *Hulme* (7)." It may be observed that the rule thus laid down has been incorporated in S. 42, Partnerships Act, 1890. The provisions of that Act are not applicable in this country; but the rule itself is manifestly consistent with the principles of justice, equity and good conscience."

We are of opinion that in view of the provisions of the Trusts Act and in view of the ruling of their Lordships in the case of *Haji Hedayatulla* v. *Mahomed Kamil* (1), the plaintiff is entitled to an account of the profits of the business since the death of Hoti Lal up to the date when the final decree is made. S. 241, Contract Act has in our opinion no application to the facts of this case.

We allow the appeal in part and vary the decree of the Court below and direct that the commissioner should take accounts as if the partnership had never been dissolved. The plaintiff is entitled to the profits in respect of the share of Hoti Lal, namely, one half, after making fair allowance to the defendant for managing and carrying on the business, due credit being given to the defendant's bringing in any fresh capital. Costs of this appeal and the cross objection will abide the result,

K.N./R.K. *Decree varied.*

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(1) A. I. R. 1924 P C. 93=81 I.C. 525 (P.C.).

(2) A. I. R. 1922 Cal. 122=64 I. C. 861=48 Cal. 906.

(3) A. I. R, 1915 P. C. 116=28 I. C. 710=42 I. A. 91=42 Cal. 914 (P.C.).

(4) [1821] Jacob 284.

(5) [1888] 13 Ch. D. 839=28 W. R. 387=49 L. J. Ch. 188.

(6) [182[illegible]] 15 Ves. 218.

(7) [1819] 1 Jac. & Wa. 122=20 R. R. 248.

A. I. R. 1931 Allahabad 329

SEN, J.

Mt. Bitana – Defendant – Appellant.

v.

Shanker Lal – Plaintiff – Respondent.

Second Appeal No. 209 of 1929, Decided on 26th January 1931, against decision of Dist. Judge, Shahjahanpur, D/- 18th May 1928.

Civil P. C. (1908), S. 105—Ex parte decree—Review allowed—On proceeding on merits plaintiff's claim partially allowed—On appeal plaintiff objecting to granting of review—Order granting review cannot be

challenged in appeal from decree in the suit.

Plaintiff obtained an ex parte decree against defendant who neither appealed against the decree, nor did he apply to have it set aside. He however applied for review of judgment, which was granted. Though the order was appealable plaintiff did not appeal against the order of review and the suit proceeded on the merits and plaintiff's claim was partially decreed. Plaintiff appealed against this decree and set forth as a ground of objection that the trial Court had acted illegally in granting the review. Order granting review was reversed and ex parte decree restored.

Held: that a ground of objection could be preferred, not from the order, but from any error, defect or irregularity in any order affecting the decision of the case on the merits. The granting of the review was not a proceeding affecting the merits, but was a proceeding which ensured the hearing or the trial of the suit upon the merits; and the District Judge had acted illegally in the exercise of his jurisdiction in entertaining the plea as regards the competency of the order granting review while hearing an appeal from the final decree. The words "affecting the decision of the case" meant "affecting the decision of the case on the merits." [P 330 C 2, P 331 C 1]

S. B. Johari and *S. N. Chaube*—for Appellants.

Harnandan Prasad—for Respondents.

Judgment.—Shanker Lal, plaintiff-respondent, instituted a suit in his capacity as a cosharer against Mt. Bitana, the lambardar, for his share of profits under S. 164, Act 2 of 1901. The suit not having been contested, an ex parte decree was passed in favour of the plaintiff on 30th September 1926. No appeal was preferred from this decree. No application was made under O. 9, R. 13, Civil P. C., for setting aside the ex parte decree. An application for review of judgment was made on 4th January 1927. This review was granted on 30th May 1927.

Under the Civil Procedure Code no appeal lies from an order rejecting an application for review of judgment, but an order granting an application for review is expressly appealable: vide O. 40, R. 1 (w), Civil P. C. For reasons unexplained, no appeal was preferred by Shanker Lal from this order. In the meantime the trial of the suit proceeded on the merits and a decree was passed on 29th August 1927. In the view of the trial Court the plaintiff was entitled to a decree upon actual collections, but not on gross rental. Shanker Lal preferred an appeal to the learned District Judge from the decree, dated 29th August 1927. He set forth as a ground of objection in the memorandum of that appeal that the Assistant Collector had acted illegally in the exercise of his jurisdiction in granting a review by his order dated 30th May 1927.

The powers of an appellate Court to entertain an appeal from an order granting the review are limited. O. 43, R. 1 (w), must be read subject to the limitations imposed by O. 47, R. 7 (1), Civil P. C. The learned District Judge held that review had been granted by the trial Court upon insufficient grounds. It therefore reversed the order dated 30th May 1927 and restored the ex parte decree which had been passed on 30th September 1926.

Mr. Johari, on behalf of the defendant, contends that the learned District Judge in hearing an appeal from the final decree, had no power to reverse the order granting the review dated 30th May 1927.

Section 105 (1), Civil P. C., runs as follows:

> "Save as otherwise expressly provided no appeal shall lie from an order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from any error, defect or irregularity in any order affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

According to the natural and grammatical construction of the section a ground of objection can be preferred not from the order but from any error, defect or irregularity in any order. It was not therefore within the competence of the learned District Judge to reverse the order which was not under appeal before him. Further, in any view, it was not within his competence to set at nought an order except where there was an error, defect or irregularity affecting the decision of the case. It has been ruled by this Court in a long series of cases that the words "affecting the decision of the case" mean "affecting the decision of the case on the merits." The proceeding before the Assistant Collector in connexion with the application for review was one which was distinct from and independent of the suit itself. There was nothing in common between the proceedings which came into existence by reason of the review being granted. The granting of the review was not a proceeding affecting the merits, but was a proceeding which ensured the hearing or the trial of the suit upon the merits. I am clearly of opinion that the learned District Judge has acted illegally in the exercise of his jurisdiction in entertaining the plea as regards the competency of the order dated 30th May 1927, while hearing an appeal from the final decree dated 29th August 1927.

I accordingly allow this appeal and set aside the order of the Court below. As the appeal has been disposed of on a preliminary point I remand the appeal to the lower appellate Court for disposal according to law.

Costs here and hereto will abide the event.

K.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 331

BANERJI AND KING, JJ.

Mohan Lal—Applicant.

v.

Madhava Prasad and *others*—Respondents.

First Appeal No. 28 of 1930, Decided on 16th December 1930, from order of Dist. Judge, Benares, D/- 25th October 1929.

Provincial Insolvency Act (5 of 1920), S. 35—Facts held sufficient for refusing absolute discharge and not for dismissing petition and hence for annulling adjudication.

The debtor realized certain debts due to him before presenting the insolvency petition and nevertheless showed the debts as still due to him. The Court further found him to be dishonest in his dealings and that he was entering recklessly into transactions and incurring debts which he never hoped to pay. Upon these grounds the Judge annulled the adjudication.

Held: that the facts found might furnish grounds for refusing an absolute order of discharge, but they furnished no grounds for dismissing an insolvency petition and that consequently no legal ground for annulling an adjudication: *A. I. R.* 1916 *P. C.* 64, *Rel. on.* [P 332 C 1]

K. Verma—for Applicant.

Gajadhar Prasad—for Respondents.

King, J.—This is an appeal against an order passed by the learned District Judge of Benares on 25th October 1929 annulling an order of adjudication passed in respect of one Mohan Lal under the Provincial Insolvency Act, 1920.

Mohan Lal presented an insolvency petition on 26th November 1924. He showed the debts due from him as about Rs. 32,000, and showed assets, mainly in the shape of debts due to him, amounting to about Rs. 24,000. On 21st November 1925 the District Judge adjudged the applicant an insolvent and ordered him to apply for his discharge within one year. The applicant did apply within the prescribed period. The period was extended from time to time upon the motion of the official receiver and successive applications for discharge were made. The last application was made on 17th September 1929. On 8th April 1929 the official receiver submitted a report recommending that "as the actions of the insolvent have not been very fair and straightforward," the insolvency should be annulled, or the insolvent should be discharged and permission should be granted to the official receiver to sell the assets of the insolvent.

The learned District Judge found that the insolvent had been dishonest in his dealings. The insolvent stated that he had sold Rs. 9,000 worth of goods to a certain State without obtaining any receipt and without making any note of it in his account books, or keeping any memorandum of the transaction, and these omissions showed, in the Judge's opinion, that the insolvent was dishonest. Moreover the Judge found that an item of Rs. 10,000, which was shown in the schedule as being due from a certain Raja, had been paid by the Raja into the Treasury, but had been refunded in the year 1923. The District Judge remarks that it is not clear to whom the money was paid, but apparently he held that it must have been paid to the insolvent himself. The District Judge states that either the insolvent has no assets, which shows that he was entering recklessly into transactions with various persons and incurring debts which he never hoped to pay, or that he has realized all the amounts and has destroyed his account books so that no evidence may be available. Upon these grounds the Judge annulled the adjudication.

It has been urged that the District Judge had no jurisdiction to annul the adjudication upon the grounds stated by him. In our opinion the contention is well founded. The only section applicable to the case under which the District Judge could have annulled the adjudication is S. 35. Under that section the Judge could have annulled the adjudication if, in the opinion of the Court, the debtor ought not to have been adjudged insolvent. There are no other grounds upon which the Court could, in the circumstances of this case, have legally annulled the adjudication.

Even if the facts found by the District Judge are correct, they do not in our opinion furnish any legal ground for annulling the adjudication because they do not show that the debtor ought not to have been adjudged insolvent. It may be accepted that the insolvent was dishonest in his dealings, and that he had no assets and that he destroyed his account books and that he was entering recklessly into transactions and incurring debts which he never hoped to repay. It may further be conceded that he realized certain debts due to him before presenting the insolvency petition, and nevertheless showed these debts as still due to him. None of these facts would have furnished the Court which passed the order of adjudication any grounds for dismissing the insolvency petition. The debtor was entitled under S. 10 to present the petition as he was unable to pay his debts, and his debts amounted to Rs. 500. These facts have never been doubted. The Court therefore could not have dismissed the petition under S. 25(2). The facts found may furnish grounds for refusing an absolute order of discharge, but they furnish no grounds for dismissing an insolvency petition and consequently no grounds for annulling an adjudication. The ruling of the Judicial Committee in *Chhatrapat Singh Dangar* v. *Kharag Singh Lachmiram* (1) may be referred to in support of our view.

We therefore allow the appeal and set aside the order of the Court below annulling the adjudication. The District Judge should now proceed to pass orders on the application for discharge. The appellant will get his costs of this appeal.

P.N./R.K. *Appeal dismissed.*

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(1) A. I R. 1916 P. C. 64=39 I. C. 788=44 I. A. 11=44 Cal. 535 (P.C.).

A. I. R. 1931 Allahabad 332

MUKERJI AND BENNET, JJ.

Raja Ram and *others*—Applicants.

v.

Chhotay Lal and *another*— Opposite Parties.

Civil Revn. No. 308 of 1929, Decided on 28th November 1930, from decree of Dist. Judge, Moradabad, D/- 27th February 1929.

Civil P. C. (1908), S. 92—Order by District Judge even with consent of parties to have decision from Sub-Judge on point whether certain trust is or is not public trust—Order is revisable.

Where a suit falls under S. 92, and is triable by the District Judge alone, the order of the District Judge, though made with consent of parties, requiring them to have a decision on a question whether trust in suit was or was not a public trust of a competent Court meaning Court of Subordinate Judge is an order requiring the suit to be decided by a Court which has no jurisdiction to decide and is, therefore an order refusing to exercise jurisdiction which he alone could exercise. [P 332 C 2]

S. N. Seth—for Applicants.

R. K. Malawiya—for Opposite Parties.

Bennet, J.—This is an application in revision by the plaintiffs against an order of the learned District Judge of Moradabad, dated 4th February 1929. This order is to the following effect :

> "The parties agree that this suit stand over pending a final decision by a competent Court whether this is or is not a public trust."

The first ground of revision is that no consent of parties can take away the jurisdiction of a Court and that the Court below has failed to exercise jurisdiction. It is not quite clear from the order complained of that the learned District Judge had refused to exercise jurisdiction ; but a later order of the District Judge dated 16th April 1929 does in our opinion amount to a definite refusal to exercise jurisdiction. This case was of a very ordinary nature, a suit by the plaintiffs with the permission of the Legal Remembrancer asking for the relief that the defendants should be removed from being pujaris or trustees of a certain public trust and that another trustee should be appointed and other reliefs given. The form of the case is clearly one coming under S. 92, Civil P. C , and only the Court of the District Judge has jurisdiction to try such a suit. The order of the District Judge requiring the parties to have the decision of a competent Court, by which he apparently meant the Court of the Subordinate Judge of Moradabad, is an order therefore requiring the suit to be decided by a Court which has no jurisdiction to decide it. We consider that the learned District Judge has refused to exercise a jurisdiction which he alone can exercise and accordingly we allow this revision and we set aside his order of 4th February 1929 and his order of 16th April

1929 and we direct that he do proceed to try this suit according to law. As the parties are both in fault, because they agreed to the order of 4th February 1929 we direct that the parties should pay their own costs in this Court.

P.N./R.K. *Revision allowed.*

A. I. R. 1931 Allahabad 333 (1)

MUKERJI AND BENNET, JJ.

B. Brij Gopal—Applicant.

v.

Mt. Dhapi Bai—Opposite Party.

First Appeal No. 36 of 1930, Decided on 16th January 1931, against order of Dist. Judge, Azamgarh, D/- 18th December 1929.

Guardian and Ward—*X* appointed guardian of her son's person and property—*Y* appealing against appointment alleging that he and minor formed joint Hindu family—Question of jointness in dispute in another suit in which *X* representing minor as his guardian—*X's* appointment was justified.

X was appointed guardian of the person and property of her son. Against this appointment the appellant appealed on the ground that the minor and he were members of a joint Hindu family and, as such, no guardian could be appointed in law. The question whether they really were members of joint family or not was in dispute in another suit in which *X* represented the minor as his guardian.

Held: that the circumstances justified the appointment of *X* as guardian. [P 333 C 2]

S. B. Johari and *Sarup Chandra*—for Appellant.

Shiva Prasad Sinha and *Baij Nath Sahai*—for Opposite Party.

Mukerji, J. — This is an appeal against an order appointing Mt. Dhapi Bai the respondent as guardian of the person and property of her minor son Babu Suraj Karan. The appellant, according to the pedigree given to us by his learned counsel is five degrees distant from the minor's father. The appellant's grandfather and the minor's grandfather were brothers. The application was based by the appellant on the ground that the family of the parties was joint and no appointment of guardian could be made in law in a joint Hindu family.

The District Judge has not decided whether the family is joint or separate. He has taken his stand on the fact that a litigation is going on between Suraj Karan on the one hand and the appellant Brij Gopal on the other in which the question of separation or jointness of Suraj Karan's late father Jaur Mal is in dispute. Jaur Mal has, it appears, executed a will and Brij Gopal's contention is that as a member of a joint Hindu family, Jaur Mal could not execute any will so as to dispose of the family property. In this litigation, the minor's mother Dhapi Bai represents the minor.

The circumstances disclosed sufficiently justify the appointment of Mt. Dhápi Bai as the guardian of the person and property of Suraj Karan. Mt. Dhapi Bai has been found by the learned District Judge to be a fit and proper person for looking after her minor son and managing the property. Nothing has been said against this view of the learned Judge. As a result, we dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 333 (2)

MEARS, C. J. and SEN, J.

Shair Ali—Plaintiff—Applicant.

v.

Jagmohan Ram and *another*—Defendants—Opposite Parties.

Civil Revn. No 318 of 1930, Decided on 16th December 1930, against order of Munsif, Azamgarh, D/- 12th March 1930.

(a) Civil P. C. (5 of 1908), O. 8, R. 1—Written statement not filed by defendant or his agent but by third person—Procedure is not regular.

Where the written statement on behalf of the defendant is not filed by him personally or on his behalf by a duly constituted agent but by a third person, the procedure is not regular. It is not sanctioned by the Code. [P 335 C 1]

(b) Civil P. C. (1908), S. 115—Remedy by invoking revisional powers of High Court should not be exercised unless as last resource for aggrieved party.

The right to file a revision under S. 115 is dependent upon the fulfilment of the condition that no other remedy by suit, by application or by appeal is available to the applicant. It is a recognized rule of procedure that the special and extraordinary remedy by invoking the revisional powers of the Court should not be exercised unless as a last resource for an aggrieved litigant. 7 *All.* 407; 7 *Bom* 341; 10 *All.* 119, *Rel. on.* [P 335 C 2]

(c) Civil P. C. (1908), Ss. 2 (3), 96 and 115—Cause of action specifically pleaded and distinct relief claimed against defendant who was impleaded not merely for convenience—Order directing removal of defendant's name from array of parties is decree and is open to appeal and not revision.

Where a cause of action against a defendant is specifically pleaded and a distinct relief has been claimed against him, and the defendant is not impleaded only for the sake of convenience an order directing the removal of his name from the array of the parties is in substance, although not in form, a decree, because the effect of the order is the refusal to grant the relief to plaintiff which he had prayed for. The proper remedy for the party aggrieved from the order is to file an appeal from it and not an application in revision under S. 115: 42 *Mad.* 219; *A. I. R.* 1925 *Pat.* 121; 43 *Mad.* 812; *A. I. R.* 1922 *Mad.* 332; *A. I. R.* 1926 *Mad.* 687 and *A. I. R.* 1923 *Mad.* 690, *Dist.* [P 333 C 1, 2]

M. Waliullah and *N. U. A. Siddique*—for Applicant.

U. S. Bajpai—for Opposite Parties.

Mears, **C. J.**—This is an application for revision of an order passed by the City Munsif of Azamgarh on 12th March 1930 directing that the name of Babu Janki Nath Sahai be struck off the plaint under O. 1, R. 10, Cl. (2), Civil P. C.

The applicant had instituted a suit for damages for malicious prosecution against two defendants viz., Jagmohan Ram, the complainant, and Babu Janki Nath Sahai, the trying Magistrate, upon allegations which appear to us to be somewhat curious.

Jagmohan Ram, defendant 1, and Shair Ali, plaintiff, are residents of Baragaon, a village within the jurisdiction of the Subdivisional Magistrate of Ghosi. On 12th October 1928, Jagmohan Ram lodged a complaint against Shair Ali, the plaintiff, Ziauddin, his father, Alim Uddin, and Barhu Bhar, in the Court of Babu Janki Nath Sahai who was the Subdivisional Magistrate of Ghosi under Ss. 447 and 323, I. P. C. During the pendency of the complaint, Babu Janki Nath Sahai was transferred from Tahsil Goshi and was put in charge of Tahsil Sagri in the same district. On the application of the complainant, the District Magistrate transferred the case to Babu Janki Nath Sahai presumably upon the ground that he had heard the case in part. Upon a concideration of the evidence, Babu Janki Nath Sahai discharged Barhu and Alim Uddin. It is not known if the case proceeded against Ziauddin at all or what orders were passed about him. It is not improbable that Ziauddin might not have appeared before the Pargana Officer because of his alleged illness. The Magistrate convicted the plaintiff Shair Ali on 15th January 1929 and sentenced him to six weeks' rigorous imprisonment and a fine of Rs. 50, and further ordered that, in default of payment of fine, Shair Ali was to be imprisoned for a further period of six weeks. The Magistrate also ordered that Shair Ali should pay to Jagmohan Ram, complainant, and to Barhu and Alimuddin the sums of Rs. 20, Rs. 10 and Rs. 10 as court-fee, process fee and compensation respectively.

On appeal by Shair Ali, the learned Sessions Judge reversed the conviction and sentence on 28th February 1929 and directed his acquittal on the ground that the charge under S. 451, I. P. C., had not been proved.

The present suit for malicious prosecution was commenced by the plaintiff on 12th February 1930 against the two defendants and the relief claimed was in the following terms:

> "That a decree may be passed in favour of the plaintiff and against the defendants for the recovery of Rs. 1,009 as detailed on account of the expenses incurred by the plaintiff in the criminal case, for loss in business and for physical and mental suffering."

Plaintiff describes defendant 1 as a highly litigious person and a great mischiefmonger who bears a bitter animus against the Mussalmans in general and against the plaintiff in particular. Defendant 2 is also a hater of Mussalmans, whose tenure of office as Sub-divisional Officer of Ghosi was characterized by a policy which was distinctly anti-Muslim. The plaintiff avers that the complaint dated 12th October 1928 was instigated and inspired by defendant 2 who during the progress of the trial harassed and persecuted the plaintiff in a variety of ways, the details of which are set out in the plaint; that on 17th November 1928, while recording the statement of the wife of Barhu accused, defendant 2 made her to say that the plaintiff had concealed her husband; that acting upon this statement the Magistrate took the plaintiff under custody "on account of the abscondance of Barnu accused" and that the plaintiff remained in the lock up till 28th November 1928 when he was released by the order of the learned Sessions Judge.

The allegations in the plaint were supplemented and developed by further statements recorded under O. 10, R. 2, Civil P. C. The plaintiff added that 20 days before the institution of the complaint defendant 2 had told the plaintiff in the presence of defendant 1 that he would have his head crushed. He also stated that he had overheard defendant 2 asking defendant 1 to institute criminal cases against two or three Mahomedans and to add one or two Hindus as co-accused, presumably as a matter of policy.

It is not within our province to go into the merits of these allegations.

It is clear from the plaint that the suit instituted by Shair Ali is not under S. 79, Civil P. C., against the Government or against the Secretary of State for India in Council. It is not clear whether defendant 2 was being sued as a public officer in respect of any act purporting to be done by him in his official capacity and as to whether the provision of S. 80, Civil P. C., was complied with. We are inclined to think that the suit was not intended to be filed against the defendant for acts purporting to be done in his official capacity.

The Local Government undertook to defend the suit on behalf of defendant 2. It is curious however that no written statement was filed by defendant 2 personally or on his behalf by a duly constituted agent. A written statement on behalf of defendant 2 was filed by Mr. V. Mehta, Collector of Azamgarh. The document was verified by "V. Mehta, Collector, Azamgarh" on 11th March 1930. We are of opinion that this procedure was not regular. It is not sanctioned by the Code of Civil Procedure. No rule having the force of law has been brought to our notice to justify this procedure and we are aware of none. As however the learned Judge took no exception to this irregularity nor did the plaintiff we think that we should not remit the case for the irregularity to be cured but should decide the case on the record as it has come to us.

One of the pleas taken in the written statement was to the following effect :

> "The acts of the defendants on which the plaintiff has based this claim were done or ordered to be done by him as a Magistrate acting judicially in discharge of his judicial duty within the limits of his jurisdiction ; and the defendant at the time in good faith believed himself to have jurisdiction to do and order the acts complained of. The defendant is therefore protected from any liability to the plaintiff by the Judicial Officer's Protection Act of 1850."

The Government Pleader appears to have pleaded in demurrer that on the facts alleged, no cause of action had accrued against defendant 2 and that the latter was protected by Act 18 of 1850.

On 12th March 1930 the learned Munsif took up this preliminary issue. He held in view of the pleadings (written and verbal) that the complaint had not been filed at the instigation or with the connivance of defendant 2 and that the plaint did not disclose any cause of action against him. He therefore ordered as follows :

> "I therefore order under O. 1, R. 10, Cl. (2), that the name of defendant 2 be struck off the plaint and that the register be amended accordingly. Defendant 2 is to get his costs if he has incurred any."

A formal order was drawn up which directed that the plaintiff do pay to defendant 2 the sum of Rs. 51 the amount of costs incurred by him on account of this application.

Shair Ali has filed a revision to this Court from the aforesaid order. We do not propose going into the question whether the order in question on the merits fulfils the requirements of S. 115, Civil P. C.

The right to file a civil revision under S. 115 is dependent upon the fulfilment of the condition that no other remedy by suit, by application or by appeal is available to the applicant. It is a recognized rule of procedure that the especial and extraordinary remedy by invoking the revisional powers of this Court should not be exercised unless as a last resource for an aggrieved litigant : *Sunder Das* v. *Mansa Ram* (1) ; *Siva Nathaji* v. *Joma Kasinath* (2) ; *Sheo Prasad Singh* v. *Kastura Kuer* (3), *Gopal Das* v. *Alaf Khan* (4) and *J. J. Guise* v. *Jaisraj* (5).

If the order dated 12th March 1930 was in effect and substance a decree in favour of defendant 2, and against the plaintiff, the remedy of the plaintiff was by an appeal to the District Judge of Azamgarh within the time provided by law. The application for revision appears to have been presented to this Court on 26th May 1930, when the period for filing an appeal to the District Judge had already expired.

Order 1, R. 10, Cl. (2), Civil P. C., provides that the Court may at any stage of the proceeding order that the name of any party improperly joined whether as plaintiff or defendant be struck out. An order striking out the name of a party is not necessarily a decree. Where the plaintiff had impleaded a person merely upon the ground of convenience and the plaint discloses no cause of action against him and the plaintiff has claimed no relief against him, the order of the Court directing the removal of the name of such a defendant does not operate as a decree, for it has not the effect of an adjudication, and the integrity of the original claim remains unbroken. Where however a cause of action against a defendant has been specifically pleaded and a distinct relief has been claimed against him the order directing the removal of his name from the array of parties is in substance, although not in form, a decree because the effect of the order is the refusal to grant the relief to the plaintiff which he had prayed for against him. Defendant 2 was not impleaded only for the sake of convenience. The plaintiff had sued him because of an alleged cause of action against him and the plaintiff had prayed for a decree against him for Rs. 1,000 as damages. The effect of the order passed by the Munsif is the virtual dismissal of the suit against him and the latter has been awarded his costs from the plaintiff. We are clearly of opinion that the order sought to be revised was in substance a decree and was open to appeal as such.

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(1) [1885] 7 All. 407=(1885) A. W. N. 87.
(2) [1883] 7 Bom. 341.
(3) [1888] 10 All. 119=(1888) A. W. N. 26.
(4) [1889] 11 All. 383=(1889) A. W. N. 151.
(5) [1893] 15 All. 405=(1893) A. W. N. 172.

In *Rama Rao* v. *Raja of Pittapur* (6) it was held that an order in a suit striking out from the array of parties a defendant as an unnecessary party under O. 1, R. 10, Cl. (2), Civil P. C., and thus dismissing the suit against him was in effect a decree and was appealable as such, Seshagiri Ayyar, J., is reported to have said as follows (p. 225):

> "In a way, the conclusion of the Subordinate Judge may be said to come within O. 1, R. 10. But what we have to see is the substance of the order and not the form of it. In his order, the Subordinate Judge examines the right of the plaintiff to bring a suit like the present one and concludes, having regard to certain authorities which he has quoted that such a suit would not lie. In my opinion this is an adjudication determining the rights of the plaintiff to bring a suit of this nature; and his order is a "decree" as defined in S. 2, Cl. (2), Civil P. C. I am disposed to agree with Mr. C. P. Ramaswami Ayyar who appeared for the appellant that unless the removal of the plaintiff or defendant leaves the suit intact, O. 1, R. 10, Cl. (2), cannot apply."

It may be conceded that technically speaking the proper form of the order in the present case ought to have been the dismissal of the claim against defendant 2 and not merely the striking off of his name. It is patent however that the effect of the order is the dismissal of the claim and that fact is emphasized by the order that the plaintiff is to bear the costs of defendant 2. The decision of *Rama Rao* v. *Raja of Pittapur* (6) followed by Das and Ross, JJ., in *in re Ramji Pandey* v. *Alaf Khan* (7) who held that where in a suit for partition on the application of the plaintiff an order was passed dismissing two persons viz. Bichan and Ritubhajan from the suit and striking out their names under O. 1, R. 10, Civil P. C., that order must be looked upon as a decree, as it amounted to a refusal to adjudicate upon the claim of these two persons.

In *Ayyamudali Velan* v. *Veerayee* (8) it was held that a refusal to implead a person as a legal representative of a deceased plaintiff on the ground that the cause of action did not survive was a decree, because it had the effect of finally depriving the person refused of all his rights in the suit and practically putting an end to the litigation altogether. The principle underlying this decision is clearly in accord with the cases already referred to.

The following three cases have been cited on behalf of the applicant in support of his contention that the order in question was not a decree and therefore not appealable as such: (1) *Shanmuka Nadan* v. *Arunachalam Chetty* (9), *Linga Aiyar* v. *Lakshumana* (10) and *Ratnachalam* v. *Siva Chidambaram* (11). The first and the third cases are distinguishable; the second is irrelevant.

In the first-mentioned case the suit was one for partition brought by four minor sons against their father. Defendants 7 to 18 were persons who held money decrees, some of them against defendant 1 alone, others against defendant 1 and the plaintiffs, all obtained on debts incurred by defendant 1. On the objections of the defendants the names of defendants 7 to 18 were struck out as being improperly joined.

> "The lower Court does not say that it removes them from the record; it does not say that the

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(6) [1919] 42 Mad. 219=49 I. C. 835.

(7) A. I. R. 1925 Pat. 121=85 I. C. 90=3 Pat. 859.

(8) [1920] 43 Mad. 812=58 I. C. 498.

(9) A. I. R. 1922 Mad. 332=69 I. C. 961=45 Mad. 194.

(10) A. I. R. 1926 Mad. 687=94 I. C. 123.

(11) A. I. R. 1923 Mad. 690=76 I. C. 207.

> suit is dismissed as against them . . . . . . It is objected that no appeal lies against such decision and certainly none is provided directly in the Code, and as the lower Court's decision, understood in the manner in which we understand it, is not a decree and is not a conclusive determination of the rights of the parties with regard to any of the matters in controversy and does not come within the definition of "decree" in S. 2 (2), there can be no appeal against it directly.

It does not appear from the report that any relief had been claimed against defendants 7 to 18. If the plaintiffs had asked for no relief against them and the defendants were impleaded simply for the sake of convenience, the view taken in this case was justified. It is in this sense that the case was understood in *Ratnachalam's* case (11) and we also understand it in that sense.

In *Linga Aiyar's* case (10) the plaintiff had sued to recover certain money due from the widow of Subbaraya Aiyar and his brother. The District Munsif directed that the name of the brother be struck off:

> "By consent I strike off defendant 2's name. Plaintiff will pay by consent half of his costs."

The only point which was in issue in second appeal was whether defendant 2 was to be considered to be still a party to the suit under S. 47, Civil P. C., in spite of his name having been struck off. It was held that in spite of his name being struck off, the brother continued to be party to the suit within the meaning of S. 47, Expln. There was no issue nor any decision on the point whether the order operated as a decree under S. 2 (2) of the Code.

The third case was an application for revision under S. 115, Civil P. C., and S. 107, Government of India Act, and arose out of a suit for possession, partition and mesne profits. There was a large array of defendants. Defendants 43 to 99 were tenants-at-will, who with the consent of the heads of the Chetties were joined as parties in order that possession may be given to the plaintiff. The plaintiff had asked for no relief against them and they were impleaded only for convenience. No substantial right had been determined between the plaintiff on one side and these defendants on the other and the effect of deleting their names did not operate to terminate the litigation altogether. Upon these grounds, it was held that the matter did not fall within the principle of the cases reported in *Rama Rao* v. *Raja of Pittapur* (6) and *Ayyamudali Velan* v. *Veerayee* (8). We are in complete accord with the view expressed at pp. 704 and 705 (of 45 *M. L. J.*) and with the reasons set out there.

Both upon principle and authorities, we have no doubt that the order in controversy was in substance a decree as defined in the Code of Civil Procedure and was appealable as such.

As the applicant did not pursue the right remedy, he cannot be permitted to come up to this Court in revision and challenge the order under S. 115, Civil P. C. We dismiss this application with costs.

R.M./R.K. *Application dismissed.*

A. I. R. 1931 Allahabad 337

SEN, J.

Secy. of State—Applicant.

v.

F. Harnarain Chand Bilangaj, Agra—Opposite Party.

Civil Revn. No. 373 of 1930, Decided on 20th January 1931, against decree of Small Cause Court Judge, Agra, D/- 31st May 1930.

Railways Act (9 of 1890), S. 55 (2)—Notice of auction sale published in newspapers, not local—No sale of goods can be validly effected.

Where a Railway Company without the publication of notice of auction sale in local newspapers, sells the goods under the impression that notice of the sale published in other newspapers was sufficient, the company cannot be said to have complied with the terms of the section and one of the conditions not having been fulfilled, no sale of goods can validly take place. By "local newspaper" is meant a newspaper which is issued from the locality and not a newspaper issued elsewhere and read in that locality. [P 338 C 2]

U. S. Bajpai—for Applicant.

S. N. Seth—for Opposite Party.

Order. — This is an application for revision of the order of the learned Judge of the Court of Small Causes at Agra, dated 31st May 1930, allowing the plaintiff's claim against the defendant-applicant for Rs. 170.

Two waggons of coal were despatched from Musanda by a Colliery Company to a firm at Agra carrying on business under the name and style of Krishna Ice Factory. The railway receipt was endorsed by the consignee in favour of Har Narain Bengal Chand, who are the plaintiffs in the action. The plaintiffs' claim against the Railway Company was founded upon tort. They alleged that the Railway Company did not deliver the goods to the consignee and unlawfully sold the goods to a third party without any statutory powers.

The goods were consigned from Musanda on or about 6th March 1929 and reached Agra on 13th March. No notice of the arrival of the goods was sent by the Railway Company to the consignee. One of the questions in controversy in the case is as to whether the Railway Company was bound under the statute to give notice of the arrival of the goods immediately on the date of its arrival. The goods appeared to have been unloaded by the consignee, but they were not removed from the railway premises. This however is a point on which the finding of the learned Judge is by no means very clear. On 16th March 1929, the Railway Company asked the Krishna Ice Factory to remove the goods and to pay certain charges. A protracted correspondence followed. The Krishna Ice Factory did not pay either the railway freight or the wharfage claimed. The result of it was that the Railway Company sold the goods at auction on 29th June 1929 for Rs. 320. The present suit was instituted against the Railway Company for recovery of the value of the goods so sold and Rs. 6 for the costs of the notices of correspondences etc. The learned Judge of the Court of Small Causes has decreed the claim. It is contended that the learned Judge has misconceived the nature of the powers possessed by the Railway Company and has misapplied them to the case in hand. Reliance has been strongly placed upon S. 55 (2), Railways Act (9 of 1890) which runs thus:

> "When any animals or goods have been detained under sub-S. (1), the railway administration may sell by public auction, in the case of perishable goods at once, and in the case of other goods or of animals on the expiration of at least 15 days notice of the intended auction, published in one or more of the local newspapers, or where there are no such newspapers, in such a manner as the Governor-General in council may prescribe, sufficient of such animals or goods to produce a sum equal to the charge, and all expenses of such detention, notice and sale, including, in the case of animals, the expenses of the feeding, watering and tending thereof."

The Railway Company prior to putting up the goods for sale ought to have published a notification in terms of this provision in one or more of the local newspapers. For some reason or other which has not been explained, the notification was not published in any one of the newspapers of Agra. It was published in the "Bengali" of Calcutta and in the "Vartman" of Cawnpore. Clearly therefore there was no compliance with the terms of this section. The Railway Company, not having fulfilled one of the conditions no sale of the goods could validly take place. The claim of the plaintiffs against the Railway Company was therefore well founded. Mr. Uma Shankar Bajpai for the Railway Company contends that "local newspaper" means any newspaper which is read at Agra. It is not improbable that the two newspapers in which the notification was published are read at Agra. but there is no evidence forthcoming in the case. But I am not prepared to accept the interpretation put by Mr. Bajpai. By "local newspaper" I understand a newspaper which is issued from the locality. The result is that this application fails. It is accordingly dismissed with costs.

K.N./R.K. *Revision dismissed.*

A. I. R. 1931 Allahabad 338

DALAL, J.

Mt. Ashraf Zadi Begam and *another*—Appellants.

v.

Lalta Prasad—Respondent.

Second Appeal No. 666 of 1929, Decided on 1st December 1930, from decision of Addl. Sub-Judge, Farrukhabad, D/- 31st January 1929.

(a) Transfer of Property Act (1882), S. 40—Agreement by husband to wife to pay her certain monthly allowance and hypothecation of his property made for further assurance—Wife given right to recover amount by suit—Property transferred by husband—Transferee sued by wife on basis that she had charge on property—Husband joining wife in prosecuting appeal—Agreement held bogus and transferee being without notice of agreement, transfer held, valid.

An agreement was executed between a husband and a wife that the wife would get a certain monthly allowance on failure of which she could recover the amount by suit. The property was also hypothecated for further assurance. The property was transferred by the husband. The wife sued the transferee on the ground that her husband's agreement had created a charge on the property. In appeal the husband also was a party with his wife.

Held: that under the circumstances, the bogus nature of the agreement was clearly apparent. It was intended to be used against strangers and not against the husband himself as was visible from the fact that the husband was a party to his wife when according to her their relations were strained. The agreement therefore had not created any interest in the property in favour of the wife. The transferee being without notice of agreement and being purchaser for value could not be held liable for payment of the amount mentioned in the agreement out of the property : 13 *All.* 28 and 33 *Cal.* 985, *Ref.*; *A.I. R.* 1925 *All.* 60 and 28 *All.* 665, *Dist.* [P 340 C 1]

(b) Transfer of Property Act (1882), S. 3—Notice.

The question of notice is a question of fact : *A. I. R.* 1921 *P. C.* 112, *Ref.* [P 340 C 1]

S. B. Johari—for Appellants.

M. L. Chaturvedi—for Respondent.

Judgment.—The plaintiff, Mt. Ashraf Zadi, wife of Aziz Alam, sued one Lalta Prasad, transferee of her husband's property for enforcement of a charge by sale of the property. Under a registered deed the husband had promised to pay his wife Rs. 4 a month by way of maintenance in case there was disunion between himself and her, and she resided in his house. He further stipulated that if he did not pay the maintenance monthly the amount shall be realized from him by suit. The property was hypothecated (mustaghraq o kafil) for further assurance. What he agreed was that he would not execute any deed of sale or gift or alienate the property and that such a document would be void if he did so. He called the security a "zamanatnamah." It was argued on behalf of the plaintiff that this document created an interest in the property and that therefore she was entitled to recover the money by sale of the property. The learned Judge of the lower appellate Court held that no interest in the property was created by the deed. Though he has not specifically said so, he held S. 40, T. P. Act, applicable and held that the plaintiff was not entitled to recover the money out of the property because the transferee had no notice of her right on her husband's obligation. This is a second appeal not only by Mt. Ashraf Zadi but also by her husband, the defendant. This indicates that in reality it is not the woman who wants the money but her husband who after making a complete alienation of the property, desires to take advantage of a document long since executed by him in favour of his wife. As pointed out by the lower appellate Court, the wife never came forward to claim any maintenance since 1909 to the present day though the husband made several transfers by way of mortgage between 1921 and 1925.

The question at issue therefore is whether an interest in the property is created by the document of 1909. In *Kishan Lal* v. *Ganga Ram* (1) that great jurist Mahmood, J., approved of the observations of Dr. Ghosh in his Transfer of Property Act:

> "A charge must be distinguished from a mortgage as defined in the Act, more specially from a simple mortgage. In every mortgage there must be a transfer of interest in a specific immovable property, while in the case of a mere charge no interest is transferred. . . . ."

These observations were referred to and sought as a support by Mookerji, J., in *Royzuddi* v. *Kali Nath Mookerjee* (2) at 992. He observed under authority of what was said by Mahmood, J., in the Allahabad ruling that a mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor, whereas a charge can be enforced against a transferee only if it is shown that he has taken with notice of the charge. The learned counsel for the appellants here quoted a Bench ruling in the case of *Mahadeo Prasad* v. *Anandi Lal* (3), where the learned Judges agreed with the observations of the learned Chief Justice in *Maina* v. *Bachchi* (4) that it was much too broad a proposition to state that in all cases where by act of parties or by operation of law immovable property of one person is made security for payment of money to another and the transaction does not amount to a mortgage, the security will not be enforced against such transferees without notice. These observations do not lay down any principle but are merely by way of a warning that an enquiry must be made in every case whether a charge has created an interest in immovable property or not. The cases dealt with in this ruling and in the ruling in the case of *Maina* v. *Bachchi* (4) were those where a specific decree of a Court of law had been passed for maintenance making it recoverable by sale of a certain property. Such however is not the case here. The plaintiff's claim does not depend on any decree of Court in her favour making the property in suit liable for payment of the maintenance allowance. The agreement executed by her husband was of a vague character and hedged round with conditions. It is obvious that it was intended to be used only against a stranger and not against the husband himself. The fact that the husband is prosecuting this appeal at a time when according to the wife, the conditions are such that the husband is unfriendly to her clearly indicates the bogus nature of the document. In my opinion it has not created any interest in the property, and therefore a transferee for value without notice cannot be held liable for payment of the amount mentioned in the agreement out of the property. The question of notice is a question of fact. The lower appellate Court has decided this issue against the plaintiff woman. In this connexion it was argued that registration was sufficient notice. This argument is met by the observations of their Lordships of the Privy Council in *Tilak Dhari* v. *Khedan* (5). It was held there that the proposition involved is not one of law but of fact, and as each case arises it should be determined whether in that individual case the omission to search the register taken together with the other facts, amounts to such gross negligence as to attract the consequence which results from notice. This point has been considered by the learned Judge of the lower appellate Court and I agree with the findings recorded by him. This appeal is dismissed with costs. Permission is granted to appeal by way of Letters Patent.

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(1) 1890] 13 All. 28=(1890) A. W. N. 216.

(2) [1903] 33 Cal. 985=4 C. L. J. 219.

(3) A. I. R. 1925 All. 60=92 I.C. 348=47 All. 90.

(4) [1906] 28 All. 655=(1906) A. W. N. 165=3 A. L. J. 551.

B.V./R.K. *Appeal dismissed.*

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(5) A. I. R. 1921 P. C. 112=48 Cal. 1=57 I.C. 465=47 I. A. 239 (P.C.).

A. I. R. 1931 Allahabad 340

MUKERJI AND BENNET, JJ.

Nanku Singh and *others* — Defendants —Appellants.

v.

Parmatmanand Singh and *others* — Plaintiffs—Respondents.

First Appeal No. 35 of 1927, Decided on 2nd April 1930, from decree Addl. Sub-Judge, Ballia.

Civil P. C. (1908), O. 34, Rr. 4 and 5— Instalment decree under O. 34, R. 5, in terms of compromise—Instalments payable on fixed dates—No appeal against decree—Decree becomes final and decree-holder can apply for preparation of final decree under O. 34, R. 5, within three years from default in payment of instalment.

If a preliminary mortgage decree under O. 34, R. 4, purporting to be in terms of the compromise of the parties provides for the payment of the mortgage amount in instalments payable on the fixed dates, has not been appealed against, it becomes final and there is nothing to debar the decree-holder from applying for preparation of the final decree under O. 34, R. 5, within three years from the date of default in payment of an instalment : *A. I. R.* 1927 *All.* 167 (*F. B.*), *Dist.* [P 341 C 1, 2]

Ambika Prasad Pandey — for Appellants.

Nihal Chand Vaish, *Peary Lal Banerji* and *Kapil Deo Malaviya* — for Respondents.

Bennet, J.—This is a first appeal by the defendants against a final decree for sale prepared under O. 34, R. 5. The argument on appeal is that the provisions of O. 34, R. 4 are not applicable to a mortgage decree based upon a compromise and the Court below has therefore erred in law in directing the preparation of a final decree, and further that the application for the preparation of the final decree is barred by time. The facts very briefly are that there was a mortgage executed by the predecessors of the defendants-appellants on 8th June 1910, for a sum of Rs. 12,000 in favour of the predecessors of the plaintiff-respondents. This was a usufructuary mortgage by which the usufruct of some 40 bighas odd of *sir* plots was mortgaged in lieu of interest, and two zamindari shares were mortgaged as security for the principal mortgage money. A Suit No. 4 of 1913 was brought by Maharaja Kesho Prosad, a stranger to the present case, in which it was declared that the 40 bighas of *sir* was his property. Therefore as the property given by way of usufruct for payment of the interest was lost to the mortgagees, a compromise was entered into between the parties. That compromise was filed in Court, and all the defendants with the exception of Dharam Deo, were parties to the compromise. The compromise therefore became the subject of a decree, and the decree which was ex parte against Dharam Deo and against the other defendants was based on a compromise. The order for the preparation of a decree was dated 31st January 1923.

Accordingly a preliminary decree was drawn up purporting to be under O. 34, R. 4 in which the terms of the compromise were set forth, and the decree then embodied two orders, the second of which was :

> "if such payment is not made into Court, the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale), be paid into Court and applied in payment of what is declared due to the plaintiffs together with subsequent costs, and that the balance, if any, be paid to the defendants."

The first instalment of Rs. 8,000 was to be paid on 28th June 1923, and the second instalment on 17th June 1924. The defendants did not make any payment. Accordingly on 11th June 1926, the mortgagees filed an application for the preparation of a final decree under O. 34, R. 5. Objections were taken by defendant 1 and defendants 2 and 3 against the preparation of that final decree, and their objections having been dismissed by the lower Court, the present appeal has been filed. The desire of the appellants is to claim that the preparation of the decree under O. 34, R. 4 was incorrect, and that as the period of three years has elapsed between the date of the decree, 31st January 1923, and the application for preparation of a final decree, 11th June 1926, the Court should hold that the decree-holder is time-barred, and unable to execute his decree for Rs. 16,000. On the other hand, the respondents contend that as a default took place on 28th June 1923 when the judgment-debtors failed to pay the first instalment and the application for the preparation of a final decree was made within three years on 11th June 1926 therefore their application is not time-barred. The first point to be noted is that none of the defendants made any appeal against the preliminary decree passed under O. 34, R. 4. Whether that decree was right or wrong, it has now become final as a preliminary decree between the parties, and it is not open to the defendants to bring that decree now in appeal on the ground that it is not in accordance with their compromise.

Reference is made by the learned counsel for the appellant to *Askari Hasan* v. *Jabangiramal* (1) where it was held that when a compromise decree provides for the payment of mortgage money in instalments, and does not provide for payment on a fixed date within six months from the date of declaring the amount due, O. 34, R. 4 does not apply, and it is not necessary to apply for a final decree. It is not shown in this ruling that there was a preliminary decree which purported to be under O. 34, R. 4, and this fact alone differentiates the ruling from the present case. But we also differentiate the ruling from the present case because the ruling merely laid down that it was not necessary for the decree-holder to apply for the preparation of a final decree. All that the ruling laid down was that, if the decree-holder had a decree on a compromise which he desired to execute, he should not be barred from applying for the execution of that decree, on the technical ground that a final decree in the terms of O. 34, R. 5 was necessary in the particular circumstances of that case.

Reference is also made to *A. I. R.* 1926 *Oudh* 385, a ruling of the Oudh Chief Court. That ruling merely laid down that it was not necessary for a decree-holder to have had a final decree prepared if he desired to execute the preliminary decree which had been prepared on a compromise. There is therefore a distinction to be drawn from the present case in which the decree-holder applies for the preparation of a final decree. The learned counsel for the appellants has altogether failed to produce any authority for this proposition that it is not open to a decree-holder to apply for the preparation of a final decree under O. 34, R. 5 in a case similar to the present case.

We consider that no case has been made out in law for the appellants and it is obvious that they are entitled to no sympathy in equity. Accordingly we dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

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SULAIMAN AND YOUNG, JJ.

Mohammad Jalil Khan and *others*—Appellants.

v.

Ram Nath Katua and *others*—Respondents.

First Appeal No. 245 of 1927, Decided on 17th December 1930, against decision of Sub-Judge, Ghazipur, D/- 2-4-1927.

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(1) A.I.R. 1927 All. 167=100 I.C. 59=49 All. 297 (F.B.).

✲ (a) Highway—Procession—Every community has right to take out religious procession along highway—Right is independent of tradition and no proof of custom is necessary.

There is right in every community to take out a religious procession, with its appropriate observances, along a highway. This is an inherent right and does not depend on the proof of any custom or long established practice. Even if such a procession be an innovation, it would be in the exercise of legal rights. The right is independent of any long standing tradition and is not lost by mere abstention or non-exercise of it for a number of years. An enquiry as to the existence or non-existence of an old custom is therefore unnecessary and irrelevant. [P 344 C 1]

(b) Highway—Procession—Right to take out procession on highway can be exercised only so as to cause no interference to other members of public.

A public highway is primarily for purposes of traffic and every individual is entitled to use it in a reasonable way. But he cannot claim it exclusively for purposes of worship. Persons of every sect are entitled to take out religious processions through public streets provided that they do not interfere with the ordinary use of such streets by the other members of the public. [P 344 C 2]

(c) Highway—No right to block public thoroughfare completely can be claimed—Magistrates and police can prevent such obstruction.

No right can be claimed to block a public thoroughfare completely so as to prevent other persons from exercising their right of way. The police authorities are responsible for a proper regulation of traffic and can issue necessary orders for that purpose. Magistrates are competent to issue directions to prevent obstructions of public thoroughfares. [P 344 C 2]

(d) Highway—Right of way—Right of way over public road is subject to order under S. 144, Criminal P. C.—No civil suit lies to question propriety of order under Criminal P. C., S. 144.

The civil Courts have no concern with the power of a Magistrate to issue whatever orders he considers necessary, even if it restricts the ordinary right of using a public thoroughfare, when he apprehends a danger or in urgent cases of nuisance under S. 144 and other sections of Criminal Procedure Code. No civil suit lies in a civil Court to question the propriety of any such order. The right of way over a public road must always be subject to such orders of the Magistrate. [P 344 C 2]

(e) Highway—Procession—Taking out procession with music is within civil rights of community but not exclusive use of highway for worship.

The taking out of a procession accompanied with music whether as a part of religious worship or not, is within the civil rights of a community but not an exclusive use of the highway for worship. [P 334 C 2]

✲ (f) Highway—Procession—Worshippers in mosque or temple abutting on highway have no right to stop music in a procession on ground of continuous worship in it.

Worshippers in a mosque or temple which abuts on a highway have no right to compel the processionists to stop their music completely while passing a mosque or temple on the ground that there was continuous worship inside it. Even if music, whether religious or not, offends against the religious sentiments of another community, it cannot be objected to on that ground. The stopping of the music would offend the religious sentiments of the processionists just as much as its continuance may offend the religious sentiment of the other. There can therefore be no right to insist on its complete stoppage. [P 344 C 2]

(g) Practice—Civil-rights—Every man can enjoy his civil right provided he does not infringe others' rights.

Every man is entitled to enjoy his own civil right provided in doing so he does not infringe the legal rights of another. [P 345 C 1]

(h) Highway—Right to use thoroughfare can be exercised in reasonable manner without any wanton disregard of rights of others.

The right to use a thoroughfare should be exercised in a reasonable manner without any wanton disregard of the legal rights of others or a riotous demonstration to provoke animosities. No Court will grant a declaration to a plaintiff as to a right to do an act on a public highway which infringes a public right or a private right of the defendant. [P 345 C 1]

(i) Practice—Relief—Parties bound by contract—Civil Court cannot grant declaration in breach of contract.

If the parties are bound by a contract inter se a declaration in breach of such contract will not be granted by a civil Court. [P 345 C 1]

(j) Nuisance—Music—All music however bad does not amount to nuisance public or private.

There is no right to commit a public nuisance on a highway, nor is there any absolute right to commit a private nuisance against a particular defendant. But all music however bad, cannot amount either to a public nuisance or a private nuisance, even though it may annoy occupiers of a dwelling-house situated on the road. [P 345 C 1]

(k) Nuisance—Noise—Noise may become nuisance—Whether noise is nuisance is to be judged by degree of its intensity, its place, time, mode of committing it and surrounding circumstances—Standard is to be of men of ordinary habits.

A noise may become a nuisance, public or private. There is no definite legal measure for a noise becoming a nuisance. It is purely a question depending on the facts of each case, including the degree of its intensity, its place, the time, the mode of committing it, its duration and all the surrounding circumstances. The standard of judging it is according to that of men of ordinary habits, and not of men of fastidious tastes or of over-sensitive nature, whether due to religious sentiment or not. [P 345 C 1]

(l) Highway—Procession—Civil suit lies for declaration of right to take out procession or playing music in vicinity of mosque or temple—Suit may be between individual or may be of representative character.

When objection is taken to the taking out of a procession or of playing music in the vicinity of a mosque or temple, a civil suit lies for a declaration of the right to do so. Such a suit can be brought either by individual plaintiffs against individual defendants who object or it may be of a representative character, the result of which will bind both the communities which are represented. [P 346 C 2]

(m) Civil P. C. (1908), S. 91—Few salf-leaders or those chosen by officials do not represent entire community.

A few self constituted leaders or even the leaders chosen by officials do not legally represent the entire community, which must include minors. Without proof of valid authority, such leaders cannot bind the other members of their community. [P 346 C 2]

(n) Specific Relief Act (1877), S. 42—Civil Court can grant relief that certain members of community have right of procession along with music on public roads provided right does not amount to nuisance—Right is subject to orders of Magistrate and police under S. 144, Criminal P. C.

A civil Court can grant a declaration to the effect that certain persons both in their individual capacities or as members of a community have a right to take out religious and social processions accompanied by music along public roads even while passing mosques, subject to any orders or directions issued by the Magistrate or the police, for preventing breaches of the public peace or obstruction of the thoroughfares or for other matters mentioned in S. 144, Criminal P. C., or under other statutory provisions or for regulation of traffic, provided that the exercise of such right does not amount to a nuisance recognized by law: *A. I. R.* 1925 *P. C.* 36, *Expl.*; *A. I. R.* 1921 *All.* 146; 26 *Mad.* 554 and *A. I. R.* 1925 *P. C.* 36, *Ref.* [P 347 C 1]

B. E. O'Conor and *Akhtar Hussain Khan*—for Appellants.

N. P. Asthana, *R. K. Malaviya*, *K. Verma*, *S. N. Verma*, *Gadadhar Prasad* and *Mokshada Prasad*—for Respondents.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for a declaration that the plaintiffs along with the other Hindus of Bahadurganj are entitled to conduct their processions, both social and religious, on all the streets and thoroughfares, playing music with other religious ceremonies according to their natural rights as well as customs of their community in the usual manner, past the sites occupied by the Juma Mosque and other mosques of the village as freely as they do at any other place, and that the defendants have no right to offer obstruction or to prevent them from doing so at any place therein. The plaintiffs allege that they have been celebrating their festivals from time immemorial and have been conducting processions accompanied with music and other religious observances, that the defendants in 1924 stopped the plaintiffs from playing music in their processions near their mosques and moved the Sub-divisional Magistrate who issued a notice under S. 144, Criminal P. C., that there were some compromises and several orders issued by the Sub-divisional Magistrate restricting the plaintiffs' right to take out their processions, that the cause of action accrued when the defendants applied to the District Magistrate for action and on subsequent dates when proceedings under the Criminal Procedure Code were taken. Several written statements were filed, but their purport is the same that the suit for the declaration was not maintainable and the plaintiffs had no cause of action, that the Magistrate's orders were administrative to avoid breach of the peace and the plaintiffs could not question them without impleading the Secretary of State, that the plaintiffs were estopped from going behind the terms of three previous compromises, that the processions are innovations and that the customary religious ceremonies are not what are alleged by the plaintiffs but are those stated in para. 13 of the written statement that no music was in the past played before mosques and that the noisy demonstration of the processionists is a public nuisance as recognized by law and a declaration of an unlawful act cannot be granted by the Court.

The learned Subordinate Judge held that the plaintiffs have a right to conduct their civil and religious processions through the public streets of Bahadurganj past the various mosques, without interfering with the ordinary use of such streets by the public and subject to such directions as the Magistrate may lawfully give to prevent obstruction or breach of the public peace, and that accordingly he was not called upon to decide whether these festivals were an innovation or otherwise. He further held that as the defendants had offered obstruction it was not necessary for the plaintiffs to implead the Secretary of State; that the three compromises relied upon by the defendants had really not been acted upon and some of the defendants themselves had resiled from them. He also found that the last compromise was entered into during the pendency of criminal proceedings under S. 107, Criminal P. C., and was not of a binding nature and that these compromises were not entered into in a representative character and Sch. 2, para. 18, Civil P. C., was not applicable. Lastly he held that the plaintiff's festivals did not interfere with the civil rights of the defendants and they cannot prevent the former from conducting their processions subject to such directions as the Magistrate may lawfully give. He accordingly gave the plaintiffs a declaration in the following form :

> "The plaintiffs along with other Hindus, the inhabitants of Qasba Bahadurganj do take out their religious and social processions along the thoroughfare and the public street passing the Jama Masjid and other mosques in Qasba Bahadurganj in this way that the public be not in any way disturbed in using the thoroughfare and the public street and also subject to those orders which may be passed by the Magistrate in accordance with the regulation of traffic on the thoroughfares for preventing obstructions and breach of peace."

The defendants have come up in appeal and on their behalf it has been urged by Mr. O'Conor that: (1) the plaintiffs cannot be allowed to conduct their processions with music at the time of prayers so as to disturb the Muslim prayers in the mosque, (2) that they are not entitled to the declaration which has been given; and (3) that they are bound by the previous compromises.

It is unfortunate that communal dissensions have stood in the way of an amicable settlement and there has had to be recourse to the Courts of law. If both the commnnities were reasonable, a suitable arrangement which would satisfy every one could easily be made, by either postponing the hours of prayer, when possible, or regulating the time of the procession. But as previous compromises have not been adhered to, it is perhaps best that a clear declaration of the civil rights should be made.

The principles which govern the rights of the parties appear to be well settled by the authorities, and may be summarized as follows.

There is right in every community to take out a religious procession, with its appropriate observances, along a highway. This is an inherent right and does not depend on the proof of any custom or a long established practice. Even if such a procession be an innovation it would be in the exercise of legal rights. The right is independent of any long standing tradition and is not lost by mere abstention or non-exercise of it for a number of years. An enquiry as to the existence or non-existence of an old custom is therefore unnecessary and irrelevant.

A public highway is primarily for purposes of traffic and every individual is entitled to use it in a reasonable way. But he cannot claim it exclusively for purposes of worship. Persons of every sect are entitled to take out religious processions through public streets provided that they do not interfere with the ordinary use of such streets by the other members of the public.

No right can be claimed to block a public thoroughfare completely so as to prevent other persons from exercising their right of way. The police authorities are responsible for a proper regulation of traffic and can issue necessary orders for that purpose. Magistrates are competent to issue directions to prevent obstructions of public thoroughfares.

The civil Courts have no concern with the power of a Magistrate to issue whatever orders he considers necessary, even if it restricts the ordinary right of using a public thoroughfare, when he apprehends a danger or in urgent cases of nuisance under S. 144 and other sections of the Criminal Procedure Code. No civil suit lies in a civil Court to question the propriety of any such order. The right of way over a public road must always be subject to such orders of the Magistrate.

The taking out of a procession accompanied with music, whether as a part of religious worship or not, is within the civil rights of a community, but not an exclusive use of the highway for worship.

Worshippers in a mosque or temple which abuts on a highway have no right to compel the processionists to stop their music completely while passing a mosque or temple on the ground that there was continuous worship inside it. Even if music, whether religious or not, offends against the religious sentiments of another community, it cannot be objected to on that ground. The stopping of the music would offend the religious sentiments of the processionists just as much as its continuance may offend the religious sentiment of the other. There can therefore be no right to insist on its complete stoppage.

Every man is entitled to enjoy his own civil right provided in doing so he does not infringe the legal rights of another. In the case of *Nanbahar Singh* v. *Kadir Bux* (1), Sen, J., and one of us held that although there was a right to slaughter cows, no right can be claimed for a riotous demonstration actuated by or creating animosities, and that even if the slaughter is on land in one's own possession it must not be done in such an exposed way as to amount to a public nuisance.

The right to use a thoroughfare should in the same way be exercised in a reasonable manner without any wanton disregard of the legal rights of others or a riotous demonstration to provoke animosities. No Court will grant a declaration to a plaintiff as to a right to do an act on a public highway which infringes a public right or a private right of the defendant.

If the parties are bound by a contract inter se a declaration in breach of such contract will not be granted by a civil Court.

There is no right to commit a public nuisance on a highway, nor is there any absolute right to commit a private nuisance against a particular defendant. But all music however bad cannot amount either to a public nuisance or a private nuisance, even though it may annoy occupiers of a dwelling-house situated on the road.

But a noise may become a nuisance, public or private. There is no definite legal measure for a noise becoming a nuisance. It is purely a question depending on the facts of each case, including the degree of its intensity, its place, the time, the mode of committing it, its duration and all the surrounding circumstances. The standard of judging it is according to that of men of ordinary habits, and not of men of fastidious tastes or of over-sensitive nature, whether due to religious sentiment or not.

On the authority of *Manzur Hasan* v. *Muhammad Zaman* (2) it is contended before us that there is an absolute unrestricted right to take out processions accompanied with music along a public road. This is not so.

In that case the Shias had sued for a declaration that they were entitled to take out a procession during the Muharrum with a right to stop and perform the matam in a circle on the public thoroughfare without obstruction. The Sunnis whose mosque lay on a narrow lane objected to it. The first Court decreed the claim

> "subject to the orders of the local authorities regulating the traffic."

The appeal to the High Court was disposed of by Tudball, J., in whose judgment one of us concurred; *Muhammad Zaman* v. *Manzur Hasan*(3). The learned Judge after pointing out that the decisions in India were conflicting remarked:

> "Be that as it may, we are not now concerned in this case with a right to play music or a right to pass in procession."

He again remarked:

> "We repeat again that the plaintiffs' right of passage along this road in procession is not in dispute."

In conformity with the view expressed by the Madras High Court in *Vijiaraghva Charia* v. *Emperor* (4) he stated the law to be that :

> "A community has a right to go in procession through a public street subject to the control of the Magistrate and to use the public thoroughfare in a reasonable and usual way."

The Bench however thought that as the road was a narrow passage, only 12 feet wide, a procession of 400 to 500 men or more with stoppage every 5 to 7 minutes covering a distance of 25 yards would take more than 35 minutes, during which time the road way would be completely blocked. It considered that

> "the right which the plaintiffs claim is practically a right to stop a procession a large number of times to block the roadway completely and prevent its user by other members of the public."

It was thought that no civil Court can possibly declare

> "the right to block a road and prevent the public from using it"

and it was held teat "the suit as brought must fail."

In appeal their Lordships of the Privy Council pointed out that.

> "the High Court had treated the suit as a prayer to be allowed to block absolutely the highway, which their Lordships considered, cannot be allowed: *Mansur Hasan* v. *Muhammad Zamman* (2)."

Their Lordships of the Privy Council examined the conflict of opinion between the Madras High Court and the Bombay High Court and affirmed the views of the Madras High Court and overruled the Bombay views. As to the appeal before their Lordships they remarked:

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(1) A. I. R. 1930 All. 753=125 I. C. 14.

(2) A. I. R. 1925 P. C. 36=86 I. C. 236=52 I. A. 61=47 All. 851 (P.C.).

(3) A. I. R. 1921 All. 146=63 I. C.984=43 All. 692.

(4) [1903] 26 Mad. 554=1 Weir 70 = 13 M. L. J. 171.

> "If their Lordships were simply to dismiss the appeal the effect would be misunderstood in India. Every different sect of religion when places of worship are upon the routes where the processions of those with whom they do not agree pass, would appeal to the judgment as settling that the functions of the procession should cease as it passed them."

Their Lordships accordingly allowed the appeal and granted a restricted declaration. They maintained the restriction

> "subject to the order of the local authorities regulating the traffic."

which had been laid down by the trial Court and in addition to it imposed two more restrictions:

> "subject to the Magistrate's direction and the rights of the public."

The first of these additional restrictions affirmed the remark of Tudball, J., quoted above and the second gave effect to his point that no declaration of right can be granted which infringed other people's rights for instance when the road is completely blocked. In order to prevent their judgment from being misunderstood in India their Lordships did not simply dismiss the appeal but granted a declaration with three reservations.

The effect of the first reservation is that the local authorities, whether Magistrates or police, have power to issue directions for the regulation of traffic on public thoroughfares and preventing obstruction even though they may involve a restriction of the use of such thorough fares.

The second reservation preserves the authority of the Magistrates to issue orders under S. 144, Criminal P. C., for the purpose of preventing obstruction, annoyance or injury, danger to human life, health or safety or a disturbance of the public tranquillty, as well as orders under other statutory provisions. The propriety of such orders cannot be questioned in a civil suit.

The third reservation ensures that the exercise of the right to take out religious processions should not infringe the rights of other members of the public. It is therefore made "subject to the rights of the public."

It may be noted that in that case there was no question as to the right to play music, nor was there any suggestion that such music amounted to a nuisance. When such a question arises, it would obviously be covered by the reservation "subject to the rights of the public."

It cannot be suggested that no suit for a declaration lies. When objection is taken to the taking out of a procession or of playing music in the vicinity of mosque or temple, a civil suit lies for a declaration of the right to do so. Such a suit can be brought either by individual plaintiffs against individual defendants who object, or it may be of a representative character, the result of which will bind both the communities which are represented.

If it were established that there is any binding contract between the parties to the suit the plaintiffs would not be entitled to a declaration of right which amounts to its breach. No doubt three previous compromises between the leaders of the two communities were entered into and signed in the presence of the Magistrates. But it is not established that any one of the plaintiffs was signatory to any of those compromises. Ganesh Prasad son of Ram Narain admitted in the withess-box that he had entered into the compromise. In the plaint plaintiff 4 was at first put down as Ganesh Prasad son of Ram Narain, but the parentage was subsequently altered to son of Sheo Narain Ram. This was presumably done before the plaint was filed. There is therefore nothing to suggest that any of the plaintiffs personally entered into any of the previous compromises.

It is suggested that the compromises by the leaders of the two communities may be in their representative capacities and would bind both the communities. We fail to see how a few self-constituted leaders or even the leaders chosen by the officials can legally represent an entire community, which must include many minors. Without proof of valid authority, express or implied, it would not be possible to bind the other members of the communities, who were no parties to the written compromises or could not validly give consent. It also seems that these compromises have not been strictly adhered to by the two communities. We therefore do not think that the plaintiffs are estopped from claiming a declaration of their legal rights.

In view of all the circumstances mentioned above we think that the proper course is to grant to the plaintiffs a declaration in the following form:

> "That the plaintiffs both in their individual capacities and as members of the Hindu community have a right to take out religious and social processions accompanied by music along public roads even while passing mosques, subject to any orders or directions issued by the Magistrate or the police, for preventing breaches of the public peace or obstructions of the thoroughfares or for other matters mentioned in S. 144, Criminal P. C., or under other statutory provisions or for regulation of traffic, provided that the exercise of such right does not amount to a nuisance recognized by law."

We accordingly modify the decree of the Court below by substituting therefor a decree in the above form. The parties are to bear their own costs.

R.M./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 347

DALAL, J.

Balbhaddra Upadhya—Defendant—Appellant.

v.

Sheomangal and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 691 of 1929, Decided on 1st December 1930, from decision of Sub-Judge, Mirzapur, D/- 29th January 1929.

Transfer of Property Act (1882), S. 75—Property mortgaged to *A*, then to *B* and again to *A*—Part of consideration of second mortgage to *A* kept with *A* to pay part of it to *B* for satisfaction of his mortgage and the rest to be kept by *A* for satisfaction of *A's* first mortgage—Nothing paid by *A* to *B*—Looking to intention of *A* and mortgagor *A's* first mortgage must be held to be extinguished and cannot be a shield for his nonpayment of *B's* mortgage.

Certain property was mortgaged to *A* and later on to *B*, and subsequent to *B's* mortgage the same property was again mortgaged to *A* and a part of the consideration of the mortgage had been kept with *A* so that a sum was to be paid to *B* for satisfaction of his mortgage money and the rest was to be kept by *A* to himself in discharge of his first mortgage. *A* paid nothing to *B* and held up his first mortgage as a shield and pleaded in a suit by *B* for sale of the mortgaged property that the property could only be sold subject to his prior charge under his first mortgage.

Held: that the question was one of intention and that the intention does not depend on the mortgagee's subsequent declaration but must be gathered from the facts of each case at the time the subsequent mortgage was executed. The main object of that transaction was to make a clean sheet of previous transactions of the mortgagor and start a fresh series of mortgages by the mortgagor. As *A* stipulated to pay full amount due to *B* at the time, he must be considered to have intended that there would be no condition made to the payment of the money due to *B*. Under the rule of equity the Court had to see that the mortgagor did not suffer by *A's* breach of contract. Hence there could be no alternative to *A*, viz., either of wiping out his claim on first mortgage or keeping it alive. He had a right to act in only one way and that is of extinguishing his first mortgage debt. Hence he could not hold it as a shield against *B's* claim for recovery of his debt by the sale of the mortgaged properties. 39 *Cal.* 527; *A. I. R.* 1923 *All.* 509; 9 *Cal.* 961 (*P. C.*) and 10 *Cal.* 1035 (*P. C.*) *Ref.*; 33 *All.* 101, *Rel. on.* [P 348 C 1, 2]

U. S. Bajpai and *G. S. Pathak*—for Appellant.

K. N. Katju and *H. P. Agarwal*—for Respondents.

Judgment.—The suit was for sale on foot of a mortgage of 1st June 1916. Other transactions with respect to the property were a usufructuary mortgage by the mortgagor in favour of the defendant-appellant Balbhaddar dated 27th May 1912, which was prior to the deed in suit and another usufructuary mortgage of 30th August 1921, which was subsequent to the mortgage in suit. There was a dispute in the Subordinate Court as to the second mortgage which was in favour of Balbhaddar; ostensibly it is in favour of his grandsons. There is the finding in favour of the plaintiff that the real mortgagee was Balbhaddar. That is a finding of fact, so it may be assumed for the purposes of this appeal that the second mortgage also was in favour of Balbhaddar. Under the second mortgage out of the entire consideration of Rs. 1425, Rs. 790 was left with the mortgagee to pay to the plaintiff of the present suit, and Rs. 499 towards the 1912 mortgage. Balbhaddar did not pay off the plaintiff, and that is the reason for the plaintiff's present suit. In this case he held up the usufructuary mortgage of 27th May 1912, as a shield and pleaded that the property can be sold only subject to his prior charge of Rs. 499 under the mortgage of 1912. The plaintiff's contention was that having regard to the terms between the mortgagor and Balbhaddar of the transaction of 30th August 1921, the property must be sold in execution of his decree free of encumbrance. The plaintiff prevailed in both the Subordinate

Courts and hence Balbhaddar has instituted this second appeal.

The defendant-appellant's counsel rightly urged that the question was one of intention; his further argument was that in the present case Balbhaddar's intention was to keep the mortgage of 1912. as a shield. The intention however does not depend on the mortgagee's subsequent declaration, but must be gathered from the facts of each individual case at the time the subsequent mortgage was executed. The learned counsel for the appellant referred to the case of *Mahomed Ibrahim Hossain Khan* v. *Ambika Prasad Singh* (1), where it was pointed out by their Lordships of the Privy Council that a man having a right to act in either of two ways shall be assumed to have acted according to his interests. This ruling has followed the principle previously enunciated by their Lordships in *Mohesh Lal* v. *Mohunt Bawan Das* (2), and *Gopal Das* v. *Rambur Sheochand* (3). Whether a mortgage paid off is extinguished or kept alive depends upon the intention of the parties. We may therefore enquire what the intention of the mortgagor and Balbhaddar must have been when the transaction of 1921, was entered into between the parties. The main object of that transaction was to make a clean sheet of previous transactions of the mortgagor and start a fresh series of mortgages by the mortgagor. The mortgagor received a very small amount of money in cash under this transaction but stipulated that the previous burdens on his property should be wiped out.

If the mortgagee had wanted to keep his prior mortgage of 1912 as a shield against the plaintiff he would not have consented in 1921, to pay off the full amount due to the plaintiff under the mortgage of 1916, which was subsequent to his mortgage of 1912. Only if the mortgagee intended to wipe out the mortgage of 1912 would the plaintiff be entitled to the full amount of the money due to him without any condition and as the mortgagee stipulated to pay the full amount due to the plaintiff at the time, he must be considered to have intended that there would be no condition made to the payment of the money due to the plaintiff. It was pointed out that there was no contract between the plaintiff and Balbhaddar. There was however a contract between Balbhaddar and the mortgagor. Under the rules of equity and good conscience the Court must see that the mortgagor does not suffer by the breach of contract on the part of Balbhaddar, if Balbhaddar's claim were allowed to treat the mortgage of 1912 as a shield, the mortgagor would be put to great trouble in clearing himself of his liabilities and would be forced to bring a suit of breach of contract for the damage he may suffer by having to pay interest to the plaintiff from 1921 to the date of the satisfaction of his claim.

As the matter stands at present Balbhaddar for his own security would be compelled to pay off the plaintiff's claim just as he ought to have done in 1921, though at present he will have to pay an enormously larger sum. The mortgagor will be saved further litigation and loss by Balbhaddar being held down to claim against the mortgagor only the money due under his mortgage of 30th August 1921. The circumstances of the present case are such that I am prepared to hold that Balbhaddar had no right to act in either of two ways, that is, either by wiping out his claim of 1912 or keeping it alive, but that he had a right to act only in one way and that is of extinguishing the debt of 1912. The Full Bench case of *Mohamad Sadiq* v. *Ghaus Mohammad* (4), in which also the Privy Council ruling in case of Gopal Das referred to by me above was followed; the facts were similar to those of the present case. Their Lordships observed at p. 103:

> "The purchaser, as has been said above, undertook to discharge not only the debt due to Kadheri Mal, but also the debt due under the mortgage upon which the present suit is based. He paid Kadheri Mal, but he did not pay Chet Ram, and he kept in his own pocket the portion of the consideration which should have been appropriated to the discharge of the mortgage debt in favour of Chet Ram. Not having paid that debt, he seeks to hold up as a shield against the claim made for the recovery of the debt, which he was also bound to pay, the pay-

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(1) [1912] 39 Cal. 527=39 I. A. 68=14 I. C. 496 (P. C.).

(2) [1883] 9 Cal. 961=10 I. A. 62=13 C. L. R. 221 (P. C.).

(3) [1884] 10 Cal. 1035=11 I. A. 126=5 Sar. 543 (P. C.).

(4) [1911] 33 All. 101=7 I. C. 200 (F. B.).

ment of the prior debt. We are of opinion that he cannot do so."

It was clearly the intention at the time when the sale was effected that the prior mortgage in favour of Kadheri Mal would be extinguished and not kept alive. The facts of a subsequent case of 1923 are also similar to those of the present case. In *Makhan Lal* v. *Natthi* (5), in the head note the facts are stated to be:

> "Certain property was mortgaged to the defendants and later on to the plaintiff. Subsequent to the plaintiff's mortgage the same property was again mortgaged to the defendants and the amount of the first mortgage was added in this deed. The defendants undertook to pay off the plaintiff's mortgage which they never did."

It was held that the defendants having undertaken to pay off the plaintiff's mortgage could not claim priority in respect of the sums due on their previous mortgage. There can be no doubt that the Subordinate Courts have taken a correct view of the law on the subject. This appeal is dismissed with costs. Permission is granted to appeal by way of Letters Patent.

B.V./R.K. *Appeal dismissed.*

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(5) A. I. R. 1923 All. 509=74 I. C. 640=21 A. L. J. 382.

A. I. R. 1931 Allahabad 349

SEN AND NIAMATULLAH, JJ.

Suba Gobind Rai and *others*—Applicants.

v.

Mt. Anar Koer and *others*—Opposite Party.

Appln. for Review in Second Appeal No. 1793 of 1929, Decided on 7th January 1931.

Civil P. C. (1908), O. 22, R. 2—One of several defendants appealing—Appeal declared to have abated on his death—No application made by his legal representatives to be brought on record—Other defendants, not joining as appellants, cannot claim to have order of abatement set aside—Civil P. C. (1908), O. 41, R. 4.

Rule 4, O. 41, merely enables one of several plaintiffs or defendants to appeal from a decree which proceeds on a ground common to them all. It does not provide that the plaintiffs or defendants who do not join with the appellant should be considered to be appellants for any purpose. It may be that the law entitles them to the benefit of the decree if it is obtained by a party whose interests are identical with their own, but this circumstance cannot convert a respondent in the array of parties into an appellant. If therefore they cannot be considered to be appellants on that account, O. 22, R. 2, Civil P. C., which applies only to a case of one of several appellants can have no application to a case in which one of several defendants alone appealed and the appeal was declared to have abated on his death as no application was made by his legal representatives to be brought on the record. His interests in the litigation could not survive to the other defendants who had not joined as appellants in the appeal and they cannot claim to have the order of abatement set aside. [P 349 C 2; P 350 C 1]

K. Verma and *Sri Narain Sahai*—for Applicants.

K. N. Katju and *Shiva Prasad Sinha*—for Opposite Party.

Niamatullah, J.—This application raises a somewhat novel question. One Jagat Gobind Rai was one of several defendants in a suit instituted by certain persons as plaintiffs. The suit was dismissed by the trial Court on 10th December 1928. On appeal the suit was decreed on 29th April 1929 by the lower appellate Court. Jagat Gobind Rai preferred a second appeal, the other co-defendants not joining with him as appellants. Thus Jagat Gobind Rai was the sole appellant in the second appeal. Jagat Gobind Rai died on 30th October 1929. No application for his legal representaives being brought on the record was made within the ninety days allowed by law. An application subsequently made for substitution was dismissed as time barred and the appeal declared to have abated. The present application has been made by the co-defendants of Jagat Gobind Rai on the allegation that they were pro forma respondents in the second appeal preferred by Jagat Gobind Rai for the benefit of himself and his co-defendants under O. 41, R. 4, Civil P. C. It is argued that the applicants were virtually the appellants and that consequently the death of Jagat Gobind Rai, and failure of his legal representatives to have themselves brought on the record within limitation, could not occasion the abatement of the appeal, as his right survived to the applicants who were already pro forma respondents in the second appeal. Reliance is placed on O. 41, R. 4, and O. 22, R. 2, Civil P. C. We are unable to give effect to the view contended for before us. O. 41, R. 4, merely enables one of several plaintiffs or defendants to appeal from a decree which proceeds on a ground common to them all. It does not provide that the plaintiffs or defendants who do not join with the appellant should be considered to be appellants for any purpose. It may be that the law entitles them to the benefit of the decree if it is obtained by a party whose interests are identical with their own, but this circumstance cannot convert a respondent in the array of parties into an appellant. If therefore they cannot be considered to be appellants on that account O. 22, R. 2, Civil P. C., which applies only to a case of one of several appellants, can have no application to the circumstances before us. Jagat Gobind Rai being the sole appellant, and no legal representatives having been brought on the record after his death, the appeal automatically abated. His interests in the litigation could not survive to any appellant, even though he be a respondent who might have figured on the same side in the array of parties in the original suit.

We are satisfied that this application has no force. It is accordingly dismissed with costs.

K.N./R.K. *Application dismissed.*

A. I. R. 1931 Allahabad 350

DALAL AND BENNET, JJ.

Khan Chand and *another*—Objectors—Appellants.

v.

Ghasita and *another*—Decree-holders—Respondents.

Execution Second Appeal No. 441 of 1929, Decided on 9th December 1930, from decision of Sub-Judge, Meerut, D/- 4th January 1929.

Civil P. C. (1908), O. 34, R. 14—Usufructuary mortgage—Suit by mortgagee for simple money decree—Money decree directing that plaintiffs would have nothing to do with mortgaged property in their possession after passing of the decree—Under O. 34, R. 14, plaintiffs could not under money decree put to sale mortgaged property—They had to file a suit for sale in enforcement of mortgage—Plaintiff as per decree had only lost their possession and their right of sale was not extinguished.

A mortgagee of a usufructuary mortgage obtained a simple money decree to recover his mortgage money and the decree directed that after the passing of the money-decree the mortgagee had to have no concern with the property mortgaged, which had been until then in his possession and the mortgagee in execution of his money decree wanted to sell the mortgaged property to recover his mortgage money.

Held: that the mortgagee could not do so but had to bring another suit for sale in enforcement of the mortgage. The money decree did not extinguish the right of such a sale but had only put an end to the mortgagee's possession. The test applicable to such cases would be to enquire whether the mortgage security did or didnot exist at the time the simple money decree was obtained. If it did exist, O. 34, R. 14, must be given effect to. If it did not, then it would be found possible in certain cases to sell the morgaged property in execution of the money decree: 39 *All.* 36 and *A. I. R.* 1921 *All.* 131, *Dist.*; 36 *All.* 264, *Rel. on.* [P 351 C 2]

N. C. Vaish—for Appellants.

Panna Lal—for Respondents.

Dalal, J.—This is a second appeal within the cognizance of a single Judge of this Court. Our brother Sen has certified it to be fit for hearing by a Bench of two Judges. That is how the appeal has come for hearing before us. This appeal is instituted by certain judgment-debtors. They are judgment-debtors under a simple money decree which was obtained by the creditors on foot of a mortgage of 1908. One Chet Ram had executed a usufructuary mortgage in favour of the ancestors of the decree-holders. The objectors (judgment-debtors) are some of the successor-in-interest of Chet Ram, we were told that two-thirds of the mortgage had been redeemed and the mortgagees sued on the basis of the mortgage for recovery of one-third of the amount of the mortgage and obtained a simple money decree. The decree was prepared in the following terms:

> "Suit is decreed with costs against the assets of Chet Ram in the hands of the defendants who will be entitled to recover possession of the mortgaged property comprised in this mortgage-deed dated 14th February 1908 and which is still in possession of the plaintiffs under their decree. The plaintiffs will have no title or concern left with the mortgaged property after the passing of this decree. The plaintiffs will get six per cent. pending and future interest."

In execution of this simple money decree the decree-holders put to sale the property mortgaged under the mortgage of 1908. The judgment-debtors objected and pleaded the bar of the provisions of O. 34, R. 14, Civil P. C. The first Court accepted the objection and dismissed the application for execution. This decree however was set aside by the Court of first appeal.

In this second appeal the same point is again raised that the execution of the decree in the manner in which it was sought was barred by the provisions of O. 34, R. 14, Civil P. C. It will be sufficient to quote the provisions of that rule to see that those provisions apply to the present case:

> "Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in O. 2, R. 2."

In the present case also the decree is obtained for payment of money on foot of the mortgage and not by way of compensation for the loss of security of the mortgage. The simple money decree will not bar a suit for sale as is laid down in the rule. On the other side it was argued that the direction in the decree under execution that the plaintiffs will have no title or concern left with the mortgaged property after the passing of this decree would prevent a suit for sale. We do not agree with this contention. All these words in the decree were entered so as to make it certain that the mortgagees may not continue in possession of the property in spite of the money decree. In reality those directions brought an end to the possession of the mortgagees but not to their title to recover money under the mortgage. As pointed out by our brother Sen the mortgage was very much alive at the time of the institution of the suit and at the moment when the decree was passed. The mortgagees were actually in possession when the decree was passed and that was the reason why clear directions had to be given so that the mortgagees may be compelled to give up possession in favour of the mortgagor. On behalf of the respondents Mr. Panna Lal quoted the following rulings: *Chedi Lal* v. *Saadatunnissa* (1) and *Tansukh Rai* v. *Sri Gopal* (2). We have studied the facts of both those rulings and find that in both these cases at the time of the institution of the suit and at the time of the decree the security of the mortgage had come to an end and no mortgage existed. Those were not cases like the present where the mortgage existed both at the time of the institution of the suit and at the time of the decree. The Bench ruling which would cover the facts of this case is that of *Indarpal Singh* v. *Mewalal* (3). It was held there that a mere averment in the former suit for simple money decree that the plaintiffs gave up their right under the mortgage for the purpose of that suit is not in the nature of an agreement and cannot be regarded as an extinguishment of the mortgagee rights. The present case is much stronger. There was no agreement and the extinction of the mortgage is based on certain terms of the decree. In our opinion they do not imply such extinction. We think that the test applicable to these cases would consist of an inquiry whether the mortgage security did or did not exist at the time the simple money decree was obtained. If it did exist, the provisions of O. 34, R. 14, Civil P. C., must be given effect to. If it did not, then it will be found possible in certain cases to sell the mortgaged property in execution of the money decree.

We set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs of all the Courts.

B.V./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 351

KING, J.

Damodar Pershad— Plaintiff—Appellant.

v.

Hardeo Pershad—Defendant—Respondent.

Stamp Ref. in First Appeal No. 572 of 1927, Decided on 2nd June 1930.

Court-fees Act (1870), Sch. 1, Art. 1—Claim by appellant among other sums of money for definitely ascertainable sum by way of pendente-lite interest disallowed by trial Court—Ad valorem fee is payable on such sum.

Where the appellant claims among other sums of money a definitely ascertainable sum by way of pendente lite interest which is disallowed by the trial Court, the sum must be held to be part of "amount or value of the subject-matter in dispute" and ad valorem court-fee is payable under Sch. 1, Art. 1, on the sum claimed as pendente-lite interest: 27 *All.* 559, *Ref.* 3 *P. L. J.* 443, *Dist.*; 17 *Bom.* 41, *not foll.* [P 352 C 2]

S. S. Shastry—for Appellant.

Ambika Prasad—for Respondent.

Judgment.—This is a reference under S. 5, Court-fees Act, 1870.

The plaintiff claimed Rs. 9,562-9-3 as principal and interest on account of profits due at the date of suit, together with pendente lite and future interest at 12% per annum. The suit was decreed for Rs. 5,304-15-4, which included interest at 12% up to the date of suit. No pendente lite interest was decreed, but future interest was decreed at the rate of 5% per annum.

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(1) [1917] 39 All. 36=36 I. C. 907.

(2) A. I. R. 1921 All. 131=63 I. C. 445=43 All. 677.

(3) [1914] 36 All. 264=23 I. C. 429.

The plaintiff appealed, claiming a further sum of Rs. 2,541-10-3. He also claimed pendente lite interest and made this the subject-matter of one of his grounds of appeal.

He paid a court-fee on Rs. 2,541-10-3. The question is whether he should not pay a further court-fee on the sum claimed as pendente lite interest, which by calculation comes, to Rs. 663.

Under Art. 1, Sch. 1, the memorandum of appeal must be stamped ad valorem on "the amount of value of the subject-matter in dispute." When the appellant has expressly claimed a definitely ascertainable sum by way of pendente lite interest, which was disallowed by the trial Court, I think that sum must be held to be part of "the amount or value of the subject-matter in dispute." Otherwise, if the appeal had related to the pendente lite interest only, we should be forced to hold that there was no "subject-matter in dispute" in the appellate Court, and such a conclusion seems absurd.

No clear rulings on this point have been brought to my notice. The Chief Inspector of Stamps relies upon *Rowlins* v. *Lachmi Narain Jha* (1), but that case has no direct bearing upon the point in dispute, as it deals only with the court-fees payable upon appeals or cross-examinations in redemption or foreclosure suits. This is a suit of a different nature.

The appellant's advocate relies upon *Vithal Hari Athavle* v. *Govind Vasudeo Thosar* (2). In that case the plaintiff obtained a decree for a certain sum due upon a mortgage together with interest up to the date of suit. The plaintiff appealed on the grounds inter alia that he was entitled to interest up to the date of payment. The Court held that the appellant was not bound to pay an additional court-fee on account of the claim for interest from institution of the suit until payment. The reason was that the claim for interest stood on the same footing as a claim for future mesne profits which had been held not to fall under S. 7, Court-fees Act. This case was decided before the amendment of Art. 1, Sch. 1, Court-fees Act by S. 155, and Sch. 4, Civil P. C., 1908. The amendment makes it clear that Art. 1, Sch. 1, is a substantive provision governing the court-fees payable upon memoranda of appeal. S. 7 applies to suits only and not to appeals. For this reason I think the Bombay ruling can no longer be considered good law.

A Division Bench of this Court in *Bhawani Prasad* v. *Kutubunnissa Bibi* (3) did not expressly dissent from the above mentioned Bombay ruling, which does not appear to have been brought to their notice, but they took a different view. In that case the trial Court, in a suit upon a mortgage, awarded interest upto the date fixed for payment. The plaintiff appealed claiming future interest from the date fixed for payment until realization. The Court did not hold (as in the Bombay ruling) that no court-fee was payable upon the amount claimed as interest. They held that it was impossible to determine the amount of future interest and therefore a fixed court-fee was payable under Sch. 2, Art. 17 (vi).

This lends support to the view that I take, that when the sum claimed in appeal as interest is definitely ascertainable (as in the present case) then an ad valorem court-fee is payable under Sch. 1, Art. 1, as the sum claimed is part of the "subject-matter in dispute" in the appellate Court.

I may add that the appellant's advocate has also cited *Kali Prasad Singh* v. *Mathura Singh*, *A. I. R.* 1923 *Patna* 28 and *Sadhu Saran Rai* v. *Barhamadeo Lall* (4), but they seem to be beside the point as they deal with cases where a plaintiff appeals against the total dismissal of a suit for money. In the present case the plaintiff's suit was partly decreed and the principles laid down in those rulings do not seem to be applicable.

I hold that the appellant is bound to pay an ad valorem court-fee on the ascertainable amount of pendente lite interest when he has expressly made it part of the subject-matter in dispute in the appeal.

R.M./R.K. *Order accordingly.*

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(1) [1918] 3 Pat. L.J. 443=44 I.C. 50.

(2) [1893] 17 Bom. 41.

(3) [1905] 27 All. 559=(1905) A.W.N. 84=2 A.L.J. 263.

(4) A.I.R. 1927 Pat. 230=103 I.C. 592.

A. I. R. 1931 Allahabad 353

BENNET, J.

Emperor—Applicant.

v.

Sheo Charan Lal and *another*—Opposite Parties.

Criminal Revn. No. 673 of 1930, Decided on 23rd January 1931 against order of Sess. Judge, Farrukhabad, D/- 15th May 1930.

Copyright Act (1914), S. 24—Copyright subsisting on date of Act—New Copyright is substituted for old one.

A new copyright under the Act is substituted for an old copyright provided that copyright was in existence at the time when the Act came into force. [P 354 C 1]

Lakshmi Saran—for Applicant.

Asst. Government Advocate (*M. Waliullah*)—for the Crown.

Ambika Prasad—for Opposite Parties.

Order.—This is an application for revision against an order of acquittal of two accused, Sheo Charan Lal and Sri Pershad, his brother. There was some difficulty in service of notice on one accused, but eventually notice was served on Sheo Charan Lal personally on 8th January 1931 and the summons bears an endorsement to that effect by him. Sri Pershad his brother has been represented by learned counsel in this Court and the facts of the case have been fully laid before me. The complainant Durga Prasad, son of Bholanath, brought a complaint in the Court of a Magistrate in regard to infringement of copyright by the two accused by their publication in the year 1920 of a book Ex. C. The printing and publication of this book is admitted by the accused, but they stated that it was composed by one Mulu Singh from whom the accused had received a manuscript copy. This book, Ex. C, is Lakhan's gauna and it is admittedly a portion of a book, Ex A, published by the complainant in 1910 and registered by him in June 1910 as shown by the certificate Ex B, granted under the Registration of Books Act (Act 25 of 1867) to complainant Durga Prasad. The complainant has shown also Ex. D, a book published by him in July 1926 which is also the story of Lakhan's gauna and he states that in 1920 he had got an earlier edition of this book Lakhan's gauna, printed by the printing press of the accused and his suggestion is that the accused having obtained his book for printing purpose improperly kept the book and reproduced it as their own book. There appears to be no doubt whatever that the accused did reproduce the book of the complainant. But the defence on which the accused have relied is that the book of the complainant had no longer copyright when the accused reproduced it in 1920. For this defence the accused rely on the argument of the learned counsel that it was for the complainant to show that the story of Lakhan's gauna was not contained in an earlier work published by his father Bholanath. It is admitted by the complainant that his father Bholanath composed the whole book, Alkhand and that Lakhan's gauna is also a composition of his father. The learned counsel for the accused relies on a passage in cross-examination of the complainant which is as follows:

> "He (my father) wrote one more Alkhand before this. It was also published and had 24 battles whereas this has 36 battles. I am not sure, but it was published 10·5 years before his death. I do not know if it was registered. I have no copy of it and cannot produce any."

Now it will be noted that in regard to the work which the complainant admits was published by his father there is no admission that Lakhan's gauna formed part of that work. On the contrary the complainant has stated in evidence:

> "I got Lakhan's gauna published in 1903 for the first time. It was not registered then. It was published again in 1910."

Now the defence have argued that the onus lay on the complainant to show that Lakhan's gauna did not form part of the book published by his father. His father died in 1898. That is admitted by the complainant and if his father had published Lakhan's gauna then the copyright would only have lasted for seven years from the time of his death, that is until 1905, unless the prosecution was able to show that the period from the first publication of Lakhan's gauna by the father of the complainant up to the year 1914, when the law as to copyright was altered by Act 3 of 1914 was not more that 42 years, that is publication after 1872. But in my opinion the argument for the defence is unsound. As the complainant has produced his certificate of registration of copyright in 1910 and as he has produced the book which he published in 1910, S. 103, Evidence

Act, would place the burden on the defence to show that Lakhan's gauna contained in the book of 1910 was also contained in a previous book published by the father of the complainant. S. 103 states :

> "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The complainant has given his own evidence to show that the book published by his father was not the same as the book published in 1910 and he has stated that no copy of the book published by his father is available. Under these circumstances I consider that the burden of proof lies on the defence to show what they wish the Court to believe, that is that Lakhan's gauna was published by the father of the complainant.

As regards the law laid down by the Magistrate who acquitted the accused of the charge under S. 7, Copyright Act (Act 3 of 1914), the following passage from the judgment of the Magistrate is relevant:

> "When the copyright conferred by S. 1, Act 20 of 1847 lasted only for 47 years it can not be said that it subsisted when the accused published the book and that 47 years had not expired from the date of its first publication by Bholanath . . . . . I do not think that any case under the Copyright Act has been made out against the accused and I acquit them on this count."

The Magistrate proceeded to convict the accused under S. 427, I. P. C., and that conviction and sentence was set aside by the Sessions Judge in appeal, as the offence would not lie under S. 427, I. P. C. The Sessions Judge also considered the question of copyright, but it appears to me that both the lower Courts were wrong in restricting their consideration of copyright to Act 20 of 1847. Act 3 of 1914, S. 24, states that a new copyright under that Act is substituted for the old copyright provided of course that copyright is in existence at the time in which that Act came into force. That copyright is shown by S. 3, Copyright Act of 1911, which states:

> "the term for which copyright subsists shall, except as otherwise expressly provided by this Act, be the life of the author and a period of 50 years after his death."

If therefore copyright subsisted when Act 3 of 1914 came into force, the period of copyright substituted by that Act would be 50 years from the death of the author, the father of the complainant which admittedly was in 1898. The question therefore which has to be examined is not whether in 1920, copyright was subsisting under Act 20 of 1847, but whether the copyright under that Act was subsisting when Act 3 of 1914 came into force. In my opinion the lower Courts have not approached the law on this question correctly both from the point of view of burden of proof and from the point of view of the law prescribing copyright. I consider therefore that the case is one in which a retrial should be ordered.

It was argued that there had been a complaint of 11th July 1929 by the same complainant against the same accused under S. 7, Copyright Act, and other sections, and that the complaint had been terminated by an order of the Magistrate under S. 247, Criminal P. C., which under that section amounted to an acquittal. This order is dated 30th September 1929. It does not appear that in the trial in question this previous acquittal was urged as a bar under S. 403, Criminal P. C. But to remove any doubt on the matter I also set aside in revision this order of 30th September 1929, so that no bar now subsists to the retrial of these accused on the complaint under S. 7, Copyright Act (Act 3 of 1914).

I may also note in regard to the argument now addressed to me as to expiry of the right of copyright on account of the alleged publication by the father of the complainant that it was not the case for the defence that the accused had reproduced any part of a publication by the father of the complainant. On the contrary it was the case for the defence that the accused had published the book in question from a manuscript supplied by another person.

Accordingly I set aside in revision the order of acquittal of Sheo Charan Lal and Sri Pershad by the Magistrate on the charge under S. 7, Copyright Act (Act 3 of 1914) and I direct that these two accused be retried by the Magistrate on the complaint under this section. It is not necessary to retry the accused on the sections of which they were acquitted by the Sessions Judge.

B.V./R.K. *Order accordingly.*

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KENDALL, J.

L. Shiam Lal—Applicant.

v.

Nand Ram—Opposite Party.

Criminal Revn. No. 493 of 1930, Decided on 10th December 1930, from order of Sessions Judge, Bulandshahr, D/- 31st March 1930.

Criminal P. C. (1898), S. 250—S. 250 does not apply to cases exclusively triable by Court of Sessions—Whether S. 250 applies to particular case should be determined from form of proceeding and not from complaint filed under particular section.

Section 250 does not apply to cases exclusively triable by a Court of Session but in such cases it should not be supposed that the complaint is to regulate the proceeding and that because a complainant mentions a section, a charge under which would be exclusively triable by a Court of Session, he therefore binds the Court and at the same time protects himself against a fine for bringing a false, frivolous or vexatious accusation. The criterion is the form of the proceedings, i. e. whether they are conducted under Chap. 18 or Chap. 21: *A. I. R.* 1926 *All.* 159 ; 40 *All.* 615 and *A. I. R.* 1922 *Mad.* 223, *Ref.* ; *A. I, R.*1930 *All.* 280, *Rel. on.* [P 356 C 2]

Saila Nath Mukerji—for Applicant.
M. Waliullah—for the Crown.

Order.—This is an application in revision from an order of the Sessions Judge of Bulandshahr setting aside an order of the District Magistrate under S. 250, Criminal P. C., on the ground that that order had been passed in a case in which the charge was under S. 307, I. P. C., which was exclusively triable by the Court of Session, and that S. 250, Criminal P. C., was not applicable. The question raised is not without difficulty. S. 250, Criminal P. C., is included in Chap. 20, which deals with the trials of summons cases by Magistrates, but the section itself comes under the heading "Frivolous accusations in summons and warrant cases" and the section itself shows that it applies to all "offences triable by a Magistrate." It is however quite clear, nor is the point contested before me, that the section cannot be applied in cases triable by a Court of Session. What has been argued before me is that the present case was not really a case under S. 307, I. P. C., but one under S. 323 or S. 147, and was triable by a Magistrate and was in fact tried by the Magistrate, and that the proceedings were not merely an enquiry under Chap. 18, Criminal P. C. It will be helpful to set forth exactly what happened. The complaint was made and the complainant's statement was recorded on 4th January 1930. The sections mentioned in it are S. 307 as well as Ss. 147 and 323. The Magistrate ordered a copy of the statement to be sent to the police for an enquiry and report before 14th January and on 10th January the report was returned to the effect that the case was one under S. 147, i. e., riot, that the injuries were simple, that no investigation was considered necessary, but that if further time was given a full investigation would be made. On 16th January the Magistrate caused notices to be issued to the accused and to the witnesses for the prosecution without mentioning any section. The complainant made an application for the summoning of witnesses, and again made mention of Ss. 307 and 147, and summonses were issued under those sections. Whether the procedure from that stage was under Chap. 18 or Chap. 21, it is really impossible to decide, because there does not appear to be any essential difference in the manner in which the witnesses for the prosecution are to be examined and other proceedings are to be conducted prior to the framing of the charge. No charge was drawn up, and the order to which exception is now taken was passed when the accused were discharged. It is argued on the one hand that the Magistrate must have been proceeding under Chap. 18 because he issued summonses under S. 307. It is argued on the other hand that he had accepted the police report, showing that the offence was a trivial one and the injuries simple. He did not issue a nonbailable warrant as he would have done if he had believed that there was a case under S. 307, I. P. C.

In fact although the summonses were issued as a matter of routine under S. 307, because that section had been made by the complainant, the Magistrate himself never had any idea that it would be necessary to frame a charge under that section, or to commit the case to the Court of Session. He did in fact believe that he was conducting a trial and not an enquiry, and that as a matter of fact what took place was a trial and not an enquiry.

The Sessions Judge in allowing the appeal against the Magistrate's order has referred to a recent decision of this Court in *Hari Har Dat* v. *Maqsud Ali* (1), where Sulaiman, J., held that when a complaint is made to a Magistrate relating to several offences, some of which are exclusively triable by a Court of Session and theMagistrate discharges the accused under S. 209, Criminal P. C., he is not empowered to pass an order for compensation under S. 250 of the Code. In an earlier judgment of this Court in *Het Ram* v. *Ganga Sahai* (2), Knox, J., held that S. 250, Criminal P. C., is not applicable where the charge which is being enquired into by a Magistrate is one which is exclusively triable by a Court of Session. It will be seen that in one of these cases the complaint of the complainant has been made the criterion, and in the other the nature of the enquiry. In a later judgment of this Court (*A. I. R.* 1930 *All.* 280) Pullan, J., declined to set aside an order under S. 250, Criminal P. C., in a case which was nominally one under Ss. 463 and 323, I. P. C. ; but in which the Sessions Judge held that there might have been a charge under S. 467, I. P. C. Mr. Saila Nath Mukerji for the applicant in the present case has relied especially on the following passage :

> "It was not in my opinion incumbent on the Magistrate to go out of his way to find that a case exclusively triable by a Court of Session might arise from the facts before him if they were proved. He was trying a case apparently within his jurisdiction. He found that there was no case and that it had been brought frivolously and vexatiously. He was therefore entitled to act under S. 250, Criminal P. C."

It is argued that the case here is exactly similar, though it does not appear whether there was any complaint under S. 467 in the case in which Pullan, J., refused to interfere. There has also been a reference to a case in *M. Venkatraya* v *K. Venkatrayar* (3) in which a Magistrate tried a case as one under S. 463, I.P.C., and passed an order under S. 250, and although the High Court were of opinion that the offence disclosed was one under S. 467, I. P. C., they did not interfere with the Magistrate's order because he had proceeded under Chap. 21, Criminal P. C., and not under Chap. 18. Their view in fact seems to have been practically the same as the one taken by Knox, J., in this Court.

I would not myself like to subscribe to the view that the complaint is to regulate the proceedings, and that because a complainant mentions a section, a charge under which is triable exclusively by a Court of Session, he thereby binds the Court and at the same time protects himself against a fine for bringing a false and frivolous or vexatious accusation. The criterion is in my opinion to be the form of the proceedings, i. e. whether they were conducted under Chap. 18 or Chap. 21; but it is frequently difficult to decide under which chapter the proceedings were conducted because, as I have already remarked, there is very little difference at any rate in the stages before the charge is drawn. In the present case it must be allowed that there are indications that the Magistrate although he caused summonses to be issued under S. 307, I. P. C., believed himself to be conducting a trial and not an enquiry, and that he took no particular notice of the complainant's allegation that there had been an offence under S. 307, I. P. C. The law however is not quite clear on the point, and the learned Sessions Judge was certainly following authority in allowing the appeal. In these circumstances I do not think that I should be justified in interfering in revision with the order, and I must therefore dismiss the application.

B.V./R.K. *Revsion dismissed.*

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MUKERJI AND BOYS, JJ.

Emperor
v.
H. L. Hutchinson

Criminal Misc. Case No. 105 of 1931, connected with Criminal Misc. Case No. 106 of 1931, Decided on 23rd April 1931.

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(1) A. I. R. 1926 All. 159 = 91 I. C. 38 = 27 Cr. L. J. 6=48 All. 166.

(2) [1918] 40 All. 615 = 46 I. C. 290 = 19 Cr. L. J. 706.

(3) A. I. R. 1922 Mad. 223 = 66 I. C. 72 = 23 Cr. L. J. 232=45 Mad. 29.

(a) Criminal P. C. (1898), S. 498 — High Court's power to act under S. 498 is entirely unfettered by any conditions.

Per *Mukerji, J.*—The High Court's power of granting bail is conferred on it by S. 498, and is entirely unfettered by any conditions. [P 358 C 1]

Per *Boys, J.*—The legislature has given the High Court and the Court of Session discretion (to act under S. 498) unfettered by any limitation other than that which controls all discretionary powers vested in a Judge viz., that the discretion must be exercised judicially. [P 360 C 2]

✲ **(b) Criminal P. C. (1898), Ss. 496 and 497—Grant of bail is the rule and refusal the exception.**

Per *Mukerji, J.*—The principle to be deduced from Ss. 496 and 497 is that grant of bail is the rule and refusal is the exception. An accused person is presumed under law to be innocent till his guilt is proved. As a presumably innocent person he is entitled to every freedom and every opportunity to look after his case. An accused person if he enjoys freedom will be in a much better position to look after his case and to properly defend himself than if he were in custody. [P 358 C 2, P 359 C 1]

✲ **(c) Criminal P. C. (1898), S. 498 — Accused under S. 121-A, Penal Code alleged to have held meetings, studied and probably disseminated communist teachings—Accused not alleged to be dangerous criminals nor charged with having done any illegal act in pursuance of conspiracy—No probability of accused being sentenced to transportation for life— Held that the case was one in which bail could be granted — Penal Code, S. 121-A.**

The accused were charged with the offence under S. 121-A but not with having done any overt illegal act in pursuance of the alleged conspiracy. All that they were alleged to have done was to hold meetings, study the principles of communism and probably also to make attempt to disseminate those teachings which were said to be dangerous to the society and dangerous to the sovereignty of His Majesty. That conspiracy was nipped in the bud by the police and the case was not one in which the accused persons would probably be sentenced for transportation for life. It was not suggested that the accused were dangerous criminals who if they were liberated would in any way intimidate or cause hurt to the prosecution witnesses or that they tamper with them and when although the prosecution evidence was closed the end of trial was not in sight and the Judge trying the case could not definitely say that the accused were really guilty.

Held: that these were pre-eminently the cases in which bail should be granted. [P 359 C 2]

(d) Criminal P. C. (1898), S. 498 — No accused has right to be allowed to argue in person application for bail.

Per *Boys, J.*—No accused person has any right under the law to be allowed to argue in person an application for bail but in special circmustances such permission can be given. [P 360 C 1]

(e) Criminal P. C. (1898) S. 497 (1), and (2)—Ss. 497 (1) does not apply to application for bail by persons accused under S. 121-A, Penal Code — Section applicable is S. 497 (2)—Penal Code, S. 121-A.

Per *Boys, J.*—Section 497 (1) has no application to an application for bail presented by persons accused under S. 121-A, Penal Code, during their trial even if it is made before a Magistrate. The appropriate provision applicacable where the investigation or inquiry or trial has been proceeding is Sub-S. (2) of S. 497. [P 360 C 2, P 361 C 1]

(f) Criminal P. C. (1898), S. 497 — Grant of bail—Discretion of High Court or Court of Session is not limited to consideration set out in S. 497.

Per *Boys, J.*— The discretion of the High Court or of the Court of Session in granting bail is not limited to the consideration set out in S. 497 but that consideration is material to be considered along with all the circumstances of the case. [P 361 C 1]

Kemp, Special Counsel in Meerut Conspiracy Case—for the Crown.

Mukerji, J.—These are two applications made by two of the accused persons in what is known as the Meerut Conspiracy Case in which a large number of persons has been charged with the commission of an offence under S. 121-A, I. P. C. namely a conspiracy to deprive the King-Emperor of His sovereignty of British India. The maximum sentence laid down in the section is transportation for life.

The two applicants were allowed to appear in person to argue their applications as they were not represented by counsel in the Court below or in this Court. In issuing the orders for the appearance of the applicants we took care to say that the permission to appear was not to be treated as a precedent for all accused persons in all cases.

A short history of the proceedings in Court against the applicants is as follows.

The applicant Mr. Nimbkar and several others were arrested on 20th March 1929 and have since been in custody as under-trial prisoners. The applicant Mr. Hutchinson was arrested about three months later on 14th June 1929, and has been since in custody for nearly two years. The proceedings before the Magistrate started on 12th June 1929 and the order for commitment to the Court of Session was passed on 14th January 1930. In the Sessions Court the trial is still pending. About the middle of March 1931 the examination of the prosecution witnesses was finished and the statements of the accused persons were begun to be taken. So far, in the course of a month the statements of only six accused persons have been taken down.

There are about 30 accused persons and the number of defence witnesses cited is about 300. Mr. Nimbkar told us that he did not cite any witnesses and proposed to apply for his witnesses to be summoned after he has been let out on bail if such an order be made in his favour.

The prosecution examined nearly 300 witnesses. It can be taken without much argument that the examination of the defence witnesses will not take such long time as the prosecution witnesses have taken. But the Court will be addressed at length on behalf of the accused persons, some of whom are represented by counsel. This will take some time bearing in mind the fact that there are nearly 300 prosecution witnesses, and nearly 2,600 exhibits which having been printed occupy 7500 printed foolscap pages. Besides this printed material there are books and news-papers and other materials on which arguments will be based for the accused persons. As the defence proposes to produce witnesses and to otherwise produce evidene, the Crown will have a right of reply and this will take considerable time. Then the learned Judge will naturally take a good deal of time to write out his judgment. In this view, the trial is very likely to last throughout this whole year.

Having stated the nature of the case and the history of its trial I will proceed to consider the powers of the High Court in ordering the bail in respect of an accused person.

The High Court's power is conferred on it by S. 498, Criminal P. C. and is entirely unfettered by any conditions. It has been argued on behalf of the prosecution by Mr. Kemp, the learned counsel who has been especially appointed to conduct the prosecution at Meerut that the High Court's power, though not limited in language, is to be exercised having regard to the provisions of S. 497, Criminal P. C. The learned Counsel cited two cases from the Calcutta High Court and one decided by the Rangoon High Court. While the Calcutta cases do support his contention, the Full Bench decision of the Rangoon High Court does not entirely support him.

Speaking for myself, I think it very unwise to make an attempt to lay down any particular rules for the guidance of the High Court, having regard to the fact that the legislature itself left the discretion of the Court entirely unfettered. The reason for this action on the part of the legislature is not far to seek. The High Court might be safely trusted in this matter and it goes without saying that it would act in the best interests of justice whether it decides in favour of the prosecution or the defence. The variety of cases that may arise from time to time cannot be safely classified and it will be dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes.

This being my reading of the law, I proceed to see whether this is a case in which the applicants ought to be let out on bail.

On general principles and on principles on which Ss. 496 and 497 (as amended in 1923) are framed the grant of a bail should be the rule and refusal of bail should be the exception. In the cases of a bailable offence, the law expressly says that if the accused person applies for bail he shall be released (S. 496). S. 497 applies to cases of nonbailable offences and there it is said that the accused person shall be released on bail except where there appears to be a reasonable ground for believing that he has been guilty of a very heinous offence, viz., one which may be punished by either death or by transportation for life: S. 497 (1). Again it is laid down that, where at any stage of the investigation or trial, there are not reasonable grounds for believing that the accused person has committed a nonbailable offence, but there are sufficient grounds for further enquiry into his guilt, the accused shall be released on bail: S. 497 (2).

The principle to be deduced from Ss. 496 and 497, Criminal P. C., therefore is that grant of bail is the rule and refusal is the exception. That this must be so is not at all difficult to see. An accused person is presumed under the law to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to freedom and every opportunity to look after his own case. It goes without saying that an accused person, if he enjoys freedom, will be in a much better position to look after his case and to properly defend himself than if he were in custody. One of the complaints made by the applicants in this case is that their letters sent from custody have been opened and inspected and censored and therefore they were not in a position to conduct their defence with the aid of such friends as may be outside the prison. As I have said, it is obvious that a presumably innocent person should have his freedom to enable him to establish his innocence.

This being the rule there may, of course, be exceptions. I will not attempt to lay down any cases of exceptions, because these cases before us are not exceptions and I do not want to say anything which will be only in the nature of an obiter dictum.

The accused persons in this case are charged, as I have said, with conspiring to deprive His Majesty of his sovereignty of British India. But it was conceded on behalf of the prosecution by Mr. Kemp, the learned counsel, that the accused persons before us have not been charged with having done any overt illegal act in pursuance of the alleged conspiracy. All that therefore they have done is to hold meetings, study the principles of communism and probably also to make an attempt to disseminate those teachings, which are said to be dangerous to society and dangerous to the sovereignty of His Majesty. In view of this admission on behalf of the prosecution, it is clear that if there was any offence committed by the applicants, in the shape of a conspiracy of a serious nature, the conspiracy has been almost nipped in the bud by the police. In the circumstances, the case is not one in which the accused persons will probably be sentenced to transportation for life. Although the maximum sentence is laid down as transportation for life, the case itself is of a much milder character, so far as I have been able to see from the presentation of it on either side.

It has not been suggested that the applicants before us are dangerous criminals, who if they are at liberty, would in any way, intimidate or cause hurt to the prosecution witnesses or that they would tamper with them. The prosecution evidence has been closed and yet the end of the trial is not in sight.

The learned Judge who has been hearing this case stated in this order refusing bail to the applicants, that he was not in a position to say definitely that there appeared (on the evidence before him) reasonable grounds for believing that the applicants had really been guilty of the offence, alleged to have been committed by them. He said this because, as already indicated, the evidence is so voluminous and relates to so many accused persons that it will not be probably possible for him to pronounce a definite opinion till he has heard the whole case and until he has heard the counsel on either side and the accused persons who have no counsel. Having regard to all the circumstances of the case, I consider that these are pre-eminently the cases in which bail should be granted. It is a pity that the applicants' applications before the Magistrate's Court and the Court of the learned Sessions Judge were not granted. The applicants ought to have been set free earlier.

I would therefore let out the applicants under certain conditions to be found in the order of the Court on bail to be furnished to the satisfaction of the District Magistrate, such bail being adequate but not excessive.

Boys, J.—This is an application for bail made by H. L. Hutchinson in what is known as "the Meerut Conspirancy Case."

The applicant was arrested in June 1929 and the magisterial enquiry against him and a number of other persons proceeded into a charge framed under S. 121-A, I. P. C. The charge reads that:

> "You the accused generally in and between the years 1925 and 1929 within and without British India agreed and conspired with one another and with Amir Haidar Khan, the absconding accused, and the persons and bodies mentioned in the list attached (appendix) and other persons known or unknown and not before the Court, to deprive the King-Emperor of the sovereignty of British India and thereby committed an offence punishable under S. 121-A, I. P. C., and within the cognizance of the Court of Session."

The applicant together with the other accused was committed for trial upon this charge on 14th January 1930. The trial in the Court of Session is still proceeding practically de die in diem since that date.

The prosecution has recently been closed, six of the accuseds' statements have been taken and the statement of the seventh is in progress. In all there are about thirty accused. The applicant applied to the Special Sessions Judge presiding at the trial for bail. On his application being rejected by the order of the Sessions Judge dated 27th January 1931 the applicant has now applied to this Court.

The applicant also prayed that he might be allowed to argue his application in person.

The materials before this Court being insufficient for the decision of the applications, the prosecution was directed by one of the members of the present Bench to inform this Court by an affidavit briefly setting forth the nature of the case for the Crown against the applicant. That affidavit was in due course sent to this Court, the applicant having been given an opportunity of answering it.

The applicant sent a further prayer to this Court asking that he might be allowed to argue his application in person. He in fact claimed this as of right. No accused person has any right under the law to be allowed to argue in person an application for bail, but it appeared desirable in the special circumstances of the present case that such permission should be given, and the applicant has therefore had an opportunity of presenting his application in person. It is only fair and just for me to say that he did not abuse the privilege given to him, but addressed to us a reasoned and proper argument appropriately and temperately expressed. In reply Mr. Kemp, the Special Public Prosecutor, in charge of the case, was heard.

The section of the Code of Criminal Procedure under which we are empowered to act is S. 498, the material portion of which reads as follows:

> "The High Court or Court of Session may in any case, * * * direct that any person be admitted to bail."

It is manifest that the discretion given to this Court, and also to the Court of Session, is unrestricted in any way by the terms of the statute. Two things follow from this, firstly that the discretion is one which must be judiciously exercised, and secondly that the Court has power if it does grant bail to grant it on such conditions as the circumstances of the case and the public interest may require.

It has been strenuously urged on both sides, from different points of view, that the discretion given by S. 498 is limited by, or must in practice be limited by the conditions to be found in S.497, and there is some support to be found for the suggestion in reported decisions. I can find no warrant for the proposition thus baldly stated. The legislature has given the High Court and the Court of Session discretion unfettered by any limitation other than that which controls all discretionary powers vested in a Judge, viz. that the discretion must be exercised judiciously. The question whether there are or are not reasonable grounds for believing that the accused has been guilty of the offence charged S. 497 (1) and (2) is no doubt one matter appropriate for consideration by the High Court or the Court of Session; but it is a consideration which would only approach being conclusive in the absence of the other considerations which may or may not be present in a particular case. There is only this much ground for attaching special weight to this consideration that it is in certain circumstances the only one to which the Magistrate is entitled to give weight, and to this extent the legislature has indicated its view of its importance.

In my view one further caution is necessary in regard to the application of S. 497. We have been addressed by the applicant and also by the Special Public Prosecutor on the assumption that S. 497, sub-S. (1) is applicable to the case, and on this basis it has been contended that by Act 18 of 1923 the legislature, by striking out the words "the offence with which he is accused" and substituting the words "an offence punishable with death or transportation for life," has intended to relax somewhat the restriction formerly placed on the powers of a Magistrate and therefore as it has been contended, the suggested restriction put by the Courts on the discretion to be exercised by the High Court or the Court of Session is similarly relaxed.

Section 497 (1) would however appear to have no application to an application for bail, such as the present, even if it had been made before a Magistrate. Sub-S. (1) reads:

"When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears, or is brought before a Court."

All these phrases, "is arrested," "detained without warrant by an officer in charge of a police station" and "appears or is brought before a Court" suggest the stage of the case when an accused person is first brought before a Court or his arrest or detention is first brought to the notice of the Court and there is little or no information before the Court upon which it can act. The appropriate provision applicable where the investigation or enquiry or the trial has been proceeding is sub-S. (2), S. 497. The importance of the distinction lies in the fact that the relaxation of the restriction on the powers of the Magistrate under S. 497 (1) effected by Act 18 of 1923 does not find place in S. 497 (2).

I will not however discuss further the distinction between the two subsections of S. 497 because, as I have said, I am of opinion that in any event the discretion of this Court or of the Court of Session is not limited to the consideration set out in S. 497, but that that consideration is only material to be considered along with all the circumstances of the case.

A large number of cases have been quoted to us by the applicant and four by the Special Public Prosecutor. I do not consider it necessary to deal with them in detail, but I merely state my conclusions.

As to the object of keeping an accused person in detention during the trial, it has been stated that the object is not punishment, that to keep an accused person under arrest with the object of punishing him on the assumption that he is guilty even if eventually he is acquitted is improper. This is most manifest. The only legitimate purposes to be served by keeping person under trial in detention are to prevent repetition of the offence with which he is charged where there is apparently danger of such repetition and to secure his attendance at the trial. The first of those purposes clearly to some extent involves an assumption of the accused's guilt, but the very trial itself is based on a prima facie assumption of the accused's guilt and it is impossible to hold that in some circumstances it is not a proper ground to be considered. The main purpose however is manifestly to secure the attendance of the accused.

The matters for consideration in this particular case to which I have given my best attention may be enumerated as follows:

(a) Whether on the facts set out in the affidavit filed on behalf of the Crown and in the replies written and oral of the applicant there is or is not reasonable ground for believing that the applicant has committed the offence with which he is charged.

The applicant has contended that he is being prosecuted only because he holds certain opinions. It is a contention which, on the materials set out in the affidavit for the Crown, prima facie has no force in it; whether it be established eventually or not, the suggestion for the Crown is that he is promulgating his opinions and endeavouring to persuade others to those opinions with a view to a resort to violence sooner or later to enforce those opinions. It is not desirable, in view of the fact that it will be for the Sessions Judge to pronounce judgment on the merits of the evidence, for me to say anything further, but it is necessary to say this much to make it clear that in passing the order at which I shall arrive I in no way lose sight of the gravity of the charge or of the nature of the evidence.

(b) The nature and gravity of the charge.

(c) The severity or degree of the punishment which might follow in the particular circumstances in case of a conviction.

(d) The danger of the applicant absconding if he is released on bail;

(e) the character, means and standing of the applicant.

(f) The danger of the alleged offence being continued or repeated, assuming that the accused is guilty of having committed that offence in the past. In view of the particular circumstances of the case and the nature of the evidence as to the particular conspiracy I do not consider there is serious danger of this.

(g) The danger of witnesses being tampered with. In the present case the prosecution is closed.

(h) Opportunity to the applicant to prepare his defence;

(i) The fact that the applicant has

already been some 22 months in jail, and that the trial is not likely to conclude for a further several months at least. I am of opinion that the accused should, on all these considerations weighed together and given their proper weight, be released on bail. This cannot of course be taken to suggest for a moment that I am prejudging the case against the applicant. His guilt or innocence is matter for future determination by the trial Judge. In a matter like the present, whether release on bail be refused or allowed, there can be no ground for the suggestion that the case is being prejudged. The only case in which such an assumption could possibly be justified is where the applicant has satisfied the Court that on the evidence hitherto produced there is no possible case against him. Such is not the case here.

I am of opinion that the applicant should be released on bail to the satisfaction of the District Magistrate, who, in determining the amount of personal bail and the amounts in which he will demand sureties, will bear in mind no doubt the fact that the object must be really and only to secure the attendance of the accused in Court at Meerut on all days during which the trial proceeds. The release on bail will be subject to the conditions set out in the order of the Court.

Order.—We direct that the applicant Mr. H. L. Hutchinson be admitted to bail to the satisfaction of the District Magistrate who will, of course, see that the bail is adequate but not excessive.

Before the applicants are admitted to bail, they must give an undertaking in writing to the District Magistrate that they will not take part in any public demonstration or agitation of any description and that they will not make any public speeches or contribute anything to the public press during the time they are out on bail.

The applicants have put in the forefront of their applications the suggestion that they need to be released on bail in order that, amongst other steps necessary for their defence, they must be at liberty to search for witnesses. We must not be understood to have approved by our order granting bail that they are entitled to any adjournment for such a purpose at this stage.

R.M./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 362

KENDALL, J.

Arjun Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 795 of 1930, Decided on 22nd January 1931, against order of Sess. Judge, Benares, D/- 10th November 1930.

Penal Code (1860), S. 193—Evidence of even one witness is sufficient for conviction on charge of perjury—Evidence Act (1872), S. 134.

The rule of the English Common law, that the testimony of a single witness is not sufficient to sustain an indictment of perjury is not a safe guide for Indian Courts. The Indian Courts are bound by the Statute law and according to S. 134, Evidence Act, even the evidence of a single reliable witness is sufficient for convicting a person of perjury: *Regina* v. *Yates*, (1841-42) *Car. & M.* 132 and *A. I. R.* 1921 *All.* 86, *not Foll.* [P 363 C 2, P 364 C 1]

K. D. Malaviya and *Gopalji Mehrotra*—for Applicant.

M. Waliullah—for the Crown.

Order.—This is an application for the revision of an order of the Sessions Judge of Benares upholding the Magistrate's order in which he convicted the applicant Arjun Singh of an offence under S. 193, I. P. C. The question raised here is what is to be the standard of proof in a case of perjury where the accused is not charged with two mutually contradictory statements one of which must be false but with making statements that must be proved to be false by other evidence. The circumstances out of which this case arose are one Santokhi a resident of Jaunpur District, together with another was sued in Rangoon in the Small Cause Court on the basis of a promissory note and a decree was obtained against him in Rangoon. Santokhi filed a suit in Jaunpur to set aside this decree on the ground that it had been obtained against him by fraud, alleging that he had never been to Rangoon and did not execute the promissory note and that Raghunandan of his village who was an enemy of his had caused this false suit to be instituted and an ex parte decree obtained against him. Part of his case was that he had never heard of the decree until it was executed against him, and that he had not received a summons showing that the suit had been instituted. He succeeded in establishing this case in the trial Court, the decree of which was upheld in first and second appeal.

The present applicant Arjun Singh made two statements in the course of this proceeding for which he had been prosecuted. Those statements are :

(1) *Santokhine samman nehin liya inkar kar dia.*

(2) *Santokhi Rangoon char panch sal tak raha hai.*

The evidence for the prosecution was the statement of Santokhi that he had never been to Rangoon and that he had never been shown the summons and the circumstantial evidence arising out of the proceedings in which Santokhi had had the fraudulent decree set aside. He was convicted by the Magistrate and the Sessions Judge has gone into the matter fully and has upheld the order. The case for the applicant which has been argued with force and ability by Mr. K. D. Malaviya is that the Courts were wrong in accepting the testimony of one witness as the sole basis for a charge of perjury. A reference has been made in the first place to the dictum of Lord Coleridge in *Regina* v. *Yates* (1) at p. 139

> "The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule but a rule founded on substantial justice ; and evidence confirmatory of that one witness, in some slight particulars only is not sufficient to warrant a conviction . . . ."

In the present case Arjun, it is pointed out, after making the statement that Santokhi had been in Rangoon for four or five years, qualified this statement in cross-examination by saying :

> "*Am taur se ham ko malum hua ke Santokhi bhi Rangoon gaya hai.*"

That is to say his statement that Santokhi had gone to Rangoon was not based on personal knowledge but on a general rumour. Now in considering whether the accused was guilty the Judge has found that the statement relating to Santokhi's going to Rangoon was definitely false and then has proceeded to find that in consequence of that the statement relating to the service of summons, being a part of the same conspiracy, must also be definitely false. In regard to this last question, viz., whether Santokhi had refused the summons or not the only direct evidence in the statement of Santokhi, and I am asked to hold that it was legally incorrect to accept the statement of Santokhi in preference to that of the accused and to convict him of perjury in regard to this statement while as regards the other statement in regard to Rangoon I am asked to hold that Arjun as a simple villager was unable to distinguish between direct and hearsay evidence, that he must be judged on the whole of his statement and that he never intended to convey to the Court that he had personal knowledge that Santokhi had been to Rangoon, in fact that he did not make a definitely false statement.

The English Common law in regard to perjury has been stated in the question given above and it has been sought to fortify this by reference to a decision of this Court, viz., *Abdul Aziz* v. *Tara Chand* (2). In this a Judge of this Court refused to sanction the prosecution of a person on the ground that it was a pure question of oath against oath, and that after going through the record he found that there was no documentary evidence whatever to support the statement of the plaintiff against the defendant.

On the other hand Dr. Waliullah has pointed out that under S. 3, Evidence Act, a fact is said to be proved when after considering the matters before it the Court either believes it to exist or to consider its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists and under S. 134 no particular number of witnesses shall in any case be required for the proof of any fact. It seems to be clear therefore that this dictum of English Common law is not a safe guide for the Indian Courts, which are bound by the Statute law. In the present case the criminal Courts had certain definitely proved facts before them, viz., that Santokhi had never been to Rangoon, that a false case had been instituted against him there, and that no summons relating to that case had been served upon him in the Jaunpur District. They had to consider the statements made by Arjun in relation to these proved facts. Now, as regards the first statement in which Arjun said that he had seen Santokhi refuse the summons it was not merely the statement of Santokhi against the statement of the accused-as the Judge remarks it was not possible for the prosecution to produce

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(14) [1841-42] Car. & M. 132=5 Jur. 636.

(2) A. I. R. 1921 All. 86=60 I. C. 800.

any other direct evidence on the subject nor is it a fair statement of the case that in considering the one against the other Santokhi must be held to have been a partial witness, while the accused was not. Santokhi went into Court with all the weight of the decisions of the civil Courts behind him—evidence of so convincing a kind that it could only be controverted, if it could be controverted at all, by the clear and direct statements of the witnesses on whom the Courts placed the most implicit reliance. With regard to the other statement the argument is that Arjun did not pretend to have told the Court that the statement was based on personal knowledge but he did not escape responsibility entirely when he said that his knowledge was based on general rumour. The Court was perfectly justified in considering and indeed was bound to consider whether the statement that he had heard such a general rumour was a true statement or not and in deciding this point the circumstances that presented themselves were that Santokhi had never been to Rangoon and that a general rumour that Santokhi had gone to Rangoon was not one that could conceivably have arisen in Jaunpur. The inference that the object of the witness in saying that Santokhi had gone to Rangoon or had been in Rangoon could only have been a dishonest one, and that the statement was one which he knew to be false or which he did not believe to be true, was therefore a fair inference.

This has been the view taken by both the Courts and I think it is the correct one. At any rate it is not possible in my opinion to displace it by relying on the argument that there is only the testimony of one man against another and that this is not a proper basis for a conviction for perjury. The result is that the application is dismissed. The applicant has been released and must surrender to his bail.

B.V./R.K. *Revision dismissed.*

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* A. I. R. 1931 Allahabad 364

YOUNG, J.

Ladli Prasad Zutshi—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 877 of 1930, Decided on 17th March 1931, Reference submitted by Sess. Judge, Allahabad, D/- 1st December 1930.

***(a) Practice—Judgment—Judgments affecting rights and more particularly liberties of people must be accessible to public—Evidence Act (1872), S. 76.**

As a matter of principle the judgments of His Majesty's Courts ought to be accessible to the public and in absence of any statutory provisions or rulings to the contrary, it is the essence of administration of justice that judgments affecting the rights, and more particularly the liberties of the people, should be made as public as possible, in order that the public at large might at leisure consider those judgments either in their own interests or in the interests in a criminal cause, of the condemned person; for it is only by such publicity that the public can be satisfied that the law is being properly administered by those responsible for its administration, and that abuses in that administration which might occur if the fullest publicity was not given to the proceedings in a Court, may be avoided. [P 365 C 1]

(b) Evidence Act (1872), S. 74—Judgment of Court.

A judgment of a Court is a public document within the meaning of S. 74. [P 365 C 2]

(c) Criminal P. C. (1898), Ss. 554 and 548—Copies of judgments—High Court Rules (Allahabad)—General Rules (Criminal), Ch. 14.

Under the rules for the Subordinate Courts made by the High Court, the general public has a right to inspect and have copies of the judgments of the subordinate Courts. [P 366 C 1]

***(d) Criminal P. C. (1898), S. 548—Words "affected by judgment or order" should not be construed narrowly—They do not refer to person who is party to judgment—General public is affected by judgment in criminal cases.**

The words "affected by a judgment or order" in S. 548 should not be construed narrowly. They do not refer to a person who is a party to the judgment or order, for the rights of the accused to the copy of the judgment are dealt with elsewhere in the Code. The public as a whole cannot fall to be affected by every judgment of a criminal Court. [P 366 C 1]

K. N. Katju and *Gopi Nath Kunzru*—for Applicant.

M. Waliullah—for the Crown.

Judgment.—This is a reference by the Sessions Judge of Allahabad to the High Court for orders.

In October last Pt. Jawahir Lal Nehru was tried in the Court of the District Magistrate of Allahabad on a criminal charge and was convicted by him. An application was thereafter made by counsel on behalf of Pt. Moti Lal Nehru, the father of the convicted person, for a copy of the judgment delivered by the learned District Magistrate. By his order of 7th November 1930, the learned District Magistrate refused the application on the ground that the applicant was not a party to the case, or acting on behalf of a party to the case. An application was made in revision to the Sessions Court asking that a reference should be made to the High Court with regard to the legality of the said order. The learned Sessions Judge allowed the application and submitted the matter to the High Court for orders.

As a matter of principle I am of opinion that the proceedings in, and specially the judgments of His Majesty's Courts ought to be accessible to the public, and unless by any statutory provision or by the rulings of any Court I am bound to the contrary, I would hold that it is the essence of the administration of justice that judgments affecting the rights, and more particularly the liberties, of the people should be made as public as possible, in order that the public at large might at leisure consider those judgments, either in their own interests or in the interests in a criminal cause, of the condemned person; for it is only by such publicity that the public can be satisfied that the law is being properly administered by those responsible for its administration, and that abuses in that administration, which might occur if the fullest publicity was not given to the proceedings in a Court, may be avoided.

The question to be decided in this reference is the right of any member of the public to obtain a copy of a judgment of any criminal Court, and the learned Magistrate himself in his explanation has asked for the guidance of the High Court in this matter. S. 76, Evidence Act, enacts that

> "every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy."

A public document is defined in S. 74 of the same Act and includes a

> "document forming the acts or record of the acts of a public officer, legislative, judicial and executive, whether of British India, or of any other part of His Majesty's dominions, or of a foreign country."

It is clear therefore that a judgment of a Court is a public document within the meaning of S. 74. The right of a member of the public to demand a copy of such a document is limited by S. 76 to "a person who has a right to inspect" the document. The right of a person to inspect a judgment therefore must be looked for outside the Evidence Act. S. 554, Criminal P. C., enacts that the High Court may make rules for the inspection of the records of subordinate Courts. This presupposes that, subject to such rules, the public has a right to inspect the records of subordinate Courts. This High Court has accordingly made such rules. Ch. 14, of the General Rules (Criminal), sets out these rules. R. 4, Ch. 14 is as follows:

> "For any inspection, other than one made under R. 2, of a record in a Magistrate's Court or record room a verbal application may be made on any Court day within the first four working hours to the Court or the officer in charge of the record room. If such officer rejects such application, he shall record his order and the reason therefor."

It is clear, then, that the rejection of the application must not be made arbitrarily. R. 6 has recently been added, and provides that

> "any person desiring to ascertain the serial number and date of institution of any case or other registered particulars respecting a case or any proceedings therein or of any judicial proceedings . . . . . shall . . . . . be entitled to have search made and the information, if obtainable, given to him in writing."

This rule would seem to infer the right of the applicant to inspect the record when found. In my opinion, the only valid reason for refusing such an inspection would be that the inspection of the particular record was against public interest, and even here it is not easy to think of a case where the inspection of a judgment, which must be delivered in open Court, would be against public interest. In construing the High Court rules with regard to subordinate Courts, it is material to consider the rules drawn up for the High Court itself. By the High Court Rules, Chap. 8, R. 6, it is laid down that after judgment even a stranger to the case may obtain either in a civil or criminal matter a copy of the judgment or record on payment of the . . . . . . prescribed fee. It would be a peculiar situation if the High Court meant to allow, except for the reason given above, an officer of an inferior Court to refuse inspection of and therefore a copy of the judgment of that inferior Court, when on appeal to the High Court that very judgment itself would be available to any member of the public after the judgment in the High Court had been delivered. It is inconceivable that the High Court would allow a right to a subordinate Court to refuse inspection of and a copy of a judgment, when by its own act the High Court does not preserve that right for itself. I am therefore satisfied that a proper construction of the rules for the subordinate Courts made by the High Court establishes a right for the general public to inspect and have copies of the judgments of the subordinate Courts.

On this question the Criminal Procedure Code itself, in S. 548, gives an absolute right to any member of the public "affected by a judgment or order passed by a criminal Court" to have a copy of that judgment or any part of the record on payment. As regards this particular case, it would be difficult to argue that the father of the convicted person was not "affected by the judgment or order" within the meaning of S. 548. I see no reason to construe the words "affected by a judgment or order" narrowly. It certainly cannot be said that they refer to a person who is a party to the judgment or order, for the right of the accused to a copy of the judgment are dealt with elsewhere in the Code. The public as a whole cannot fail to be affected by every judgment of a criminal Court. For example, as in this case, the judgment in a criminal case dealing with sedition affects the general public as indeed any judgment dealing with any crime is bound to affect the general public. A knowledge of the law, it is, true, in many cases is made available to the public by statute, but the construction of statutes by the Courts, as expressed in their judgments, is of even greater importance. It is a rule of law that every member of the public is presumed to know the law, it follows that the public must have a right of access to the judgments of the Courts which express that law.

It is suggested by the learned District Magistrate in his explanation that if the right of the public to take copies of judgments is recognized, there would be a real danger of the legitimate work of the copying department, namely, the supply of copies to the public for Court purposes, being hampered by the demand for copies for private purposes. I see no reason for this apprehension. The fact that payment has to be made for copies of judgments must by itself limit the applications to those persons who have a legitimate interest in the judgments required. If the fees for the copies are too small, they could no doubt be increased. While the right of the public to such copies must be recognized, and it is naturally of importance that demands for copies should be complied with as quickly as possible, there is nothing to prevent an officer in charge of such a department from regulating the work of his copying department in supplying copies asked for in such a way so as not to interfere with the copyists' other work. I am satisfied whether on general principles or on a consideration of the existing statutes or of the rules prescribed by the High Court, that this reference must be accepted and the order of the learned District Magistrate set aside.

R.M./R.K. *Order set aside.*

A. I. R. 1931 Allahabad 366

PULLAN, J.

K. S. Rashid Ahmad—Applicant.

v.

S. F. Rich—Opposite Party.

Criminal Ref. No. 892 of 1930, Decided on 3rd March 1931.

Criminal P. C. (1898), S. 446—Magistrate cannot cancel charge once framed.

The effect of S. 446 is to debar a Magistrate from cancelling a charge which has once been framed against a person who has claimed to be tried under the provisions of Ch. 33 as a European British subject, and whose claim to be so tried has been upheld by a competent Court under S. 443: *A. I. R.* 1929 *All.* 84, *Ref.* [P 367 C 1]

Saila Nath Mukerji—for Applicant.

P. L. Banerji—for Opposite Party.

Assistant Government Advocate — for the Crown.

Judgment.—This is a reference made by the learned Sessions Judge of Meerut asking this Court to set aside the order of discharge passed by a Magistrate of the Fist Class in the case of one Mr. S. F. Rich who had been charged with offences under Ss. 409 and 420, I. P. C. This Mr. Rich claimed to be tried as a European British subject under the special provisions of Ch. 33, Criminal P. C. After he had made that claim and after an order had been passed under S. 443, directing that he should be tried under those special provisions a charge was framed against him by the Magistrate. The powers of a Magistrate when an order has been passed under S. 443 of the Code are strictly limited by S. 446. In that section it is laid down that the Magistrate inquiring into, or trying, a case shall, if he does not discharge the accused under S. 209 or S. 253, as the case may be, commit the case for trial to the Court of Session. This section appears to me to take away from the Magistrate the powers given him under S. 213, (2) Criminal P. C., in cases which are to be tried under the special provisions of Ch. 33 of that Code. The same view was expressed by Dalal J., in the case reported in *Emperor* v. *Shankar Singh* (1), but that case cannot be taken as an authority because, in so far as the observations of the learned Judge referred to a European British subject, they were obiter. Thus as far as I know there is no authority to guide the Court in this matter. But the words of S. 446 are, in my opinion, sufficiently clear. It has been argued before me that on this interpretation of the Code a person who has claimed a right to be tried as a European British subject has forfeited another valuable right, namely a right to have a charge against him cancelled if in the opinion of the Magistrate there is not a sufficient case to justify a commitment. This may be so, but whatever may have been the intention of the legislature in framing S. 446, I am satisfied that the effect of that section is to debar a Magistrate from cancelling a charge which has once been framed against a person who has claimed to be tried under the provisions of Ch. 33, as a European British subject, and whose claim to be so tried has been upheld by a competent Court under S. 443 of the Code. I accept this reference, set aside the order of discharge made by the Magistrate and direct that the Magistrate or his successor-in-office shall commit this case to the Sessions.

P.N./R.K. *Order set aside.*

A. I. R. 1931 Allahabad 367

SULAIMAN, J.

Nanhe and *another*—Appellants.

v.

Emperor

Criminal Appeal No. 342 of 1930, Decided on 28th November 1930.

Penal Code (1860), S. 397—Robber or dacoit carrying with him gun or sword—He is using the gun or sword and S. 397 is applicable.

If a robber or a dacoit carries with him a gun or sword and by that means overawes his victim he is using that gun or sword although he may not actually fire the gun or wound or stab the person attacked with the sword, and S. 397 is applicable to such a case. [P 368 C 1]

Shabd Saran—for Appellants.

Government Pleader—for the Crown.

Judgment.— This is an appeal by Nanhe and Abdual Hasan from an order convicting them under S. 395 read with S. 397, I. P. C., and sentencing them each to seven years' rigorous imprisonment. There can be no doubt as to the facts of the dacoity. On 15th January 1925, at about 7 p. m., seven or eight dacoits surrounded the house of Shyam Lal Padhan. They were armed with guns, sword, spear, knives and lathis. Shyam Lal was outside in the verandah and his wife Mt. Phul Kali was inside, and her statement is that three dacoits entered the house, one of whom was armed with a sword and the other two had knives with them. They caught hold of her and stripped her of her silver and gold ornaments which she was wearing. They also beat her and asked her to point out where the other valuables were. She was dragged outside the house, was slapped and dragged up to a pipal tree which is about 30 or 40 paces from the house. On an alarm being raised the villagers arrived and then the dacoits fled away. In order to scare away the villagers gunshots were also fired at them. One of the villagers was seriously injured and fell down senseless on the ground. Mt. Phul Kali got scratches on her neck and wrists.

There can be no doubt that Mt. Phul Kali was in a good position to see the faces of these dacoits who took away the ornaments from her body and dragged her outside the house.

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(1) A. I. R. 1929 All. 84=113 I. C. 764=30 Cr. L. J. 218=51 All. 483.

The two appellants were mixed up with 16 other undertrial prisoners at the jail identification parade and Mt. Phul Kali was able to pick them out without committing any mistake. She again identified them before the Magistrate and also before the Sessions Judge without making any mistake. There is other evidence to corroborate her identification. The accused were also seen by other witnesses in the company of other strangers coming in a cart. The learned Judge was fully satisfied that the evidence of Mt. Phul Kali supported by all the circumstances proved the guilt of these accused. I agree with this conclusion. There is absolutely no reason to doubt that Mt. Phul Kali identified these appellants.

The only other point urged in appeal is that there being no direct evidence that these appellants actually "used" the weapons which they had carried, their conviction under S. 397 is not justified. The contention is that mere carrying of a deadly weapon would not make S. 397 applicable, but it must further be shown that the deadly weapon was actually used by the offender. It seems to me that if a robber or dacoit carries with him a gun or sword and by that means overawes his victim he is using that gun or sword although he may not actually fire the gun or wound or stab the person attacked with the sword. It is noteworthy that in the case of an attempt to commit robbery and dacoity under S. 398 the mere fact of the offender being armed with any deadly weapon makes him liable to punishment for not less than seven years. It would therefore be extraordinary if in order to fix the minimum sentence the mere carrying of a deadly weapon would not suffice when the offence went beyond the mere attempt and amounted to actual robbery or dacoity. In my opinion S. 397 is applicable. In any case the dacoity was a brutal one and a sentence of seven years by no means errs on the side of severity. The appeal is dismissed.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 368

SULAIMAN AND YOUNG, JJ.

Mt. Ram Sri—Applicant.

v.

Thakur Narain Singh — Opposite Party.

Execution First Appeal No. 445 of 1929, Decided on 20th November 1930, against decision of Sub-Judge, Etah.

Hindu Law—Widow—Decree for maintenance—Decree is not part of assets of deceased husband and is not attachable—Civil P. C. (1908), O. 34 R. 6.

No doubt the creditor of the deceased husband can claim priority in respect of his debt which should be discharged out of the assets of the deceased husband before any other debts created by subsequent heirs are paid off. But he cannot treat the decree for maintenance which the widow has obtained against a reversioner as a part of the assets of the deceased. It is not therefore attachable. There is nothing however to prevent the mortgagee from the husband from proceeding to attach the corpus of the property itself and selling it in execution of his decree under O. 34, R. 6, Civil P. C., claiming priority even as against the maintenance claim of the widow. [P 369 C 1]

S. D. Sinha—for Applicant.

Panna Lal—for Respondents.

Sulaiman, J.—This is a judgment-debtor's appeal arising out of an execution proceeding. A mortgage had been executed by the deceased husband of the appellant Mt. Ram Sri. A final decree for sale on the basis of this mortgage deed was obtained in February 1920. The mortgaged property was sold and proved insufficient to discharge the whole decretal amount. In 1926 the mortgagee obtained a decree under O. 34, R. 6 which was against the widow Mt. Ram Sri and the next reversioner Sahab Singh, to whom she had surrendered the estate, as legal representatives of the deceased. The decree was for realization of the money out of the assets of the deceased in their hands. In 1928, in pursuance of an agreement between the widow and the next reversioner, she obtained a decree for maintenance allowance against him with a charge on the property in his possession.

The mortgagee has sought to attach not only the corpus of the property in the hands of Sahab Singh, but also the decree for maintenance allowances in favour of the widow which is against the reversioner. The objection of the widow that the decree itself was no part of the assets of her deceased husband has been overruled. Hence this appeal.

It seems to us that the objection must prevail. No doubt the creditor of the deceased husband can claim priority in respect of his debt which should be discharged out of the assets of the deceased husband before any other debts created by subsequent heirs are paid off. But he cannot treat the decree for maintenance which the widow has obtained against Sahab Singh as a part of the assets of the deceased. In the first place, it is doubtful whether she could not be allowed to appropriate the income of the estate even if it accrued after the death of the husband. In the next place she has obtained the decree on the strength of an agreement between herself and the next reversioner, the liability for which did not exist in the lifetime of the deceased. The decree is therefore not a part of the assets of her deceased husband and is not attachable. There is nothing to prevent the mortgagee from proceeding to attach the corpus of the property itself and selling it, claiming priority even as against the maintenance claim of the widow. The appeal is accordingly allowed and the order of the Court below is set aside to this extent: that Mt. Ram Sri's objection is allowed and her maintenance decree released from attachment. She will have the costs of this appeal from the respondent, including fees in this Court on the higher scale.

K.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 369

BANERJI AND KING, JJ.

Radha Krishna — Plaintiff — Appellant.

v.

Ram Narain and *others* — Defendants —Respondents.

First Appeal No. 429 of 1929, Decided on 19th January 1931, against decision of First Sub-Judge, Cawnpore, D/- 23rd October 1929.

(a) Court-fees Act (1870), Sch. 2, Art. 17 (3)—Question of court-fees must be decided on plaint irrespective of whether suit is maintainable or not under Specific Relief Act (1877), S. 42.

The question of court-fee must be decided on the plaint and the decision is not affected by the question whether the suit is maintainable under S. 42, Specific Relief Act, or by any action subsequently taken by the plaintiff to obtain an injunction otherwise than by an amendment of the plaint. Though it is open to the Court to say that the plaintiff has really asked for a consequential relief though he has tried to conceal it by casting the reliefs in a particular form, it is not open to the Court to say that the plaintiff should have asked for a consequential relief and should have paid the proper Court fee as in such a suit. Plaintiff insisting that it is not necessary for him to ask a consequential relief takes a risk in so insisting in that he is liable to have his suit dismissed under S. 42, Specific Relief Act, if the Court ultimately comes to the conclusion that it was open for him to ask for a consequential relief. Yet he is clearly entitled to have the case made by him in the plaint, tried by the Courts: *A. I. R.* 1925 *Pat.* 210, *Foll.* [P 371 C 1]

(b) Court-fees Act (1870), Sch. 2, Art. 17 (3)— Suit for declaration that petition of compromise and decree based on it are null and void and that plaintiff is not bound by them studiously refraining from asking consequential relief, falls under Art. 17 (3).

A suit for mere declaration that a petition of compromise and the decree based on it are ineffectual and null and void against the plaintiff and that the plaintiff is not bound by them where the plaintiff studiously avoids asking for any consequential relief is a suit "for declaratory decree where no consequential relief ,is prayed for" within the meaning of Sch. 2, Art. 17 (3) and no ad-valoram court-fee is necessary. The plaintiff cannot be deemed to have asked for consequential relief when he studiously refrains from asking it: 20 *Bom.* 736; 30 *Cal.* 788; 35 *I. C.* 797; *A. I. R.* 1924 *Cal.* 183; *A. I. R.* 1925 *Pat.* 210, *Ref.*; 5 *All.* 331; 38 *Mad.* 922; 29 *Bom.* 207; 39 *Cal.* 704; *A. I. R.* 1927 *Lah.* 499; 3 *P. L. J.* 194, *Dist.* [P 372 C 1, 2]

A. Sanyal and *S. B. Johari*— for Appellant.

Iqbal Ahmad, Gopi Nath Kunzru, and *Mansur Alam*—for Respondents.

King, J.—The suit which gives rise to this appeal was instituted for setting aside a compromise and a decree for money passed on the basis of the compromise.

The plaintiff is a minor. Defendants 2 to 4 are his brothers. After their father's death defendant 2, Gauri Shankar, executed promissory notes for Rupees 75,000 in favour of Ram Narain, defendant 1. Mt. Janki Kuar (defendant 5) and her three sons Manni Lal (defendant 3), Kanhai Lal (defendant 4) and Radha Krishna (plaintiff) sued Gauri Shankar (defendant .2) for partition of the joint family property. While the suit was pending Ram Narain (defendant 1) brought a suit, No. 53 of 1928, against Gauri Shankar and his three brothers on the basis of the promissory notes. Both the suits were decided according to a compromise filed on 8th August 1928.

Ram Narain's suit was decreed in full against Mt. Janki Kuar and her three sons. Gauri Shankar surrendered his share in the family property in return for being absolved from liability in respect of Ram Narain's claim.

The plaintiff instituted the present suit for cancellation of the compromise and the decree passed upon its basis, alleging that he was a minor and his interests were not protected by any validly appointed guardian ad litem, and that he is not bound by the compromise and the decree which were obtained by fraud. He paid a court-fee of Rs. 10 only, as for a simple declaratory suit, although the suit was valued at Rs. 70,350 for the purpose of jurisdiction. Objection was made that the court-fee should be paid ad valorem on Rs. 70,350. The plaintiff then applied to amend his plaint so that the prayer for relief should read as follows:

> "It may be declared that the petition of compromise dated 8th August 1928 and the decree passed upon its basis in Suit No. 53 of 1928 are ineffectual and null and void as against the plaintiff, and that the plaintiff is not bound thereby."

The Court passed an order on 5th September 1929 that the plaint be amended accordingly. We have therefore to consider the court-fee payable on the plaint in its amended form.

The trial Court held that the suit was in substance a suit to set aside the compromise and decree and that the plainttiff must pay an ad valorem Court-fee on the money value of the decree which he sought to set aside. As the plaintiff failed to make good the deficiency of court-fee the trial Court rejected the plaint under O. 7, R. 11 (c), Civil P. C. Hence this appeal.

The question for decision is whether the suit should be held to be a suit "to obtain a declaratory decree where no consequeutial relief is prayed" within the meaning of Sch. 2, Art. 17 (iii); or a suit

> "to obtain a declaratory decree or order where consequential relief is prayed"

within the meaning of S. 7 (iv) (c). No other provision of the Court-fees Act has been suggested as applicable to this suit.

Prima facie the suit is to obtain a mere declaratory decree. No consequential relief, such as an injunction restraining Ram Narain from executing his decree against the plaintiff, is prayed for. The question seems to be whether the plaintiff should be deemed to have prayed for consequential relief although he has not expressly done so.

The rulings on this point are unfortunately conflicting. Each side can support his contention with judicial authority.

The following rulings are cited by the plaintiff-appellant-

Karam Khan v. *Daryai Singh* (1). This is a Full Bench decision. The suit was for cancellation of a mortgage deed. The order of reference suggested that the suit was of the kind mentioned in S. 39, Specific Relief Act, and was in the nature of a simple declaratory suit. Five learned Judges concurred in that view, without giving any reasons. This omission is unfortunate as a decree for the cancellation of an instrument might well be held to be more than a simple declaratory decree and a suit under S. 39 is not a suit under Ch. 6 which deals with declaratory decrees. We should be bound by the ruling, if it were directly applicable to the facts of this case, but in our opinion it can clearly be distinguished. In the present suit a declaration of the invalidity of the petition of compromise can hardly be regarded as a separate relief, because the compromise is embodied in the decree. We consider therefore that the suit should be treated, for the purpose of the court-fee, as a suit for a declaration that the decree is not binding upon the plaintiff. A decree is not an "instrument" within the meaning of S. 39 and the suit cannot be held to be a suit under S. 39. The ruling therefore only helps the plaintiff indirectly in so far as the cancellation of an instrument can be considered analogous to a declaration that a decree is not binding upon the plaintiff. No decision of this Court has been cited which is directly in point.

Shrimant Sayajirao v. *Smith* (2) is a clear authority in the plaintiff's favour. It was held that a suit in which the only prayer is for a declaration that a decree was null and void is a suit for a declaratory decree without consequential relief and Art. 17 (iii) is applicable. This case is on all fours with the case before us.

This ruling was followed by the Calcutta High Court in *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (3) which is also directly in point. Maclean, C. J., remarked:

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(1) [1883] 5 All. 331=(1883) A.W.N. 55 (F.B.).
(2) [1896] 20 Bom. 736.
(3) [1903] 30 Cal. 788.

> "The safest course in these cases is to ascertain what the plaintiff actually asks for by his plaint, and not to speculate upon what may be the ulterior effect of his success."

Bagala Sundari Debi v. *Prosanna Nath Mukeriee* (4) follows the above ruling and also clearly supports the plaintiff's contention. It may be noted that in that case the prayer was not merely for a declaration that a certain decree passed against the plaintiff was not binding upon him, but also for setting aside the decree. In that respect it goes beyond the present case where the prayer is for a declaration only and not for "setting aside" the decree as against the plaintiff.

A similar view was taken in *Gokul Nath Jiu* v. *The New Birbhum Coal Co.* (*A. I. R.* 1924 *Cal.* 183). The Court observed that it was not within the province of the Taxing Officer;

> "to see whether the suit is properly framed, whether the plaintiff is entitled to the declaration asked for or what would be the effect if the plaintiff succeeds in obtaining a declaration as prayed for."

Tikait Thakur Narayan Singh v. *Dildar Ali Khan* (5) (at p. 928 of 3 *Pat.*) also supports the plaintiff's contention. The plaintiff had prayed for a mere declaration of title. An objection was raised that he should have paid a court-fee as in a suit for declaration of title and for possession. The Court observed:

> "The question of court-fee must be decided on the plaint, and, though it is open to the Court to say that the plaintiff has really asked for a consequential relief though he has tried to conceal it by casting the reliefs in a particular form, it is not open to the Court to say that the plaintiff should have asked for a consequential relief, and should have paid the proper fee as in such a suit. Here the plaintiff insists that it is not necessary for him to ask for a consequential relief. Although he takes a risk in so insisting, in that he is liable to have his suit dismissed under S, 42, Specific Relief Act if the Court ultimately comes to the conclusion that it was open to him to ask for a consequential relief, he is clearly entitled to have the case made by him in the plaint tried by the Courts"

We concur in this view.

Now we have to consider the authorities cited by the defendant-respondent.

The weightiest authority is a Full Bench decision of the Madras High Court in *Arunachalam Chetty* v. *Rangaswamy Pillai* (6). The suit was for a declaration that a mortgage-decree was not binding on the plaintiff and for an injunction restraining the defendant from executing the same. It was held that the suit was for a declaratory decree with consequential relief within the meaning of S. 7. Cl. (iv) (c), Court-fees Act. Upon the facts of that case the correctness of the decision cannot be doubted, as there was a prayer for an injunction which is clearly a prayer for a consequential relief. The present case is distinguishable upon the facts, as there is no prayer for an injunction or for any other form of consequential relief. The terms of the reference to the Full Bench however raised a question which was unnecessary for the decision of the case namely

> "whether a suit for a declaration that an instrument of mortgage or sale executed by the plaintiff or a decree that has been passed against the plaintiff for a debt is not bindiug on him is a declaratory suit only."

Their Lordships after reviewing the authorities held that a suit of the nature indicated in the reference, which merely asks for a declaration, is none the less a suit for declaretary decree with consequential relief within the meaning of Cl. (iv) (c). Although this opinion is entitled to great weight it must be regarded as an obiter dictum. From the point of view of the fiscal authorities this decision seems unimportant, as their Lordships also held that the plaintiff was entitled to put his own valuation on the relief claimed, and such valuation was conclusive.

Parvatibai v. *Vishvanath Ganesh* (7) was a suit for a declaration that a sale-deed was fraudulent and for an order to have it cancelled and a copy sent to the Sub-Registrar. It was held that the suit was one in which there was a distinct prayer for consequential relief. The Allahabad Full Bench ruling in *Karam Khan* v. *Daryai Singh* (1) was expressly dissented from. This decision is distinguishable as in the present suit there is no distinct prayer for consequential relief and it is not a suit for the cancellation of an instrument under S. 39, Specific Relief Act.

Deokali Koer v. *Kedar Nath* (8) was a suit for a declaration that a mortgage deed was fraudulent and that a decree passed upon its basis had been fraudulently obtained and that the mortgaged property could not be sold for the satisfaction of the decree. It was held that the suit was not of the nature contemplated by S. 42, Specific Relief Act, and therefore was not a suit for a declaratory decree where no consequential relief is prayed. This view was confirmed by the fact that the plaintiff obtained an interim injunction restraining the defendant from executing the decree.

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(4) [1916] 35 I. C. 797.

(5) A. I. R. 1925 Pat. 210=80 I. C. 544=3 Pat. 915.

(6) [1915] 38 Mad. 922=28 I. C. 79 (F. B.).

(7) [1905] 29 Bom. 207=6 Bom. L. R. 1125.

(8) [1912] 39 Cal. 704=15 I. C. 427.

We consider that the question of court fee must be decided on the plaint and the decision is not affected by the question whether the suit is maintainable under S. 42 or by any action subsequently taken by the plaintiff to obtain an injunction otherwise than by amendment of the plaint.

Hakim Rai v. *Ishar Das* (9), is directly in point. The plaintiffs sued for a declaration that a decree obtained against them was based on fraud and was not enforceable. It was held that the substance and not the language of the plaint is to be looked at and that the suit must be deemed to be a declaratory suit in which consequential relief is prayed. We doubt whether this is a correct method of interpreting a fiscal statute.

The ruling in *Mt. Noowooagar Ojain* v. *Shidhar Jha* (10), is distinguishable as it was a suit under S. 39 for the avoidance of a registered deed of gift. The forwarding of a copy of the decree to the registration office was held to amount to consequential relief.

The foregoing review of relevant decisions shows a conflict of judicial opinion without any clear preponderance on one side or the other. We hold that the Court-fee must be decided on the plaint. The plaintiff asks for a mere declaration. He studiously avoids asking for any consequential relief. The suit as framed therefore is clearly "to obtain a declaratory decree where no consequential relief is prayed." We are not concerned at the present stage with the question whether the suit is of the nature contemplated by S. 42 or whether the Court will refuse to grant a mere declaration on the ground that the plaintiff has omitted to ask for further relief such as an injunction restraining the decree-holder from executing the decree, or whether the plaintiff has applied for stay of execution; or whether a mere declaration, if granted will serve any useful purpose. Fiscal statutes must be strictly construed. If the plaintiff chooses to take the risk of asking for a mere declaration without consequential relief he is, in our opinion at liberty to do so under Art. 17, (iii) upon payment of a fixed court-fee of Rs. 10. When he has carefully refrained from asking for consequential relief we do not consider that he should nevertheless be deemed to have asked for consequential relief. This would be doing violence to the language of S. 7, (iv) (c). We hold that the plaint, as amended, is sufficiently stamped.

We therefore allow the appeal, set aside the decree of the trial Court and direct that Court to dispose of the suit according to law.

The appellant will have his costs of this appeal. Costs in the Court below will abide the result.

R.M./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 372

SULAIMAN AND KING, JJ.

Khub Chand and *others*—Defendants—Appellants.

v.

Chittar Mal—Plaintiff — Respondent.

First Appeal No. 174 of 1927, Decided on 15th April 1930, from decree of Sub-Judge, Bulandshahr, D/- 8th March 1927.

Contract Act, S. 182—Person employed by another to invest money on his behalf and to represent him in dealings with debtors is agent—Principal and agent.

Agency need not be created by written document and can be inferred from the circumstances and the conduct of the parties.

A person who is employed by another to invest money on his behalf and to present him in his dealings with the debtors is an agent within the meaning of S. 182 : 33 *I. C.* 438, *Ref.*

[P 373 C 2; P 374 C 1]

B. E. O'Conor and *A. Sanyal*—for Appellants.

N. C. Vaish, *A. M. Khwaja*, *P. L. Banerji* and *Panna Lal*—for Respondent.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for rendition of accounts against them on the allegation that Khub Chand defendant 1, for himself and as the managing member of the defendants' family was the agent of the plaintiff. According to the plaint the plaintiff's ancestors were residents of Shikarpur although they were carrying on business at Haldwani and Chiter Mal plaintiff was a connexion by marriage of Khub Chand. About the year 1904 the defendant suggested to the plaintiff that he might, through him, start money-lending business and make investments in properties in the district of Bulandshahr, to which the plaintiff agreed. He sent about Rs. 20,000 to the defendant who obtained documents mostly in his own name except one for Rs. 10,000 which was taken jointly in the name of the plaintiff and his uncle, as well as the defendant Khub Chand. According to the plaintiff the defendant did not render account to him but put him off.

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(9) A. I. R. 1927 Lah 499=102 I. C. 46=8 Lah. 531.

(10) [1918] 3 Pat. L.J. 194=45 I. C. 238.

In the written statement the defendant denied the allegation that he ever became the agent of the plaintiff or even that he ever received any money belonging to the plaintiff. He suggested that the plaintiff or his uncle Basdeo personally carried on some business and obtained documents in their own favour directly. The defendant however admitted that he was a joint creditor so far as the bond for Rs. 10,000 was concerned. In the written statement, apart from the absolute denial of the agency and the receipt of any money belonging to the plaintiff, there was no specific plea that the suit was brought more than three years after the termination of the agency. Nor was there any suggestion that more than three years before the suit accounts had been demanded and refused by the defendant. There was however a general plea that the claim was barred by time.

The learned Subordinate Judge has found in favour of the plaintiff both on the merits as well as on the question of limitation and has passed a preliminary decree in his favour. The defendants have accordingly appealed.

Although full details of the money said to have been paid by the plaintiff to the defendants were not given in the plaint five specific transactions were put forward at the trial as those in which the plaintiff's money was invested through the agency of the defendant. The plaintiff served certain interrogatories on the defendant before the documentary evidence filed by him was allowed to be taken out of the sealed cover and shown to the defendants. The answers of the defendant Khub Chand are to be found at pp. 8 and 9 on the lines of the pelas taken by him in the written statement. They contain an absolute denial of any receipt of money belonging to the plaintiff and of any realization of any bond by him. There is a clear denial of the advance of any loan through the defendant to any person like Mahommad Ali Nawaz Khan Deputy Sahib, Pandit Pahlad Singh, Mian Talib Ali of Naurangabad or Mian Hatim Ali of Naurangabad. The defendant admitted that he had instituted a suit against Pahlad Singh to recover the amount due on a promissory note executed by him about six years ago but claimed that related to his own personal money. Contrary to the statement in the plaint he admitted that he had realized Rs. 1,200 due to the plaintiff in different sums under instructions from him and pleaded that this sum was paid to the plaintiff through Lachhman Das though no receipt was obtained for it. (His Lordship after dealing with several transactions and considering the evidence, proceeded). The defendant Khub Chand did not produce any account books of his own and stated that he only kept a note-book or memorandum. Even such memorandum has not been produced. We are therefore satisfied that the plaintiff's case that money was sent to the defendant from time to time which was invested by him on his behalf is true and that the transactions in question are evidenced by the defendants' own letter dated 18th January 1908 (Ex. 1, p. 43)."

The next question is as to the legal position of the parties and the plea of limitation. The defendants deny that Khub Chand was acting as the agent of the plaintiff. Now under S. 182, Contract Act, an agent is defined to be a person employed to do any act for another or to represent another in dealing with third persons. On our finding it is quite clear that Khub Chand was employed by the plaintiff to invest money on his behalf and to represent him in dealings with the debtors. The case therefore comes directly within the definition of "agent" as given in S. 182. We have already pointed out that the mortgage deed of 10th January 1904, expressly showed that money had been advanced to the mortgagor through Lala Khub Chand and in that transaction he undoubtedly acted as the agent of the plaintiff. The fact that he made realizations himself and made endorsements on the back of the deed also shows that he did realize the money on behalf of the mortgagees. His admissions contained in Ex. 1 also go to show that he was receiving interest on behalf of the plaintiff and was holding his money in his hands and was expressing his readiness to send the money wherever directed. He also sent an account showing the amounts due to the plaintiff from the various debtors and admitted that he had the ruqqas and bonds in his possession which he could send to the plaintiff if so instructed. We have therefore not the least doubt in our minds that the position of Khub Chand was that of an agent of the plaintiff in this business. Agency need not be created expressly by any written document and can be inferred from the circumstances and the conduct of the parties. In this case we have both: see *Jetha Ram* v. *Mehnga Ram* (1). We therefore affirm the finding of the Court below on this point.

The next question is whether the present claim is within limitation. As pointed out above the defendants did not plead in their written statement that the agency had terminated more than three years before the suit nor did they plead that they had refused to render accounts on a demand by the plaintiff more than three years before the suit. If therefore the defendants are to be pinned to their pleadings no question of limitation would arise as the burden undoubtedly lies on the defendants to establish that the claim is beyond time.

The learned advocate for the defendants, however relies on certain admissions made by the plaintiff in the witness box and urges that they amount to an admission that there was a demand for rendition of accounts and a refusal. The plaintiff stated that six years ago he had demanded money from Khub Chand and that another demand was made by him four years before he gave evidence. He further admitted that 15, 16 or 14 years ago he asked for accounts and that he also asked for accounts five or six years ago. He was not asked whether the defendant promised to render accounts and pay him off or whether he refused to render any account, but the plaintiff did admit that seven or eight years ago he asked the defendant to show him the bond and the ruqqas but the defendant refused to show them. On these admissions it is argued that there was a refusal on the part of the defendant to render accounts seven or eight years before the plaintiff gave his evidence. The admissions, however fall short of showing that there was any refusal on the part of the defendant to render accounts. Any doubt that there may remain is removed by the statement of Khub Chand himself in which he positively asserted that the plaintiff never asked him to give an account of money-lending nor did he refuse to give such an account. The reason given by him was of course, that no money-lending was done through him and he had no such account. Taking these two statements of the parties together it is impossible to hold that there was a refusal to render an account some years before the suit.

The claim is undoubtedly governed by Art. 89, Lim. Act which relates to a suit by a principal against his agent for property received by the latter and not accounted for and for which the period of three years runs from the date when the account is, during the continuance of the agency, demanded and refused, or where no such demand is made when the agency terminates: see *Nobin Chandra Barua* v. *Chandra Madhab Barua* (2) In the present case we have already pointed out that there was no refusal to render accounts.

There is also no proof that there was any termination of the agency. Under S. 201, Contract Act, an agency terminates by the principal revoking the authority or by the agent renouncing the business of the agency or by the business of the agency being completed or by either party dying or becoming of unsound mind or by the principal becoming an insolvent. In the present case there is no proof of any revocation of authority or any renunciation of the business of the agency by the agent. The business also may be said to have been completed when no accounts were actually rendered and the amounts outstanding were never paid to the plaintiff. We are therefore clearly of opinion that the claim is in no way barred by time.

It is not necessary to consider at this stage whether the defendant has made any payment to the plaintiff so as to reduce his liability. The suit was no doubt brought after a long interval of time and it is extraordinary that the plaintiff would have allowed himself to put off and not insist on complete accounts being submitted to him long ago. The question whether any or what amount is actually due from the defendant to the plaintiff is a matter which will have to be gone into thoroughly when the time for the preparation of the final decree arrives.

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(1) [1916] 33 I.C. 438.

(2) A. I. R. 1916 P. C. 148=36 I. C. 1=44 Cal. 1 (P.C.).

We accordingly dismiss this appeal with costs including in this Court-fees on the higher scale,

R.M./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 375

BANERJI AND KING, JJ.

Ganesh and *others*—Defendants—Appellants.

v.

Mallu Mal Girdhas Das—Plaintiff—Respondent.

First Appeal No. 349 of 1927, Decided on 4th February 1931, against decision of Addl. Sub-Judge, Benares, D/- 22nd April 1927.

(a) Limitation Act (1908), S. 20—Writing and payment need not be simultaneous.

Section 20 does not suggest in any way that the writing must come into existence immediately, and further, when the part payment is admitted and the fact of the part payment is made in writing by the debtor, the debt is revived and a suit can be maintained within three years of the part payment: 17 *Mad.* 92; *A. I. R.* 1923 *Nag.* 117, *Foll.* [P 376 C 1]

(b) Limitation Act (1908), S. 20—Payment must be before expiry of prescribed period.

To bring into operation the provisions of S. 20 the part payment must be made before the expiry of the prescribed period. [P 376 C 1]

(c) Limitation Act (1908), Art. 64—"Account stated" has technical meaning.

The term "account stated" has a technical meaning, and where balances shown as struck on various dates and final balance found on particular date which final balance was signed by the debtor, the transaction does not amount to "accounts stated" within the meaning of Art. 64. [P 376 C 2]

P. L. Banerji, K. N. Malaviya and *Badri Narain*—for Appellants.

S. K. Dar, S. N. Seth and *Gadadhar Prasad*—for Respondent.

Banerji, J.—This is a defendants' appeal against a judgment and decree of the learned Addl. Subordinate Judge of Benares in a suit for recovery of money.

There are several defendants in the case but the case as presented to us does not require consideration of the case set up by the defendants, other than defendant 1, as defendant 1 must be treated as the "karta" of the joint family consisting of defendant 1 and the other defendants.

The plaintiff's case as disclosed in the evidence of Kashmiri Mal was that the "sarkhat" Ex. 1 was executed by Ganesh Misir defendant 1, that on 18th October 1923 the accounts were balanced and Rs. 16,518-7-6 were found due to the plaintiff, that thereafter on 7th October 1924 there was another accounting, and finally, on 17th May 1926, Rs. 14,287-2-6 were found due to the plaintiff, and the plaintiff claims that sum together with interest.

The defence was that the "sarkhat" was not executed on the various dates mentioned, but everything was written up on 17th May 1926 on which date Ganesh Misir signed. It was pleaded that all items prior to 17th May 1923 which might be found due to the plaintiff must be held to be time barred, and the plaintiff's suit must be dismissed. The defendants, other than Ganesh Misir, pleaded that they were not members of the joint family and that the acknowledgment was not binding as the business was not the joint business of the family.

The learned Subordinate Judge found that all the entries on Ex. 1 were written up on 17th May 1926, that the business was a joint ancestral business, that no part of the plaintiff's claim was barred by limitation, as the effect of part payments in the years mentioned in Ex. 1 was that the part payments saved limitation as they appeared in the handwriting of the debtor, and came within S. 20, Limitation Act.

The case for the plaintiff further in the Court below was that no question of limitation arose because Ex. 1 represented the accounts as stated between the parties, and Art. 64 of the Limitation applied to the case, but the Court below repelled the contention of the plaintiff.

The defendant-appellants claim that the fact of the part payment appearing in the handwriting of the appellant, was later than the part payment of principal and therefore S. 20, Limitation Act did not save the plaintiff's claim from being barred. It was contended that the writing must come into existence simultaneously with the part payment of the principal as contemplated by S. 20, Limitation Act.

In our opinion S. 20, Limitation Act, does not suggest in any way that the writing must come into existence immediately, and further, when the part payment is admitted and the fact of the part payment is made in writing by the debtor, the debt is revived and a suit can be maintained within three years of the part payment: see *Vankatasubbu* v. *Appusundram* (1) and *Ram Prasad* v. *Bansi Lal* (2).

In the present case Ex. 1 shows that there was part payment of Rs. 1,000 on 23rd January 1924. To bring into operation the provisions of S. 20, Limitation Act, the part payment must be made before the expiry of the prescribed period, and in the present case any sums of money that were due to the plaintiff three years before 23rd January 1924 can be sued for by the plaintiff and time would be computed from 23rd January 1924. The learned Subordinate Judge has however said:

> "there were such payments in every year and they would give fresh start to the period of limitation."

We find that the part payment must be considered to have been made on 23rd January 1924 and any items which might be found due to the plaintiff for three years before that period would not be barred by limitation; neither would any of the items after that date. It would be necessary to send an issue to the Court below on this point which we shall set out later.

The learned advocate for the respondent has in support of the decree passed by the Court of first instance urged that Art 64, Sch. 1, Limitation Act, was applicable to this case and that no part of the plaintiff's claim is barred by time. It was contended by the learned counsel that upon the finding of the Court below what happened on 17th May 1926 was that the accounts were gone into, what was found due to the plaintiff from the defendants was recorded, and the balance was signed by the defendants, and that all this comes within what is technically called "accounts stated." A number of cases were cited before us but, in our opinion, it is unnecessary to refer to any of them. Upon the facts of the case we are unable to hold that there was any such accounting as is contemplated by the words "accounts stated." Kashmiri Mal was examined and has stated that there was accounting on different dates in different years. In our opinion the statements of the defendant Ganesh Misir and his munim are so vague that it is difficult for us to find out what actually happened on 17th May. In our opinion we have not before us sufficient materials on the record of this case to show that the seven items for which credit was given to the defendants were due to the defendants from the plaintiff. We therefore cannot accept the contention of the learned advocate that the proper article to apply to the case is Art. 64, Sch. 1, Lim. Act. "Accounts stated" has a technical meaning and in our opinion the materials before us do not entitle us to hold that on 17th May 1926 there was any such accounting as would amount to "accounts stated" within the meaning of Art. 64.

It is further contended by the learned counsel for the respondent that Ex. 1 must be taken to be an agreement within the meaning of S. 25, Cl. (3), Contract Act. Although the agreement is without consideration, it amounted to a promise made in writing and signed by Ganesh Misir to pay money which partly was barred by limitation. The contention of the learned advocate is that the word 'promised' may mean either an express promise to pay, or an implied promise, and because the document has got an endorsement "interest at the rate of 8 per cent", this amounted to an implied promise to pay the sum entered in the agreement. In our opinion the claim of the plaintiff cannot be considered to be claim based on a document which is a good document under S. 25, Contract Act. In our opinion to bring the case within that section it is necessary to show that there was an express promise to pay, as a mere acknowledgement of liability, even if it implies a promise, would not in our opinion be sufficient for purpose of S. 25. We therefore cannot accept the contention of the learned advocate.

Before we can finally decide this case it will be necessary to have findings upon the following issues from the Court below :

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(1) [1894] 17 Mad. 92.

(2) A. I. R. 1923 Nag. 127=71 I. C. 17=19 N. L. R. 6.

1. What sums became due to the plaintiff from the defendants on account from 23rd January 1921 to the date of the suit ?

2. What payments were made by the defendants during that time and how were they appropriated.

3. Whether the whole or a part of the sum of Rs. 5,597-0-9 was legally recoverable by the defendants from the plaintiff on 17th May 1926, and are they entitled to set it off ?

4. What is the amount due to the plaintiff on principal and interest ?

Parties will be entitled to call fresh relevant evidence. Ten days will be allowed for objections on return of the findings. The findings are to be returned within three months.

V.B./R.K. *Case remanded.*

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MUKERJI AND BENNET, JJ.

Anand Krishna—Judgment-debtor and objector—Applicant.

v.

Kishan Devi and *others* — Decree-holder and Judgment-debtors—Respondents.

Execution First Appeal No. 456 of 1929, Decided on 18th December 1930, from decision of Sub-Judge, Bulandshahr, D/- 20th July 1929.

Civil P. C. (1908), O. 21, R. 91—Decree-holder in execution of joint decree against certain persons attaching certain property and purchasing it himself — Subsequently half of the property lost — Decree-holder consequently seeking by execution to recover half purchase money—Any one of judgment-debtors may object to such execution though his personal property be not attached — Decree-holder is not entitled to get back his money.

A decree-holder, in execution of a joint decree against certain persons, attached certain property as property of judgment-debtors and purchased it himself at auction sale. Subsequently a suit by certain persons alleging that one-half of the property belonged to him was successful. Consequently the decree-holder by application for execution sought to recover one-half of the auction sale price paid by him and attached a property belonging to one of the judgment-debtors.

Held : that any one of the judgment-debtors might object to the execution although for the time being his personal property had not been attached inasmuch as if the application be successful and if the property attached did not fetch the full amount for which execution had been taken out, there would be nothing to prevent the decree-holder from seeking execution against others.

Held further : that decree-holder purchaser was not entitled to ask the judgment-debtors to pay one-half of the price which he himself chose to pay : *A. I. R.* 1924 *Pat.* 273, *Dist.* [P 378 C 1]

Bhagwati Shankar, S. N. Seth and *H. C. Mukerji*—for Applicant.

M. A. Aziz and *Hazari Lal Kapoor*—for Respondents.

Mukerji, J. — This appeal raises a point of law for which no authority either way has been produced before us. The point has to be decided on general principles. It appears that the respondent Mt. Kishan Devi held a decree for money for a large amount against four persons, the appellant Anand Krishna and his brother Raj Bahadur Krishna, Shiam Krishna and their mother Mt. Kishan Devi. At one stage of the execution a certain house was attached as the property of the judgment-debtors and was sold on 24th August 1922. It was purchased by the decree-holder Mt. Kishan Devi, and the sale was in due course confirmed. The sale was however contested by a suit by one Jagmohan Swarup, who claimed to have purchased a half-share in the property, being the share belonging to the judgment-debtors' ancestors brother Badri Krishna. The suit succeeded with the result that Mt. Kishan Devi lost a half-share in the property purchased by her.

By the application for execution out of which this appeal has arisen Mt. Kishan Devi seeks to recover a sum of Rs. 3,000 being one-half of the auction-sale-price paid by her. The judgment-debtor Anand Krishna objected to the execution but was unsuccessful. Hence this appeal.

A preliminary point has been taken on behalf of the respondent, namely the appeal is not maintainable at the instance of Anand Krishna, inasmuch as the property that has been sought to be attached is the property not of Anand Krishna but of his brother Raj Bahadur Krishna. We do not think that this preliminary objection has any force. The execution application itself shows that the decree-holder sought execution against all the judgment-debtors and not against Raj Bahadur Krishna alone. If the application be successful and if the property attached do not fetch the full amount for which execution has been taken out, there will be nothing to prevent the decree-holder from seeking execution against the present appellant. The present appellant would then be met with the plea that he ought to have preferred an objection to the execution and the execution order operates as res judicata. The decree is a joint one, and we think any one of the judgment-debtors may object to the execution although for the time being his personal property has not been attached.

On the merits we think the appeal ought to succeed. When the decree-holder sought the attachment of the house the judgment-debtors never asserted that they had title to the whole of it. Further the judgment-debtors never demanded any particular price for the property. The decree-holder alone chose the property to be sold and she alone chose what price she would pay for it. Such being the case there does not seem to be any equity in favour of the decree-holder by which it may be said that she is entitled to recover one-half of the price paid by her, because she lost one-half of the property attached and sold. Suppose that the property was really worth Rs. 20,000, and the decree-holder obtained it at the auction-sale for Rs. 6,000. The property left with her, after the success of the claim of Jagmohan Swarup would still be worth more than Rs. 6,000 paid by the decree-holder. The illustration given would show that there is no principle of law under which the decree-holder auction-purchaser can turn back and ask for a refund, as it were, of the price paid by her.

The learned Subordinate Judge relied on the case of *Radha Kishan Lal* v. *Kashi Lal* (1). That case is clearly distinguishable on the ground that there the title of the judgment-debtor to the lot No. 1 was found to be entirely absent. There was no consideration whatsoever for the purchase. In the circumstances R. 91, O. 21, Civil P. C., would have applied and would have permitted the auction-purchaser to ask for a refund of the purchase money after the setting aside of the sale. In the Patna case there was no discussion as to the maintainability or otherwise of the application. It was assumed that the application was maintainable and the only point that was decided was one of limitation. The Patna case is therefore no authority whatsover for the point we have to decide. Further, as we have shown, the facts of the case show that there is no conflict between the case before us and the Patna decision. We may point out that the Patna case was not accepted as laying down good law by two learned Judges of the Madras High Court in the case of *Muthu Kumar Swami Pillai* v. *Muthu Swami Thevan* (2). In the Madras case it was held that the decree-holder, if he thought that he should avoid the sale altogether, should have made an application within 30 days of the sale under Art. 166, Limitation Act and his failure to do so prevented him from maintaining a subsequent application for execution of the decree. This however was a question of limitation and limitation alone.

On general principles, we are of opinion that the decree-holder purchaser is not entitled to ask the judgment-debtors to pay one-half of the price which she herself chose to pay. In the result we allow the appeal, set aside the order of the Court below and dismiss the execution application of the decree-holder with costs to the appellant throughout.

P.N./R.K. *Appeal allowed.*

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(1) A. I. R. 1924 Pat. 273=76 I. C. 927=2 Pat. 829.

(2) A. I. R. 1927 Mad. 394=100 I. C. 522=50 Mad. 639.

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KING, J.

Raghunath Prasad and *another*—Defendants—Appellants.

v.

Jwala Prasad and *others*—Plaintiffs—Respondents.

Second Appeal No. 491 of 1929, Decided on 2nd March 1931, against decision of Addl. Sub-Judge, Aligarh, D/- 22nd January 1929.

Agra Tenancy Act (1926), S. 15—Usufructuary mortgage of *sir* land — Mortgagor agreeing to pay rent in case he was declared exproprietary tenant and to allow mortgagee to retain possession—Mortgagor declared exproprietary tenant—Agreement amounted to waiver of exproprietary rights.

A specific area of *sir* land was transferred by usufructuary mortgage. The mortgagor expressly agreed in the mortgage deed that in the event of his being declared exproprietary tenant he would be liable to pay rent determined under S. 36, and that the mortgagee should retain full possession and enjoyment of the mortgaged property. The mortgagor was subsequently declared exproprietary tenant.

Held: that the agreement amounted to waiver by the mortgagor of his exproprietary rights. Hence he could not insist upon retaining possession of the property in exercise of his rights as expropriietary tenant: *A. I. R.* 1927 *All.* 779 and 9 *All.* 88 (*F. B.*) *Dist.* [P 380 C 1]

Panna Lal and *Hari Pal Varshin*—for Appellants.

S. K. Dar and *Krishna Murari Lal*—for Respondents.

Judgment.—This appeal arises out of a suit for damages for fruit misappropriated by the defendant from a grove and for a permanent injunction restraining the defendant from interfering with the plaintiffs' possession of the trees of the grove. On 15th September 1927, the defendant executed a usufructuary mortgage of certain plots of land, which have been held to be grove land, in favour of the plaintiffs. The property was described as being resumed muafi, and it was recorded as *sir* land. On 20th January 1928, the zamindar brought a suit for the determination of the rent of the mortgagor on the ground that by reason of the transfer of his proprietary rights under the usufructuary mortgage, he had become an expropriietary tenant and his rent should be fixed. Accordingly the revenue Court fixed Rs. 10-10-0, as the rent of the defendants as an expropriietary tenant. Subsequently, a dispute arose between the parties or their lessees for possession and enjoyment of the produce of the grove, and the plaintiffs instituted the present suit.

The principal defence was that as the mortgagor had become an expropriietary tenant of the land in suit, the trees which formed part of the expropriietary holding could lawfully be retained by the mortgagor notwithstanding the terms of the mortgage deed. The jurisdiction of the civil Court was also challenged, as it was stated that the relation of landlord and tenant exists between the parties. Both the Courts below have decreed the plaintiffs' claim and the defendant comes to this Court in second appeal.

It is clear that under the terms of the mortgage deed itself the mortgagee, namely the plaintiff, is entitled to the usufruct of the grove. It was contemplated in the mortgage deed itself that by reason of the transfer the mortgagor would become an expropriietary tenant, and it was expressly provided that in such an event, if rent were fixed upon the holding of the defendant as an expropriietary tenant, then he would be liable to pay that rent, but the mortgagee was to be entitled to the full use and enjoyment of the grove, to appropriate the produce and to plant new trees. The question is whether the mortgagor is bound by the terms of his own agreement, or whether this agreement is void as contrary to the provisions of the Agra Tenancy Act.

The appellant has relied upon a ruling of *Mt. Hafizan* v. *Chakko Lal*, *A. I. R.* 1927 *All.* 779, in which it was held that groves situate on expropriietary holdings partake of the nature of the holding on which they stand, and as such cannot be attached and sold in execution of a decree. This was the decision of a single Judge, but it followed a Full Bench Division in *Jugul* v. *Deokinandan* (1). These rulings however are not strictly applicable to the facts of the present case. The mortgage of the land, with the grove standing thereon, was made by the mortgagor as a proprietor before any question of his being a mere expropriietary tenant arose. The mortgage of the trees therefore was perfectly valid and it is open to question whether the mere fact that the mortgagor subsequently was found by the revenue Court to be an expropriietary tenant, in consequence of the transfer, renders the valid mortgage of the trees invalid. It is necessary for me to consider that point for reasons which will presently appear. In any case the point decided by the rulings mentioned does not arise, because there is no question whether the defendant as an expropriietary tenant, is now able to transfer the grove or whether the grove can be attached and sold in execution of a decree against him.

The finding of the revenue Court that the defendant is an expropriietary tenant of the land in suit (which finding necessarily is implied in the determination of rent payable by the defendant as an expropriietary tenant), is, in my opinion, binding upon the civil Courts and cannot be challenged. The decision of this appeal appears to me to turn upon the provisions of the last paragraph of S. 15, Agra Tenancy Act 1926. S. 15, lays down certain rules regarding the relinquishment of expropriietary rights. The last paragraph runs as follows:

> "Notwithstanding anything in this section, where the property transferred by means of a mortgage of the kind specified in sub-S. (5),

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(1) [1887] 9 All. 88 (F. B.).

S. 14, consists wholly of a specific area of *sir* the mortgagor may by simultaneous agreement in writing waive his exproprietary rights, and in that case the mortgaged land shall, if the mortgagor regains within 12 years of the date of the transfer possession thereof on repayment of the mortgage, resume the character of *sir*."

In my opinion the terms of this provision apply exactly to the facts of the present case. The property was transferred by a usufructuary mortgage which is a mortgage of the kind specified in sub-S. (5), S. 14. The property consisted wholly of a specific area of *sir*. The mortgagor moreover, in the mortgage deed itself, expressly agreed in writing that in the event of his being declared an exproprietary tenant he would be liable to pay the rent determined (under S. 36), but the mortgagee should retain full possession and enjoyment of the mortgaged property, that is the grove. In my opinion this amounts to a waiver of his exproprietary rights, since he expressly consented that the mortgagee should retain possession of the mortgaged property which would form the subject of the exproprietary rights.

In view of this express provision of the Agra Tenancy Act, I think it is not open to the mortgagor to claim that he can disregard the terms of the contract of mortgage, and that he can insist upon retaining possession of the land and grove in exercise of his rights as an exproprietary tenant. In my opinion the Court below have come to a right decision and I dismiss the appeal with costs. In my opinion this is a fit case for a Letters Patent appeal.

S.N./R.K. *Appeal diimissed.*

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SULAIMAN AND YOUNG, JJ.

Bhullan and *others*—Plaintiffs—Appellants.

v.

Bachcha Kunbi and *others*—Defendants—Respondents.

First Appeal No. 332 of 1927, Decided on 21st January 1931, against decision of Addl. Sub-Judge, Benares, D/- 14th April 1927.

(a) **Interpretation of Statutes—Equitable doctrine cannot override clear terms of Act.**

If the terms of an Act are clear and precise no equitable doctrine can override the terms of the Act. [P 381 C 2]

(b) **Transfer of Property Act (1882), Ss. 62 58 & 60—"Term" in S. 62 means reasonable term—Only reasonable terms can be enforced and not those amounting to clog on equity.**

The word "term" in S. 62 (b) must be read to mean a reasonable term and enforceable in Court of law or term which does not amount to a denial of the right to redeem.

In the case of a usufructuary mortgage the right to redeem the property arises when the term is one that is reasonable and enforceable in law; that is, is not void because it amounts to a clog on the equity.

Per *Sulaiman, J.*—A mere unreasonably long period of the term by itself would not necessarily be sufficient for Court to override the express contract. At the same time a long term say of a thousand years, would not by itself suffice: 36 *All.* 551, and *A.I.R.* 1925 *All.* 643, *Ref.* [P 383 C 1]

(c) **Transfer of Property Act (1882), Ss. 60 58 & 62—Covenant amounting to clog cannot be enforced—Term in usufructuary mortgage that mortgage was to be redeemed on one particular day after 60 years, held to be unreasonable and clog on equity.**

If it is established that a certain covenant in the mortgage deed amounts to a clog on the equity of redemption, such a covenant would not be enforced. No hard and fast rule can be laid down as to when a covenant amounts to a clog on the equity of redemption. The Court has to take into account all the circumstances as they then existed and all the terms of the mortgage deed and then oonsider whether the covenant in dispute is so unduly hard and unconscionable as to nullify for all practical purposes the right of redemption, or the exercise of the right of redemption is restricted in such an unreasonable manner as practically to deny it. If the fetters or clogs placed on the redemption are hard and unreasonably oppressive, the intervention of the Court may be called for.

In a usufructuary mortgage one of the terms was that there would be redemption on only one specified day and on no other day whatsoever and that day was to arrive after the lapse of 60 years.

Held: that the covenant restricted and limited the right of redemption in a most unreasonable manner and was a clog on equity of redemption and a suit for redemption before the date fixed was not premature: 36 *All.* 551; and *A. I. R.* 1914 *P. C.* 36, *Ref.* [P 384 C 2]

K. Verma—for Appellants.

P. L. Banerji and *S. Majid Ali*—for Rsepondents.

Young, J.—This is an appeal arising out of a suit for redemption of a usufructuary mortgage dated 19th January 1898. The plaintiffs are the sons of one of the original mortgagors, and defendant 1 is a transferee from the original mortgagee, having purchased the mortgagee rights on 3rd May 1913. The defence was that the suit was premature. The learned Judge in the Court below has held that the suit is premature, and has dismissed it.

The mortgage deed itself is a peculiar document. The main point in the deed which has been discussed here on appeal is contained in Cl. 4, which reads as follows:

> "Should we, the executants, or our heirs wish to get the property redeemed and pay the principal amount in a lump sum after 59 years on Jeth Sudi Puranmashi of the 60th year, then the property shall be redeemed. Should we the executants, or our heirs wish to get the property redeemed within 60 or after 60 years, then the property shall not be redeemed."

The meaning of this clause clearly is, and it is so admitted by both the appellants and the respondents, that the mortgagors could only redeem the property mortgaged on one day during the 60th year, and if they so failed to redeem the property on the particular day, their right of redemption should be for ever extinguished. It is argued on the part of the appellants that such a condition is void, being contrary to the whole principle of mortgages, in that it amounts to a clog on the equity of redemption. On the other hand, the respondents argue that Ss. 60 and 62 (b), T. P. Act, which give the right of redemption, must be construed in accordance with the terms of those sections, and that the strict reading of those sections makes it clear that the doctrine of clog on the equity of redemption which applies in England, does not apply in India where the law of mortgage is regulated by statute.

There can be no doubt whatever that the condition referred to in Cl. 4 of the deed does amount to as complete a clog on the equity as it is possible to imagine. One day 60 years hence the mortgagors, or rather their grandsons, might easily have forgotten the particular day. The mortgagee himself would probably make it convenient to be absent from his village, and generally the result of this term must be that to all intents and purposes the mortgage is irredeemable. If this case was considered in England, there would be no difficulty whatever in deciding it. In the words of Andrews, J. in *Browne* v. *Ryan* (1), at p. 667, which were approved and adopted by Collins, M.R. in *Jarrah Timber and Wood Paving Corporation, Ltd.* v. *Samuel* (2), p. 7, it was laid down that:

> "in every mortgage a condition is implied by law that the borrower has the right, on repayment of the mortgage debt and the payment or discharge of interest or other obligations upto date and costs, to get back his property free from every obligation arising out of the mortgage; and any agreement or stipulation forming part of the mortgage bargain which attempts to exclude, evade or hamper this right is void in so far as it would, if held good, have this effect."

The right to redeem, however, in England is always held to be subject to any reasonable postponement or condition for the benefit of the mortgagee. If we were administering the English law, there would be no difficulty in saying that this clause is a clog on the equity and is void, and that the appeal must, therefore succeed. There have been cases in this Court where the Court has interfered with the contract between the parties and have declared that a clog is void in India: See *Sarbdawan Singh* v. *Bijai Singh*, (3), and *Rajai Singh* v. *Randhir Singh*, *A. I. R.* 1925 *All.* 643. The latter case especially is on all fours with the present case. In that case the mortgage was for 82 years and only one day, at the expiration of the term, was allowed for redemption. Two learned Judges of this Court held that that was a clog on the equity of redemption and was not enforceable. On the other hand several cases have been quoted to us showing that various Courts in Allahabad and elsewhere have held that periods varying from 20 years up to 150 years for repayment of money, were enforceable. But in none of those cases was the doctrine of a clog on the equity argued or discussed. We could, no doubt, follow the decision of this Court in *A.I.R.* 1925 *All.* 643. But it is to be noted that in cases, not only decided in this Court, but in other Courts, there does not seem to have been either argued or discussed the question of the effect of Ss. 60 and 62 T. P. Act. If the terms of this Act are clear and precise, it is obvious that no equitable doctrine can override the terms of the statute. It is necessary, therefore, to see if there is anything in the Transfer of Property Act which makes it impossible for us to use the equitable doctrine of a clog on the equity. S. 60 enacts that:

> "at any time after the principal money has become payable, the mortgagor has a right to require the mortgagee to deliver the mortgage deed and all documents to the mortgagor etc."

Section 62 (b) enacts that:

> "in the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property when the term, if any, prescribed for the payment of the mortgage money has expired."

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(1) [1901] 2 Ir. R. 653.

(2) [1903] 2 Ch. 1.

(3) [1914] 36 All. 551=24 I.C. 705.

It is argued on behalf of the respondents that, reading these two clauses together, the result is that in the case of a usufructuary mortgage, as in this case, the right to redeem by statute only arises when the term prescribed for in the deed has expired, and that the term in this deed is 59 years, and as it has not expired, there is not, and cannot be, any right to redeem. If these two sections of the Act did, indeed mean this, it would be clear that the doctrine of a clog on the equity could not possibly apply to India where there was a term fixed in the deed itself, however long that term might happen to be. If, for instance, it was expressed in the deed that the property could only be redeemed after a thousand years, that term would have to be enforced. In my view, it is impossible to construe these two sections in the above manner. It is impossible to consider that the legislature in passing this Act could have meant to enact anything which would completely defeat the right to redeem; for it is clear that if redemption was postponed for the term of a thousand years, it would be equivalent to say that the mortgage was irredeemable. At any rate, before one could construe the sections in that manner, one would have to be satisfied that the legislature had expressed its intention in the clearest possible terms. In my opinion these two sections, when read with S. 58 of the same Act, make it reasonably clear that the word "term" in S. 62 (b) must be read to mean a reasonable term or a term which does not amount to a denial of the right to redeem. S. 58, which defines a mortgage, is as follows:

> "A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan."

The condition in this mortgage would mean that a document which is called a mortgage could not possibly be a mortgage within the meaning of S. 58, because it provides, as I have already stated, that the property should never in effect be redeemed. Also, this particular deed could not be for the purpose of securing the payment of money, when the terms of the deed itself made it impossible that that money should ever be paid. In my opinion therefore Ss. 60 and 62, being read with the definition of S. 58, and it being possible to reconcile the three sections, come to this, that in the case of a usufructuary mortgage, the right to redeem the property arises when the term is one that is reasonable and enforceable in law; that is, is not void because it amounts to a clog on the equity. I would therefore allow the appeal.

Sulaiman, J.—I concur in the conclusion of my learned brother, but would like to add a few words. A mortgage is essentially a transaction of loan for the payment of which security is offered. This idea is embodied in its definition as contained in S. 58 (a), T. P. Act. If money is advanced by way of loan and a transfer of interest in immovable property is effected for the purpose of securing its payment, the essential idea is the repayment of the loan. This necessarily involves the right to redeem the property. The mortgagee, on the other hand, is entitled to sufficient security for the repayment of the loan. There can be no doubt that the Courts of equity in England have always given relief to a mortgagor where he attempted to contract out of his right to redeem and the bargain was found to be harsh and unconscionable. As pointed out by my learned brother, this case, if it arose in England would create no difficulty and the suit would not be thrown out as being premature. The Courts in England would not enforce any restriction or fetter on the right of redemption which amounts to a clog. The equity judges looked not at what was technically the form, but at what was really the substance of the transaction, and consistently refused to give effect to covenants which unreasonably delayed or defeated redemption as fetters or clogs which they treated as absolutely null and void.

The first question is whether in spite of the codification of the law, the doctrine of a clog on the equity of redemption is at all applicable in India. If the very essence of a mortgage is the repayment of the loan for which security has been offered, then the right to redeem must exist and the mortgagor cannot contract himself out of such a right. If such a contract were allowed, the transaction would cease to be a mortgage. There is plenty of authority that the Courts in India have applied the doctrine of clog on the equity of redemption. I shall refer to some of the cases of this Court later.

If the Indian Courts, which are both Courts of law and of equity, have power to interfere and protect the right of a mortgagor to redeem in spite of an express contract which makes it nugatory, then the only question would be whether the present case is a fit one for such interference.

So far as the covenant for postponing the redemption for a long term is concerned, some difficulty is created by the language of Ss. 60 and 62, T. P. Act. Under S. 60, a mortgagor is given the right to redeem "at any time after the principal money has become payable." Under S. 62, in the case of a usufructuary mortgage where the mortgagee is authorized to pay himself from rents and profits the interest and the principal money, the mortgagor has a right to recover possession

"when the term (if any) prescribed for the payment of the mortgage money has expired."

Prima facie, it would appear that if the mortgage deed contains an express covenant that the money will not become payable before the expiry of a fixed period, howsoever long, or that the right to redeem will come into existence only after the expiry of that period, the mortgagor's right to claim possession before that term has expired would not be conferred on him by either of these two sections.

On the other hand, it seems that the term of the mortgage referred to in these sections must mean a term which is enforceable in a Court of law. If the combined effect of the long term and other covenants in the deed is to make it a clog which a Court can ignore and treat as being enforceable, it would not be the term contemplated by these sections. I am therefore not prepared to say that a mere unreasonably long period of the term by itself would necessarily be sufficient for an Indian Court to override the express contract. At the same time, I would not like to commit myself that a long term, say of a 1,000 years, would not by itself suffice.

There are no doubt several cases of the other High Courts, in which it has been laid down that the mere length of the term for redemption does not amount to a clog on the equity of redemption. In some of those cases it was assumed that if there had been a clog on the redemption, the Court might have interfered. On the other hand, the Chief Court of Oudh following previous cases has held in *Fateh Mohammad* v. *Ram Dayal Singh* (4), that a long term of years may itself amount to a clog. I consider it unnecessary to refer to cases of the other High Courts. I would however briefly refer to the cases of this Court which have been cited before us, and which relate to mortgages executed after the passing of the Transfer of Property Act.

In *Ram Prasad* v. *Jagrup* (5), it was held that a covenant in a mortgage deed fixing 58 years for the mortgagor to redeem the mortgaged property was not, in the absence of fraud or duress, hard and unconscionable. But even in that case it was conceded that if a covenant were harsh or unconscionable, the Court might refuse to enforce it.

In the case of *Rambaran Singh* v. *Ramker Singh* (6), a single Judge of this Court held that where in a usufructuary mortgage there was a stipulation that the mortgagor could redeem on the expiry of 13 years and that if he failed to do so, the mortgage would hold good for another period of 13 years, and the mortgagor did not redeem at the expiry of the first 13 years but brought a suit to redeem about a year after the expiry of the first term of years, the suit was premature. In view of the pronouncement of their Lordships of the Privy Council in the case of *Bakhtawar Begam* v. *Husaini Khanum* (7), the soundness of this decision may now be doubted. Where the first term fixed for payment has expired and the right to redeem has accrued, the statutory right of redemption under S. 60 cannot be destroyed by any covenant to the contrary entered in the deed.

In the case of *Sarbdawan Singh* v. *Bijai Singh* (3) a mortgage was made for 40 years and a provision was inserted in the deed fixing a particular day on which it was to be redeemed, failing which the mortgage was to be redeemed for another term of 40 years. The learned Judges held that the provision was designed to make redemption very difficult, if not impossible, and should not be enforced. On p. 929 they pointed out that to give a man one day only in 80 years on which he may redeem is to make difficulties for him far greater than are to be found in some of the earlier cases referred to. They also pointed out that it was impossible to lay down a hard and fast rule as to what should or what should not be regarded as an improper restraint or fetter on the right of redemption. In that particular case they considered the covenant to be a clog on the redemption. No doubt the decision in that case can now be supported also on the ground mentioned by their Lordships of the Privy Council in the case quoted above inasmuch as a suit had been brought after the expiry of the first term of 40 years; but there is at the same time the fact that the learned Judges did not proceed to decide that case on that basis but applied the doctrine of a clog on the equity of redemption.

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(4) A.I.R. 1927 Oudh 224=102 I.C. 160=2 Luck. 588.

(5) [1912] 15 I.C. 880.

(6) [1911] 10 I.C. 243.

(7) A.I.R. 1914 P.C. 36=36 All. 195=41 I.A. 84.

In the case of *Ram Ganesh* v. *Rup Narain, A.I.R.* 1925 *All.* 34 it was held that where the term of a mortgage was 82 years and even at the end of that term only one day was allowed for redemption and unless the money was paid on that particular day, the mortgage was to become a sale, and it was further covenated that the mortgagor, who did not redeem the mortgage, cannot borrow money, the thing amounted to a clog on the equity of redemption, and was not enforceable. The learned Judges relied mainly on the Allahabad case quoted just above. But there too the covenant postponing the redemption, although expressly entered in the deed of mortgage, was not enforced, and the redemption was allowed in spite of it. This case cannot be explained on the ground mentioned in the Privy Council case quoted above.

In the case of *Narsingh Prasad Singh* v. *Rupan Singh* (8) a Bench of this Court remarked that where in the case of a mortgage containing a stipulation that if the mortgage was not redeemed by a fixed date it was not to be redeemed for another period of 20 years, and the mortgagor failed to redeem the mortgage on the fixed date but urged that the stipulation extending the period of redemption to another term of 20 years amounted to a clog on the equity of redemption, the plaintiff had not placed sufficient material before the Court to warrant a conclusion that the postponement of redemption for another 20 years must be regarded as an improper restraint or fetter on the right of redemption. Apparently the attention of the learned Judges was not drawn to the Privy Council case of *Bakhtawar Begam* v. *Husaini Khanam* (7) which might well have been applied. But even in that case the learned Judges assumed that the Court would have the power to interfere if a case of an improper restraint or fetter on the right of redemption were made out. They also remarked :

> "No hard and fast rule can be laid down as to what condition entered in a mortgage deed amounts to such a contract which requires a Court of equity to give relief when it finds that it had made the redemption of a mortgage difficult, or when it has made the calculation of the mortgage money uncertain."

In the case of *Ram Sarup* v. *Nageshwar Tewari* (9) there was a mortgage called bibilwafa miadi under which the right to redeem was postponed for 45 years, and in case of default the mortgage was to become an absolute sale. The suit to redeem it was brought before the expiry of the fixed period. The learned Judges considered that the period of 45 years was a period fixed not only for foreclosure but also for redemption, and accordingly the mortgagor did not acquire the right to redeem until that period had expired. The question whether under the circumstances of that case the covenant amounted to a clog on the redemption was not argued at all.

No other case of this Court has been cited before us.

It follows that so far as this Court is concerned there is authority for the view that if it is established that a certain covenant in the mortgage deed amounts to a clog on the equity of redemption, such a covenant would not be enforced. No hard and fast rule can be laid down as to when a covenant amounts to a clog on the equity of redemption. The Court has to take into account all the circumstances as they then existed and all the terms of the mortgage deed and then consider whether the covenant in dispute is so unduly hard and unconscionable as to nullify for all practical purposes the right of redemption, or the exercise of the right of redemption is restricted in such an unreasonable manner as practically to deny it. If the fetters or clogs placed on the redemption are hard and unreasonably oppressive, the intervention of the Court may be called for.

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(8) A. I. R. 1929 All. 388=116 I. C. 876.

(9) A. I. R. 1930 All. 444=124 I. C. 412.

Examining the facts of the present case we find that ample security was offered by the mortgagor for the advance. The mortgagee was put in possession of the property and was to appropriate the profits in lieu of interest. Para. 4 provided :

> "Should we, the executants, or our heirs wish to get the property redeemed and pay the principal amount in a lump sum after 59 years on Jeth Sudi Puranmashi of the 60th year, then the property shall be redeemed. Should we, the executants, or our heirs, wish to get the property redeemed within 60 or after 60 years, then the property shall not be redeemed."

The idea that the redemption was to take place just on that one day after the expiry of 60 years after which the transfer would become absolute, and that there would be no right to redeem the property before the expiry of that period or after the expiry of that period, is also contained in other clauses of the deed.

The learned advocate for the mortgagees tries to split up the covenant into three parts, the one, prohibiting redemption within the period of 60 years ; the second, allowing redemption on one particular day in the 60th year ; and the third, prohibiting redemption after that date; and argues that the last may be ignored and the first upheld. No doubt in view of the pronouncement of their Lordships of the Privy Council the last prohibition after the money has once become payable would be illegal and invalid, but this follows by operation of law. So far as the intention of the parties can be gathered from the deed, the one idea was that the redemption would be only on one day. This was one covenant restricting and limiting the right of redemption in a most unreasonable manner. The properties mortgaged consisted of several sugar-cane pressing mills and wells as well as fixed rate tenancies. In the deed Rs. 2,530 were left in the hands of the mortgagee for payment of a decree of one Matadin Sahu which was in execution, and for the payment of which part of the mortgaged property had been advertised for sale. The mortgage deed was executed on 19th January 1898. The mortgagee did not deposit the decretal amount and the property was sold by auction on 20th January 1898, and the deed was presented for registration by the mortgagor on 21st January 1898. It is a fact that the mortgagee did not pay off this part of the mortgage money and the property was sold and purchased by his son-in-law. The mortgagor did not himself put the mortgagee in possession of a part of the mortgaged property which was purchased by the mortgagee's son-in-law. Assuming in favour of the mortgagee that this purchase was not made benami in the name of his son-in-law, there can be no doubt that there was a breach of covenant on the part of both the mortgagor and the mortgagee. On the one hand the mortgagor failed to put the mortgagee in possession of the entire mortgaged property, and on the other hand the mortgagee has not parted with the money which he contracted to pay towards the decree. The Court below has thought that because the mortgage deed was not presented for registration till one day after the sale, the mortgagee could not have paid the amount. On the other hand, it may well be said that he might have paid the amount and saved the property for sale, and in case the mortgagor refused to get the deed registered he could have got compulsory registration.

The covenant quoted above is, in my opinion, one covenant by which the parties agreed that there would be redemption on only one specified day and on no other day whatsoever, and that day was to arrive after the lapse of 60 years. By the time that day arrived the parties to the deed may themselves have died and their heirs may not remember the date exactly ; it may be that on the day in question it may not be easy to discover all the heirs and representatives of the original mortgagee ; it may also be that they may not be available in the village so that the money may be paid to them ; there may also be difficulty in depositing the amount in Court to the credit of the heirs of the mortgagee when they were not to be discovered easily, and, lastly, the sugar-cane pressing mills, which were part of the mortgaged property, might become useless by wear and tear. If the mortgagor's heirs failed to deposit the amount on that particular day, it was the intention of the parties that the right to redeem would be lost for ever. It seems to me that if ever there was a case where redemption was made most difficult, if not altogether impossible, it was this case. I am also inclined to think that there was a breach of contract on the part of both the parties which would enable the Court to avoid the covenant. Having regard to all the circumstances, I agree that the present suit should not be held to be premature and that the plaintiffs should be allowed to redeem the property on condition of their depositing the entire amount which may be found due to the mortgagees.

R.M./R.K. *Appeal allowed.*

✻ ✻ A. I. R. 1931 Allahabad 386
Full Bench

BANERJI, KENDALL AND KING, JJ.

Sat Parkash and *another*—Appellants.

v.

Bahal Rai and *another*—Respondents.

Order on application in First Appeal No 101 of 1930, Decided on 16th July 1930.

✻ ✻ (a) **Civil P. C. (1908), O. 34, Rr. 4 and 5—Appeal preferred against preliminary decree—Final decree can be prepared under R. 5:** 92 *I. C.* 608=*A. I. R.* 1926 *All.* 291, *Overruled.*

In a mortgage suit, where a preliminary decree has been passed by the trial Court and an appeal has been preferred, the final decree can be prepared by the trial Court at the end of the period allowed for payment of the mortgage debt : **92 I.C. 608=A.I.R. 1926 All. 291. Overruled** 39 *All.* 641 (*F.B.*) ; *A.I.R.* 1926 *P.C.* 93 ; *A. I. R.* 1927 *P. C.* 25, *Dist.* ; *A. I. R.* 1929 *All.* 287, *Ref.* [P 386 C 1, P 388 C 2]

(b) **Civil P.C. (1908), S. 2 (2)—Preliminary decree.**

A preliminary decree is conclusive as regards the Court that passes it and is only subject to alteration by the appellate Court when an appeal is preferred against it. P 386 C 2]

(c) **Civil P. C. (1908), O. 34, R. 5—Preparation of final decree.**

The preparation of the final decree is a continuation of the proceedings after the preliminary decree. [P 387 C 2]

(d) **Civil P. C. (1908), O. 41, R. 5—Proceedings relating to passing of final decree are "proceedings under a decree."**

The proceedings relating to the passing of a final decree in a mortgage suit must be held to be included in the words "proceedings under a decree." [P 388 C 2]

Panna Lal—for Appellants.

P. L. Banerji and *K. C Mital*—for Opposite Parties.

Order.—The question that has been referred to this Bench for decision is as follows :

> "In a mortgage suit, where a preliminary decree has been passed by the trial Court and an appeal has been preferred, can a final decree be prepared by the trial Court at the end of the period allowed for payment of the mortgage debt or not."

An application under O. 41, R. 5, Civil P. C., was presented by Mr. Panna Lal in First Appeal No. 101 of 1930, praying that the preparation of the final decree in a suit, *Satparkash and another* v. *Bahal Rai and another* be stayed till the decision of the appeal. The application was opposed, and during the hearing of the application it was submitted by Mr. Panna Lal that by reason of an appeal against the original preliminary decree having been preferred the Court that passed the preliminary decree ceased to have jurisdiction to pass the final decree. It is upon that objection being raised that the present reference was made to this Bench.

Mr. Panna Lal appearing for the petitioner has urged before us that under the provisions of the Civil Procedure Code no preliminary decree for sale on foot of a mortgage can be made final when an appeal has been preferred against that preliminary decree. In making this submission he has referred us to the definition of a decree in S. 2, Civil P. C. S. 2 defines a "decree" as follows :

> "Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

In the explanation to the section it is stated that :

> "a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of."

Mr. Panna Lal urges that the preliminary decree in a suit for sale necessarily becomes inconclusive when an appeal is filed against that decree. It is difficult to accept that contention because the definition of decree contains the words : "so far as regards the Court expressing it." The preliminary decree is conclusive as regards the Court that passed it and is only subject to alteration by the appellate Court when an appeal is preferred against it.

The learned advocate, in support of his contention, that the jurisdiction of the Court which passed the preliminary decree ceases, has referred us to the case of *Lalman* v. *Shiam Singh* (1). His contention is that it was held by a Full Bench of this Court in the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (2) that one and only one final decree can be passed in a suit for sale on a mortgage. He states that in the cases of *Jowad Hussain* v. *Gendan Singh* (3) and *Fitzholmes* v. *Bank of Upper India Ltd.* (4) the view taken by the Full Bench has been approved of by their Lordships of the Privy Council.

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(1) A.I.R. 1926 All. 291=92 I.C. 608.

(2) [1917] 39 All. 641=42 I.C. 93 (F.B.).

The learned advocate for the respondent relies on the case of *Khairunnissa Bibi* v. *Oudh Commercial Bank Ltd.* (5). Before we decide the point raised by Mr. Panna Lal it is necessary to refer to the provisions of O. 34, Civil P. C., as it now stands after amendment by Act No. 21 of 1929.

Rule 4, sub-R. (1), is as follows :

> "In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in Cls. (a), (b), (c), (i), sub-R. (1), R. 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same."

Sub-R. (2) is as follows :

> "The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-R. (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest."

Sub R. 5 (3) is as follows :

> "Where payment in accordance with sub-R. (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-R. (1), R. 4."

In the absence of any ruling it is clear to us that the Court which passed the preliminary decree was bound by these rules to proceed to pass a final decree under the provisions of R. 5, sub-R. (3). We have to examine therefore whether in view of the rulings referred to us we should hold that the Court that passed the preliminary decree was precluded by reason of an appeal from passing the final decree. Whatever may have been the view before the amendment of O. 34 by Act 21 of 1929, it is clear that under sub-R. (2), R. 4, the Court that passed the preliminary decree could on good cause being shown postpone the date fixed by the Court from time to time, before the plaintiff could be entitled to ask for a final decree under sub-R. (3), R. 5. The provision of sub-R. (2), R. 4, appears to us to have taken into consideration any practical difficulty that may arise in passing the final decree and enables the Court that passed the preliminary decree to extend the time for payment. Had it been the intention of the legislature to take away the jurisdiction of the Court which passed the preliminary decree we have no doubt that it would have provided that no final decree should be passed if an appeal against the preliminary decree has been filed. There can be no question that the suit does not come to an end when the Court passes a preliminary decree, and the passing of the final decree is a further proceeding in that very suit : see the case of *Anmol Singh* v. *Hari Sankar Lal* (6).

We have now to examine the rulings referred to by Mr. Panna Lal. It has been contended by Mr. Panna Lal that in the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (2) it has been laid down that there can be only one final decree in a suit for sale on a mortgage. The facts of that case are that on 16th May 1911, the plaintiff obtained a preliminary decree for sale; six months' time was allowed to the judgment-debtor to pay up the decretal amount. That decree was appealed against and on the appeal being dismissed a second appeal was filed in this Court, which was also dismissed. It was after the dismissal of the second appeal that the plaintiff Gajadhar Singh applied for a final decree to be passed in his favour. The defendant raised the plea that the plaintiff's application was barred by limitation as having been filed beyond time, i. e., more than three years from the date when the time for payment fixed by the Court of first instance had expired. It is clear to us that the point which was before the Full Bench was whether the application by Gajadhar Singh was barred by time on the date when it was made and further whether on that date Gajadhar Singh could have applied for a final decree on the preliminary decree passed by the Court of first instance, or whether Gajadhar Singh had to apply for a final decree on the decree passed by the High Court in appeal. Their Lordships held that where the High Court has decided an appeal against a preliminary decree for sale it is the decree of the High Court which must be deemed to be the preliminary decree that may be made final under O. 34, R. 5, Civil P. C. There was no question before this Court about any final decree being passed in pursuance of the preliminary decree for sale which had been passed by the Court of first instance, and we are of opinion that the expression :

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(3) A.I.R. 1926 P.C. 93=98 I.C. 499=53 I.A. 197=6 Pat. 24 (P.C.).

(4) A.I.R. 1927 P.C. 25=100 I.C. 22=54 I.C. 52=8 Lah. 253 (P.C.).

(5) A.I.R. 1929 All. 287=119 I.C. 510=51 All. 640.

(6) A.I.R. 1930 All. 779=126 I.C. 20=52 All. 910.

> "It is impossible to hold that there can be more final decrees than one in a suit for sale upon a mortgage."

must mean that on the date when Gajadhar Singh presented his application praying for the final decree to be passed there could not be more than one final decree, and as the preliminary decree of the trial Court was superseded by the decree passed in appeal, the trial Court could not possibly have made final the original preliminary decree which had ceased to exist.

The case referred to above was quoted with approval by their Lordships of the Privy Council in the case of *Jowad Hussain* v. *Gendan Singh* (3). In that case also the application for the final decree was presented to the Court after the preliminary decree had ceased to exist by reason of an appellate preliminary decree superseding it. The question before their Lordships was whether on the date when the plaintiff applied for the preliminary decree to be made final the plaintiff's right to apply for a final decree had ceased by reason of the application being barred by time. There was no final decree passed by the Court of first instance in that case, nor could the Court of first instance pass a final decree when its preliminary decree had been superseded by the preliminary decree passed by the High Court.

In the case of *Fitzholmes* v. *Bank of Upper India Ltd.* (4), which follows the case of *Jowad Hussain* v. *Gendan Singh* (3) the point is made further clear, as we find that in that case further time was granted by the appellate Court when it confirmed the preliminary decree passed by the Court of first instance. The plaintiff applied for the preliminary decree passed by the Court to be made final, and as six months had not expired since the decree of the High Court, the defendant urged that no final decree could be prepared and the High Court accepted that contention. Their Lordships of the Privy Council held that if the preliminary mortgage decree passed by the first Court is superseded by the preliminary mortgage decree passed by the appellate Court, it is the decree of the appellate Court that can be made final.

We have already stated that the preparation of the final decree was a continuation of the proceedings after the preliminary decree. A reference to O. 41, R. 5, of the Code makes it clear that an appeal does not operate as a stay of proceedings under a decree or order appealed from. The proceedings relating to the passing of a final decree in a mortgage suit must be held to be included in the words "proceedings under a decree". If the legislature intended to oust the jurisdiction of the trial Court as soon as an appeal was filed against the preliminary decree, it would not have been necessary to provide for "stay of proceedings" by R. 5, O. 41, which specifically lays down that, merely by reason of an appeal, further proceedings are not to be stayed. Hence we cannot accept the contention of Mr. Panna Lal that the trial Court ceases to have jurisdiction to proceed with the case simply on the ground that an appeal had been filed.

The correctness of the decision in *Lalman* v. *Shiam Singh* (1) has already been doubted by a Bench of this Court in *Khairunnissa Bibi* v. *Oudh Commercial Bank Ltd.* (5) and in our opinion the former decision should not be accepted as a correct statement of the law.

We think that our view is confirmed by the recent amendment of the Civil Procedure Code by Act 21 of 1929, by which a provision has been inserted in R. 4, O. 34, Civil P. C., to the effect that the Court in passing a preliminary decree shall :

> "further direct that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree . . "

and by which the Court, i. e., the trial Court has been empowered under sub-

R. (2), R. 4, to extend the time fixed for the payment of the amount on good cause shown. The answer of the question is therefore in the affirmative.

V.B./R.K. *Answered affirmatively.*

✲ A. I. R. 1931 Allahabad 389

Full Bench

SULAIMAN, AG. C. J. AND MUKERJI AND BOYS, JJ.

Ram Saran Das—Defendant—Appellant.

v.

Yudhishtar Prasad and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 11 of 1929, Decided on 8th April 1931, from decision of Sub-Judge, Aligarh, D/- 18th September 1928.

✲ **(a) Civil P. C. (1908), O. 32, R. 16—Assignment of security bond need not be by registered deed of sale.**

Where a Court obtained a security bond which hypothecated immovable property to secure a proper disposal of money due to minors, deposited with it, an assignment of the security bond in favour of the minors on their attaining majority in order to enable them to realize the money from the surety is not required to be by way of a regularly stamped and registered deed of sale, but can be made by an order passed by the Court: 5 *All.* 248; 12 *C. W. N.* 481; *All. S. A. No.* 1642 *of* 1927 *decided on 3rd April* 1930, *Dist.*; *A. I. R.* 1919 *P. C.* 55, *Ref.* [P 389 C 1 P 391 C 1]

(b) Civil P. C. (1908), O. 32, R. 16—Assignment can be to nazir, or pleader.

Per *Mukerji, J.*—There is nothing to debar a Judge from acting similarly as under S. 35, Guardians and Wards Act, and assigning the bond to his nazir or to a pleader of the Court (to be remunerated out of the proceeds of the suit), to sue on behalf of the Court and to realize the money. [P 391 C 2]

(c) Civil P. C. (1908), O. 32, R. 16—"Assignment."

Per *Mukerji, J.*—The "assignment" is merely an authorization on the part of the Court to such person as it deems fit to collect the money by way of suit. [P 392 C 1]

Iqbal Ahmad and *Panna Lal*—for Appellant.

P. L. Banerji, K. N. Katju and *Gopi Nath Kunzru, H. P. Sen, Baij Nath Sahai, Hari* and *Pal Vershnand Mahesh Chandra*—for Respondents.

Sulaiman, Ag. C. J.—The question referred to the Full Bench is:

> "Where a Court obtained a security bond which hypothecated immovable property to secure a proper disposal of money due to minors, deposited with it, whether an assignment of the security bond in favour of the minors on their attaining majority in order to enable them to realize the money from the surety must be made by way of a regularly stamped and registered deed of sale or may be made by an order passed by the Court."

It appears that Rs. 30,000 odd had been deposited to the credit of certain minor plaintiffs in the execution proceedings. Their mother, Mt. Saraswati, who was their guardian ad litem in the suit, applied to the Court for permission to take out the amount. Security was demanded from her under O. 32, R. 16, Civil P. C., and on her behalf one Hakim Jiwan Lal executed a registered security bond dated 13th November 1922, under which he made himself liable for the whole amount and agreed that the Court would be at liberty to realize the said sum from the property hypothecated by him under the document.

After the attainment of majority the plaintiffs applied to the Court for permission to bring a suit against the surety because the amount had been taken out by their guardian and paid to the surety himself, who had executed a separate agreement to refund the amount. As the surety had subsequently transferred a part of the hypothecated property it was not considered sufficient to proceed against him personally under S. 145, Civil P. C., but it became necessary to enforce the charge by a regular suit. The Court granted permission to the applicants, stating that with the consent of the surety permission was granted to the applicants as prayed. A condition was however laid down that in order to give time to the surety to pay up, the suit should not be instituted before the expiry of six months, when the suit was instituted by the plaintiffs against the surety and his son, an objection was raised that the suit was not maintainable inasmuch as the bond in question had not been formally assigned to the plaintiffs. It is this question of law which has been referred to us for an answer.

There is no doubt that in the case of *Amar Nath* v. *Thakur Das* (1), which has been followed in the unreported case of *Sheo Baran Singh* v. *Munshi Singh* (2), it was held that the right to sue for the enforcement of a contract entered into in a security bond could only be enforced after the bond had been properly assigned. That was a case in which a security bond had been taken from a guardian under the Guardians and Wards Act of 1858 (Act 40 of 1858) in which there was no provision corresponding to S. 35, Guardians and Wards Act 1890, for the assignment of such a security bond. The Bench in Amarnath's case did not lay down exactly how the assignment was to be made by the Court. It was not said in express terms that without a registered document executed by the Court no right of suit would accrue to the assignee.

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(1) [1883] 5 All. 248.

(2) Second Appeal No. 1642 of 1927, decided on 3rd April 1930.

There is also a short passage at the end of the judgment in *Sarat Chandra Roy Chowdhury* v. *Rajani Mohan Roy* (3) to the effect that the law does not require that there should be a written assignment by the District Judge. No reasons apart from a reference to S. 35 of the Act 8 of 1890 were given.

A security bond hypothecating immovable property may very well come within the definition of a mortgage as given in S. 58, T. P. Act. But S. 2 (d) of that Act provides that nothing in the Act would affect any transfer by operation of law, or by, or in execution of, a decree or order of a Court of competent jurisdiction. Even if the assignment of the bond were to amount to a transfer which would ordinarilly have to be effected by a registered document, there would be no such necessity if the transfer takes place by, or in execution of, a decree or order of a Court.

The mere fact that the money deposited to the credit of the minors was allowed to be taken out by their guardian on furnishing security, would not necessarily involve a liability on the Court to refund the amount in case it was lost. It is therefore very difficult to hold that the assignment of the security bond by the Court to the beneficiaries would amount to a sale, as defined in S.54, T.P.Act. The Court does not transfer it in consideration for any price paid or promised. Indeed the Court receives no consideration for it at all and if there was no initial liability on the Court to refund the amount no such liability can be said to have been discharged by the assignment. Nor can it be treated as a pure gift or a deed of exchange. It follows that there is no provision of law which requires that such assignment should be either in writing or by a registered instrument. S. 9, T. P. Act lays down that a transfer of property may be made without writing in every case in which a writing is not expressly required by law.

It follows that an assignment of a security bond of this kind made by the Court to the person entitled would not be such a transfer as can be effected only by means of a written and registered instrument. In *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (4), there was an order for sale without even a formal suit. The assignment is in reality by order of the Court and the provisions of the Transfer of Property Act do not apply to it.

It is doubtful whether when the Court instead of itself proceeding to enforce the security, assigns it to another so as to authorize him to sue upon it, there is necessarily a transfer of an interest in immovable property within the meaning of S. 17, Registration Act. But assuming that it is, that section would not be applicable to it because the assignment is really by an order of the Court, and the order is exempted from registration under S. 17 (2), (vi).

Provisions for the assignment of security bonds of this kind are to be found not only in S. 35, Guardians and Wards Act, but also in S. 292, Succession Act, and Ss. 78 and 79, old Probate and Administration Act. The legislature obviously contemplated that a security bond may be in favour of the presiding officer of the Court itself and may be assigned by him to any person whom he considers to be a fit person or entitled to sue upon it. We also find that various forms of security bonds are given in the appendices E, F, G, and H attached to the Civil Procedure Code, and many of them are in favour of the presiding Judge himself. It is therefore difficult to believe that the legislature intended that there should in every case have to be a registered deed of transfer executed by the presiding officer and duly registered.

Orders passed for assignment of security bonds are as a rule passed on applications made to the Court after the Court has considered all the circumstances and made up its mind as to the conditions which it would impose in the interest of the beneficiaries. Such an order cannot be treated merely as an administrative act, but is a part of a judicial proceeding.

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(3) [1908] 12 C. W. N. 481.

(4) A. I. R. 1919 P. C. 55 = 55 I. C. 550 = 42 All. 158=22 O. C. 212=46 I. A. 228 (P.C.).

I am therefore of opinion that an assignment of security bonds standing in the name of the Court can be made by a mere order without any registered deed of transfer.

Mukerji, J.—The question referred to the Full Bench is as follows:

> "Where a Court obtained a security bond which hypothecated immovable property to secure a proper disposal of money due to minors, deposited with it, whether an assignment of the security bond in favour of the minors, on their attaining majority in order to enable them to realize the money from the surety, must be made by way of a regularly stamped and registered deed of sale or may be made by an order passed by the Court."

The facts, briefly, are these. To the credit of two minors a sum of Rs. 13,000 odd was deposited in the Court of the Subordinate Judge of Aligarh in Suit No. 183 of 1904. Their mother, Mt. Saraswati, was anxious to realize the money from the Court and on her application to the Court for payment of the money to her as the guardian of the minors the Court directed her to furnish security. One Hakim Jiwan Lal appeared and furnished the security bond which has been made the subject-matter of the suit of which this appeal has arisen. Hakim Jiwan Lal gave a regularly executed and registered mortgage bond in favour of the Court by which he undertook that:

> "the Court shall be at liberty to realize the said sum from the property hypothecated. . . . ."

The two minors who were parties to the suit of 1904 attained majority and then they applied to the learned Subordinate Judge in whose Court the money had been deposited, asking that the money might be realized and handed over to them or in the alternative, they might be permitted to sue the surety to recover the money. It appears that the mother, having realized the money, lent it to Hakim Jiwan Lal himself. Jiwan Lal paid only a part of the interest and not the balance of interest and the principal amount. To the suit of the plaintiffs, a son of Hakim Jiwan Lal was made party and he raised the objection in appeal that there should have been a regular deed of assignment executed and registered by the Court, namely the Subordinate Judge of Aligarh before the suit could be maintained. The question is whether this was really necessary or whether the order of the Court printed at p. 57 which runs as follows, namely:

> "with the consent of the surety permission is granted to the applicant as prayed"

was enough?

We have to consider what should the nature of the document which, according to the defendant-appellant, should have been executed by the learned Subordinate Judge. The Subordinate Judge held money belonging to the minors. He was not sure that the mother would properly invest the money and therefore he required security to be furnished. Strictly speaking, it would be the duty of the Court to realize the money from the person who stood surety and to hand over the money to the plaintiffs, because ordinarily, the plaintiffs should not be put to the trouble of bringing a suit to recover the money which was their own and which was in the custody of a Court. The Subordinate Judge, in order to realize the money, could either bring a suit of his own, on the mortgaged bond, or he could direct any of his officers, say the munsarim or the nazir, to bring a suit, on his behalf, and to realize the money. The money so realized would of course be handed over to the plaintiffs. In the present case the money was deposited in course of the suit and a security bond was taken, it appears under the provisions of O. 32, R. 6, Civil P. C. of 1882. In that case, there is no clear provision as to how the security is to be realized. In the case of a security being taken under S. 35, Guardians and Wards Act of 1890 or of security being taken under S. 292, Succession Act of 1925, there is a provision to the effect that the Court may assign the security to some person who shall be entitled to sue on the said bond. There is nothing to debar the Subordinate Judge of Aligarh from acting similarly and assigning the bond to his nazir or to a pleader of the Court (to be remunerated out of the proceeds of the suit), to sue on behalf of the Court and to realize the money.

Now, if this be possible, the question is: what would be the nature of the transaction by which the Court would authorize the nazir or the pleader of the Court to realize the money? Can it be held that the transaction would be one of sale or gift, within the meaning of the words used in the Transfer of Property Act? Surely, the answer would be in the negative. The "assignment" therefore would be merely an authorization on the part of the Court to such person, as it deems fit, to collect the money, by way of suit.

If this be the right interpretation of the word "assignment" which, I take it, really means transfer, then it cannot be said that, under the Transfer of Property Act the document by which the assignment is created must be a registered deed.

Further, the question arises whether there need be any document at all. I do not suggest that the assignment may be made orally, what I mean is, whether there need be any document purporting to be a deed of assignment, apart from a mere order of the Court, authorizing a particular person to institute a suit. In my opinion the order of the Court alone would do and no deed is called for. If the authorization (assignment) may be made by an order of the Court, it would not be required to be registered under the registration law and would, besides, be not affected by the provisions of the Transfer of Property Act itself, under S. 2, Cl. (d), T. P. Act, the provisions of the Act are not to affect any transfer made by an order of a Court of competent jurisdiction. For these reasons I agree with the learned Chief Justice in answering the question in the way he proposes to answer it.

V.B./R.K. *Question answered.*

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Full Bench

SULAIMAN, Ag. C. J. AND MUKERJI AND BOYS, JJ.

In the matter of *Mahant Raj Balamgir* Misc. Case No. 708 of 1930, Decided on 8th April 1931, on reference by Junior Secretary, Board of Revenue, U. P., on 28th November 1930.

(a) Stamp Act (1899), Sch. 1, Art. 5—Agreement evidencing transaction of sale—Deed —Construction.

A person agreed to purchase standing timber in certain jungle for a certain consideration and executed a document which he called kabuliyat (counterpart of lease) under which he promised to pay the price in a lump sum on a certain date and in case of default he agreed that the owner of the timber would have the right to realize the amount from him. He further promised to have the wood of the said jungle cut and removed within a year.

Held : that the transaction was one of sale of goods or merchandise and the deed was an agreement or memorandum of agreement evidencing such sale, and was exempt from stamp duty under Sch. 1, Art. 5, and the mere fact that beyond the stipulation for a sale of goods there was however an agreement that in a case rival proprietor raised any objection to the cutting of timber and removal of the same the vendor was to have the responsibility did not in any way detract from the character of the agreement. [P 393 C 1]

(b) General Clauses Act (1897), S. 3(25)—"Standing timber."

Standing timber which has to be cut down and removed is moveable property. [P 393 C 1]

Sankar Saran—for the Crown.

Sulaiman, Ag. C. J.—This is a reference under S. 57, Stamp Act. One Mahant Raj Balamgir agreed to purchase standing timber in a certain jungle in the District of Basti for Rs. 36,000 and executed a document which he called a kabuliyat (counterpart of a lease) under which he promised to pay the price in a lump sum on a certain date and in case of default he agreed that the owner of the timber would have the right to realize the amount from him. He further promised to have the wood of the said jungle cut and removed within a year. He affixed a stamp of one anna on this document.

The question arose whether the document was a lease of immovable property or whether it was an agreement. Members of the Board of Revenue were inclined to the view that standing timber should be considered as moveable property and the document in question was a mere agreement chargeable under Art. 5 (c), Sch. 1, Stamp Act, and was not a lease within the meaning of S. 2 (16) of the said Act. They have referred the question to the High Court because of some difference of opinion which has prevailed in the Board. The object of the transaction was obviously to enable the purchaser of the timber to cut down the trees and remove them from the jungle and not to maintain in them as forest or to enjoy the benefit of the standing trees. Had the idea been that the purchaser would have a right to maintain the trees on the land for a sufficiently long period in order to derive benefit from the growth of those trees the case might have been different. But here the primary object was the cutting down of the timber and its removal from the forest.

Section 3, T. P. Act, expressly provides that "immovable property" does not include standing timber, growing crops or grass.

It has been contended before us by the Government Advocate that standing timber is immovable property within the meaning of S. 3 (25), General Clauses Act (Act 10 of 1897), which in that Act includes things attached to the earth, or permanently fastend to anything attached to the earth. But here there was no idea of conferring a right on the purchaser to retain possession of timber which would remain attached or fastened to the earth. It is therefore quite clear that the standing timber, which had to be cut down and removed, was moveable property and not immovable property. The agreement in question therefore cannot be the counterpart of a lease of immovable property within the meaning of S. 2 (16), Stamp Act.

The agreement signed by the executant was attested by witnesses and contained a promise to pay Rs. 26,000 within a certain time. An "agreement" is a wider expression than a "bond." S. 2 (5) defines what a bond includes. The definition is not exhaustive. If a document comes within the definition of a bond, the general Art. 5, relating to agreement not otherwise provided for would not be applicable. But even assuming that the promise by which the executant obliged himself to pay money to the owner of the timber would come within the definition of bond it is clear that it amounted to an agreement or memorandum of agreement for or relating to the sale of goods or merchandise, referred to under the head " exemptions" in Art. 5, Sch. 1. The primary object of the deed was to evidence the transaction of the sale of goods and the agreement or memorandum of agreement undoubtedly related to such sale. The mere fact that provision was made for the payment of price or the removal of the goods within a certain time would not make it an agreement or memorandum of agreement other than one relating to sale of goods or merchandise within the mean- of the "Exemptions." I am therefore of opinion that this deed was exempt from stamp duty so far as it related to the transaction of the sale of moveable property.

But the agreement also contained a stipulation that :

> "if Raja Sahib of Bansi raises any objection in cutting the jungle or removing the wood or gives any other sort of trouble, the responsibility of that would lie on the abovenamed Babu Sahib.

This was an additional undertaking which was not necessarily a condition of the sale transaction of goods. These terms amounted to an agreement which would not be covered by the " Exemptions" and they would be an agreement not otherwise provided for, for which a duty was payable under Art. 5.

Mukerji, J.—This is a reference by the Board of Revenue under S. 57, Stamp Act. The question is what would be the proper stamp duty to be paid for the document of 20th March 1925, a copy of which has been furnished to us.

By this document a certain person, Balamgir, purchased the standing timber in a certain area for a sum of Rs. 26,000. The terms of the purchase were that Balamgir would remove the timber in the course of one year and would pay the price in a lump sum on a particular date In my opinion the transaction was one of sale of goods or merchandise, and was therefore exempted from the stamp duty under Sch. 1, Art. 5, Stamp Act of 1899.

Beyond the stipulation as to the sale of goods there was however an agreement that in case a rival proprietor Raja Sahib of Bansi, raised any objection to the cutting of the timber and removal of the same, the vendor was to have the responsibility. This was a matter which was independent of the transaction of sale of goods or merchandise and therefore brought the transaction within the purview of "an agreement."

My opinion therefore is that the document would be sufficiently stamped if it be stamped under Art. 5, Sch. 1, Stamp Act, as "an agreement not otherwise provided for."

Boys, J.—I agree with the order proposed.

V.B./R.K. *Question answered.*

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MUKERJI AND BENNET, JJ.

Khushal Singh and *others*—Petitioners—Appellants.

v.

Secy. of State—Opposite Party—Respondent.

First Appeal No. 430 of 1927, Decided on 23rd February 1931, against decision of Dist. Judge, Meerut, D/- 30th March 1927.

(a) **Land Acquisition Act (1 of 1894), S. 25—Land acquired by Government under Act—Zamindar cannot claim compensation for kankar.**

When Government made settlements in the Province of Agra both permanent and temporary as settlements of rights in the soil only, stone quarries were treated as a monopoly of Government and no rights of zamindars were recognized in stone quarries; and hence a zamindar whose land is acquired by Government under the Land Acquisition Act cannot claim compensation for kankar, which comes under the definition of mineral and which is essentially the property of Government : 39 *Cal.* 696 (*P.C.*); *A. I. R.* 1924 *Pat.* 776; 38 *Bom.* 37; 15 *Bom.* 279; *A. I. R.* 1921 *Cal.* 193; *A. I. R.* 1925 *P. C.* 91; *A.I.R.* 1921 *Mad.* 324; 16 *Mad.* 369; *A.I.R.* 1929 *P. C.* 112, *Dist.* [P 398 C 1]

(b) **Land Acquisition Act (1 of 1894), S. 28—Court has discretion to decree interest if compensation awarded is more than that of Collector.**

Under S. 28, it is within the discretion of a Court to decree interest where a larger amount of compensation has been given than was awarded by the Collector. [P 398 C 1, 2]

K. Verma and *H. C. Mukerji*—for Appellants.

U. S. Bajpai—for Respondent.

Bennet, J.—By this appeal Khushal Singh and others are claiming a large sum of money as compensation over and above what has been allowed to them by the learned District Judge.

It appears that an area of 7 bighas 15 biswas, which is equivalent to 4·84 acres of land belonging to the appellants, was acquired by the Government. Out of this area 4 bighas 13 biswas were under cultivation, being the *sir* land of the appellants. The remaining area of 3 bighas 2 biswas were fallow or banjar land. In this appeal we are concerned, among other matters, with the amount of compensation to be awarded for the area under cultivation. The appellants are satisfied with the amount they have got from the learned District Judge as compensation for the fallow land.

The District Judge has allowed to the appellants Rs. 600 per bigha compensation for the land under cultivation. The appellants want Rs. 1,000 a bigha.

We have been taken through five exemplars cited on behalf of the appellants. They are five sale deeds, one dated 8th July 1922, three are dated 5th September 1924 and the fifth one is dated 28th August 1925. It appears that one Risal Singh made the first and the fifth purchase and the purchasers by the three sale deeds of the same date, namely 5th September 1924, sold what they had purchased to Risal Singh on 22nd August 1925. The result is that virtually there are only four exemplars and not five. These exemplars all come from the village of Sultanpur, and according to the appellants' own witness the lands of the examplars are situated at a distance of not less than three-fourths of a mile from the land of the appellants. The appellants have not cited a single exemplar from their own village. It was not stated, and it could not be stated, that there have been no sales in the village Khurrampur itself. The kanungo who was cited as a witness on behalf of the Crown, prepared an extract from the register of proprietors, and this document shows that there had been no less than ten transfers of the proprietary rights between 1921 and 1925. We have not looked into the figures of the kanungo, because we consider that the extract filed by him cannot be treated as relevant evidence, but none the less the fact remains that there have been transfers in the village of Khurrampur.

It was for the appellants to establish to our satisfaction that they are entitled to a larger compensation than they have received. We are of opinion that they have entirely failed to do so. We may point out that one of the appellants in his statement, recorded at p. 3 of the paper book, stated that he let out 2-1/2 bighas of land for Rs. 54. This would mean that he got only Rs. 20 per bigha for his land from a sub-tenant. The compensation of Rs. 600 per bigha means 30 years purchase. We cannot say that this is by any means too small. Accordingly we do not see any reason to interfere with this portion of the learned District Judge's judgment.

The next question which was argued before us on appeal was in regard to issue 1 of the lower Court. That issue was whether the appellants are not entitled to the price of the kankar. It was argued before us that the kankar belonged to the appellants as zamindars and that the value of the kankar extracted should be paid by Government to the appellants. The appellants claimed a sum of Rs. 23,250 as compensation for the kankar in ground 3 of their petition of reference to the District Judge. The question is of considerable importance in these provinces because kankar is extracted every year for the construction and maintenance of roads in practically all districts of the province.

Now the first point to be mentioned in this regard is that a form of agreement was entered into by these zamindars at settlement and a translation of this form is printed at p. 27 of the paper book. This form states:

> "We admit that only the Government have all rights and interests in respect of the mines."

Some discussion was made in regard to the exact vernacular words used in the form signed by zamindars in this particular village of Khurrampur. The Urdu form used the word "madaniat" and this form was signed by the zamindars and the Hindi form used the word "dhathu." There seems no doubt that these words conveyed the idea of minerals and the form is actually taken from the Board Circulars. The Board Circular 1-1, R. 45 of the edition of 1918 states as follows:

> "An agreement shall be taken from the persons with whom the settlement is made in the following form: We the lambardars proprietors of mohalla . . . . pargana . . . . agree to pay the following revenue on condition of Government sanction from . . . . to . . . . and thereafter till the next settlement is made. We admit that the State has reserved to itself all rights in minerals."

The printed form on p. 27 is therefore the translation from the vernacular rendering of this statement:

> "We admit that the State has reserved to itself all rights in minerals."

Some argument is made as to whether the word "minerals" would cover kankar. In the Board Circular 1-1, para. 27 it is stated:

> "The Settlement Officer may take into consideration the average receipts (sayar or sawai) derived from natural products such as fruit or fish (but excluding stone and kankar quarries and fruits of groves and timber of trees), and add them to the rental of cultivated area."

This reference clearly shows that kankar and stone are to be excluded from the calculation of the Settlement Officer in ascertaining the assets of the village and therefore we consider that the reference to minerals in the agreement entered into under R. 45 includes kankar.

We may also note that at p. 23, para. 12 of the Wajibularz of Mouza Khurrampur shows that the only sawai in this village was from water-nuts. It is therefore clear that in this particular village kankar was not treated as producing any income and was not entered in the assets of the village at settlement. As regards the question of what is meant by mineral we have consulted a standard work on the World's Minerals by Leonard, J. Spencer, published by Messrs. Chambers in1911 and it states that

> "the mineral kingdom includes all inorganic bodies that have not been produced by the agency of life."

Kankar is concretionary limestone and at p. 108 of this book it is stated that rocks of the limestone class consist entirely, or almost entirely of the mineral calcite class. Calcite is a mineral and therefore there is no doubt that kankar will come under the definition of mineral. Now this question should be regarded in our opinion from the historical point of view in the Province of Agra and it is necessary to see how Government has dealt with the mineral rights in these provinces.

The question arises how far the attitude of Government shown in the Circulars of the Board of Revenue of 1904 and 1927 in regard to minerals including kankar has been asserted in the past. Baden-Powell in Land System of British India, 1892, Vol. 1, p. 234 under the heading of how far claims of previous Governments had been adopted by the British Government says:

> "I think, on the whole, what was meant by the various declarations in the regulations and elsewhere was this that the Government claimed to succeed to the de facto position of the preceding ruler, only so far as to use the position (not to its full logical extent but) as a locus standi for re-distributing, conferring and recognizing rights on a new basis. And the outcome of the action taken by the Government was this that it at once recognized certain rights in private individuals and only retained such rights for itself as were necessary. The power to make this distribution was no doubt based on the de facto power of the Government to dispose of all land. I may exhibit the main feature of the disposition of landed rights made by Government under five heads:
>
> . . . (3) It retained useful subsidiary rights-such as minerals, or the right to water in lakes

> and streams. In some cases it has granted these away, but all later laws reserve such rights."

In Vol. 11, p. 3 and 4 Baden-Powell classifies the origin of the districts of the present province of Agra as follows.

(1) The old "Benares province" permanently settled by an extension of the Bengal Permanent Settlement Regulations.

(2) The Ceded Districts, ceded by the Nawab of Oudh in 1801.

(3) The conquered districts obtained by the victories of Lord Lake in 1803. These include the district of Meerut where the land in suit is situated.

(4) Dehra Dun ceded in 1815, and Garhwal and Kumaon.

(5) Bundelkhand Districts acquired between 1803 and 1840.

The Permanent Settlement of Bengal was effected by Regn. 1 of 1793 which stated in S. 4:

> "the zamindars independent Talukdars, and other actual proprietors of land, and their heirs and lawful successors, will be allowed to hold their estates at such assessment for ever."

In *Durga Prasad Singh* v. *Broja Nath Bose* (1), their Lordships of the Privy Council stated at p. 472:

> "Apparently the Government does not claim the minerals under permanently settled estates. However that may be the Government has never claimed the minerals under the two mouzas or either of them, or put forward any claim inconsistent with the rights now asserted by the zamindars. The rights of the Government, whatever they are, will not be prejudiced or affected by the result of suit to which it is not a party."

In *Debi Singh* v. *E. F. Christian* (2) the Patna High Court held that a tenure holder called a Tekait with whom the permanent settlement had been made in F. 1197 and who was entered in the record of revenue-paying estates could claim the right to the minerals as against trespassers, even though:

> "it may well be that the Government did not give any right to the minerals to the Tekait." (p. 432, Col. 2.)"

Now as already quoted Board of Revenue Circular 1 of edition of 1918 para. 27, following previous circulars states:

> "The settlement officer may take into consideration the average receipts (sayar or sawai) derived from natural products, such as fruit or fish (but excluding stone and kankar quarries and the fruit of groves of timber trees) and add them to the rental of the cultivated area."

The treatment of this question of Sayar in early regulations is of importance. It was similar in the ceded and conquered districts, and there was a proclamation embodied in Regn. 9 of 1805 which stated in S. 111:

> "At the commencement of the year 1213, Fasli the sayar of every denomination will be separated from the *mal*, or land revenue and a settlement will be concluded for the land revenue only, in all practicable cases with the zamindars of other actual proprietors of the soil . . . for a period of three years, viz. for the years 1213, 1214, and 1215, F . . . The kabuliyats executed by zamindars and other actual proprietors of land, or farmers of land, shall contain a clause restricting them from collecting sayar duties or any duties whatever in their respective estates or farms."

Section 4 of this Regn. 9 of 1805 provided for a further settlement for Fs. 1216, 1217, 1218 calculated on "the actual yearly produce of the land."

Section 5 provided for a further settlement for Fs. 1219, 1220, 1221 and 1222. S. 7 provided for a permanent settlement from Fs. 1322:

> "for such lands as may be in a sufficiently improved state of cultivation to warrant the measure."

Section 8 provided that zamindars not agreeing to the present settlement should receive an allowance not exceeding 10 per cent of the jama of the estate as nankar.

Regulation 10 of 1812 states in S. 1 that the Court of Directors had not confirmed the proposal to make a permanent settlement. S. 2 rescinded part of Regn. 10 of 1807. Regn. 9 of 1818 and 9 of 1824 provided for settlements for five years. Act 8 of 1846 fixed the duration of the settlement for Meerut District up to 1st July 1865. With the exception of the Benares division therefore the whole province of the N. W. P. now Agra, became subject to temporary settlements.

The principles on which these temporary settlements were made was first laid down in Regn. 7 of 1822, where S. 6, first part, provided for revision of the settlement by

> "ascertaining and determining the extent and produce of the lands, and the amount of jama properly demandable therefrom.

Section 9, first part, prescribed that the revenue officers should form

> "as full as practicable a specification of all persons enjoying the possession and property of the soil."

Regulation 9 of 1833, S. 2, rescinded so much of Regn. 7 of 1822 as prescribed that the jama was to be calculated on the quantity and value of produce. Settlements were from 1833 prepared on the basis of the Record-of-rights and Records of Assets (Moreland, Revenue Administration of the United Provinces 1911 p. 34.)

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(1) [1912] 39 Cal. 696=39 I. A. 133=15 I. C. 219 (P. C.).

(2) A. I. R. 1924 Pat. 776=84 I. C. 429.

These regulations show that the settlement jama was based on the agricultural value of the land, and not on the value of any minerals which might be in the land.

Similarly Regn. 11 of 1795, S. 3, recites method of 1788 for the valuation of crops in the Benares Province before the settlement was made permanent. This shows that the revenue was based on the agricultural value of the land and not on other assets.

Now in the Province of Agra there are no coal mines or other minerals of considerable commercial value comparable to the coal mines of Bengal and Bihar. There is kankar in all districts, and in some districts, chiefly Mirzapur, there are sand stone quarries. Although Mirzapur is in the permanently settled division of Benares, the zamindars have no rights in the stone quarries. This is a great distinction from the zamindars under the permanent settlement in Bengal, where numerous cases show that the zamindars have asserted right to mines, although, as in *Durga Prasad Singh* v. *Broj Nath Bose* (1), the Courts have been careful to point out that no decision has been made as to whether the zamindars or Government possess the mining rights. In the province of Agra the question of stone quarries was settled by Regn. 11 of 1800 which stated in S. 1 :

> " The stone quarries at Chunar, Ghazipur and Mirzapur in the province of Benares have been hitherto worked for the exclusive use of Government, and either let in farm . . . . or managed by an agent. "

The regulation proceeded to lay down that the public might quarry stone subject to payment of certain duties to the Collector. This system still prevails, and the payments are credited to the " stone mahal." The " hill people " are allowed to quarry stone for their own use without payment of duty (S. 15). But the regulation shows that zamindars did not have any rights in the stone quarries.

These regulations show: (1) that Government made settlements in the Province of Agra, both permanent and temporary, as settlements of rights in the soil only, (2) that the siwai rights were reserved for Government, (3) that stone quarries were treated as a monopoly of Government and that no rights of the zamindars were recognized in stone quarries.

The learned counsel has not been able to refer to any ruling of this Court in which any claim has been advanced by any zamindar in these provinces to receive compensation for kankar, or any case in which a zamindar has claimed against third parties that he owns kankar. Certain rulings were referred to by counsel. One of these is *Daya Kushun* v. *Assistant Collector, Surat* (3). In that case compensation was under consideration for stone for the B. B. & C. I. Railway, and it was held in regard to certain quarries from which stone had been previously extracted by the owner without permission, that under the Bombay Land Revenue Code the Collector could grant permission for the working of these quarries and that therefore this use should be a matter to be taken into account in the award of compensation. That rulings follow *In the matter of the Land Acquisition Act* 10 *of* 1870 v. *Munji Khetsey* (4). These rulings however differ from the present case, because in the present case it is not open to the Collector or to anyone else to sanction the use of the kankar by the zamindar.

The next ruling to which reference was made was *Mohini Mohan Banerji* v. *Secy. of State* (5). This was a case of compensation for the use of land for brickfields and it was held that the potential value of land for this purpose should be taken into account for compensation. The Court however was only following the principle laid down by their Lordships of the Privy Council in *Narsingh Das* v. *Secy. of State* (6), that the actual condition of the land at the time of expropriation together with all the existing conditions and its possibilities should be taken into account. But it is always open to the zamindar to make a brick-field on his land whereas in these provinces at any rate it is not open to a zamindar to quarry kankar from his land for the purposes of sale. Reference was also made to *Raghunath Row* v. *Secy. of State* (7) in which there was the question of compensation for a gravel quarry and it was held that the special adaptability of the land for the purpose of a gravel quarry should be taken into account. There was no question in that case whether the Secretary of State owned the gravel and apparently the gravel formed the surface of the ground.

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(3) [1914] 38 Bom. 37=21 I. C. 320.
(4) [1891] 15 Bom. 279.
(5) A. I. R. 1921 Cal. 193=67 I. C. 25.
(6) A. I. R. 1925 P. C. 91=86 I. C. 556=52 I. A. 133=6 Lah. 69.

Similarly, in *Secy. of State* v. *Shanmugaraya* (8) there was the question of a gravel quarry, but there was no question raised as to the rights of zamindars to make this quarry. In *Vallabdas Naranji* v. *The Collector* (9) there was a case from Bombay before their Lordships of the Privy Council where a piece of waste land on the seashore was acquired, and it was held that the potentiality of the piece of land for salt work should not be taken into consideration and the sum of Rs. 14 per acre awarded by the Collector was not an unreasonable amount. In this ruling the Privy Council did not consider that compensation should be awarded for the potential use of the land for a salt factory, because the possibility was too remote. In this present case the zamindar claims compensation for kankar which is essentially the property of Government.

The appellant relied on these cases for the proposition that even if kankar was the property of Government, still the zamindar could make a profit out of it by selling the kankar and therefore he was entitled to some compensation. But we consider that the rulings do not support him on this point, because kankar being the property of Government, the appellant is not entitled to any compensation when Government takes its own property.

We consider therefore that the appellant has no right to any claim for compensation in regard to the kankar and that the kankar in this province is the property of Government.

The next point raised by the appellant was in regard to interest. Under S. 28, Land Acquisition Act, Act 1 of 1894, it is within the discretion of a Court to decree interest where a larger amount of compensation has been given than was awarded by the Collector. We do not consider that under the circumstances of the present case there should be any amount of interest given.

The remaining point was in regard to costs. The order of the lower Court was that the parties should receive and pay costs in proportion to their success and failure. It is claimed for the appellant that no proportionate costs should have been awarded to Government. But the appellant had claimed a very large amount of compensation and as we have held, the appellant was not entitled to the Rs. 23,250 compensation for the value of the kankar. We do not see any reason to interfere with the order of the lower Court. Accordingly we dismiss the present appeal with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 398

BANERJI AND KING, JJ.

Kamta Rai and *others* — Plaintiffs — Appellants.

v.

Rani Jaduraj Kunwari—Defendant—Respondent.

First Appeal No. 432 of 1927, Decided on 13th March 1931, against decision of Sub-Judge, Basti, D/- 22nd August 1927.

(a) Limitation Act (1908), Ss. 19 and 21—Authority to agent need not be express in every case.

Sections 19 or 21 do not contemplate that the authority to be given to the agent must in every case be an express authority. [P 400 C 1]

(b) Limitation Act (1908), Ss. 19 and 21—Pleader's admission in course of his business acts as acknowledgment.

An admission by a pleader in a petition made in course of his business is binding as an acknowledgment so as to give fresh starting point irrespective of whether the pleader represents majors, or guardian for minors: 18 *All.* 384, *Foll.* [P 400 C 1]

(c) Limitation Act (1908), S. 7 — Applicability—Extension of, stated

Section 7 clearly has got no application to any but the cases to which it is made applicable, namely to debts and to execution of decrees. [P 400 C 2]

(d) Precedent—Case is authority only for what it actually decides.

A case is only an authority for what it actually decides and that every judgment must be read as applicable to the particular facts proved or assumed to be proved: *Quinn* v. *Leatham* (1901) *A. C.* 495, *Foll.* [P 400 C 2]

(e) Hindu Law—Alienation — Manager or guardian — Bar of limitation against one major member cannot affect other members —Limitation Act (1908), S. 7.

In the case of alienation by manager or guardian of minors the bar of limitation as against one member does not affect other members if such other members have a right to impeach alienation: *A. I. R.* 1926 *P. C.* 16, *Foll.* [P 400 C 1]

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(7) A. I. R. 1921 Mad. 324=60 I. C. 187=44 Mad. 264.

(8) [1893] 16 Mad. 369=20 I. A. 80 (P.C.).

(9) A. I. R. 1929 P. C. 112=115 I. C. 730.

K. N. Katju and *Binod Bihari Lal*—for Appellants.

P. L. Banerji—for Respondent.

Banerji, J.—This is a plaintiffs' appeal in a suit to set aside a sale deed dated 2nd July 1923.

The suit was for avoidance of a sale deed executed by the certificated guardian of the first two plaintiffs, who were minors, on 2nd July 1913. The sale was of a three anna share in mauza Phulvi for the sum of Rs. 14,400.

On 1st April 1900 a mortgage deed had been executed in favour of the defendant by the grandfather of the two minors. No question as to the legality or otherwise of the mortgage could have been raised as the mortgage of the year 1900 was executed in lieu of antecedent debts. The mortgagee was entitled on 3rd May 1901 to demand repayment of the money and therefore any suit that the defendant had chosen to file to enforce the mortgage would have been within time up to 3rd May 1913.

The share of mauza Phulvi which was mortgaged by the deed was 6 annas 10 pies, and further, a tiled house was also mortgaged. Mt. Bhagwanta, step-mother of plaintiff 1 and the mother of plaintiff 2, applied on 31st August 1912 to be appointed guardian of Kamta Rai and Jatan Rai, the first two plaintiffs, and in that application, Ex. F, the reason for making the application stated by Mt. Bhagwanta for applying to be guardian is entered in the application as follows:

> "Debt amounting to about Rs. 13,276 is due by the minors, interest on which is increasing day by day. It is required to pay the debt due by the minors by selling a portion of the property."

On 5th October 1912 the learned District Judge of Cawnpore appointed Mt. Bhagwanta as guardian of the two minors. On 20th November 1912 an application for permission to sell a three anna share in mauza Phulvi, which on that date had become six annas by partition, was presented to the District Judge and permission was sought to sell the three annas former share to pay the mortgage in favour of the defendant and to pay up a decree of Rs. 1,100 which had been passed against the minors. After due enquiry on 28th March 1913 the learned District Judge sanctioned the sale and directed that a draft sale deed be presented to him to pass and check the draft. Eventually, on 2nd July 1913 the sale deed now questioned by the plaintiffs was passed by the District Judge, executed by Mt. Bhagwanta and under the deed a three anna share, which had then become a six anna share by partition, passed to the defendant Rani.

The plaintiffs' case is that a fraud was practised on the District Judge by Mt. Bhagwanta in conspiracy with the Rani's servants and that the transfer on 2nd July 1913 was for a grossly inadequate consideration. The plaintiffs also urged that on the date of the sale the Rani's claim upon the mortgage had become barred by time and that the plaintiffs were in adverse possession of the property alleged to have been conveyed by the deed of 2nd July 1913.

The learned Subordinate Judge decided on these points against the plaintiffs and hence this appeal. All the findings recorded by the learned Subordinate Judge have been challenged by the learned advocate for the appellants.

It is urged strenuously by the learned advocate for the appellants that the Court below had erred in holding that there was a valid acknowledgment within the meaning of the Limitation Act of the Rani's debt. Ss. 19 and 21 have been referred to and it is urged that the acknowledgments mentioned by the District Judge could not be treated as valid acknowledgments either under S. 19 or S. 21 because the person who signed the acknowledgment was only a vakil of Mt. Bhagwanta and under the vakalatnama the vakils were not authorized to acknowledge any debts. It is no doubt true that in the vakalatnamas in favour of the two vakils no specific authority is given to them for acknowledging a debt but they were given full powers under the vakalatnama to do all acts necessary for the purposes of the case. It appears to us that the two vakils, while acting, had to enter what they did in the application and therefore the vakils had done nothing which was not necessary to carry on the cases that they were entrusted with. In our opinion the principle of the ruling in *Hingan Lal* v. *Mansa Ram* (1) clearly applies to the facts of the case. Dr. Katju however urges that in that case the vakils were not acting on behalf of the guardian of the minor but, in our opinion, that makes no difference. We do not think that either S. 19 or S. 21, Lim. Act, contemplates that the authority to be given to the agent must in every case be an express authority.

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(1) [1896] 18 All. 384=(1896) A. W. N. 101.

We therefore are of opinion that there is no force in the contention of the learned advocate for the appellants that on the date of the sale, namely 2nd July 1913, the defendant's right to sue for the money due under the mortgage of 1900 was barred by limitation.

It is unnecessary to refer to the other question of facts raised as. in our opinion, there is no force in the contention that fraud was practised on the District Judge by the guardian of the defendant or the guardian's brother.

It is urged that the sale of 2nd July 1913 was not for the benefit of the minor. Although the sale was sanctioned by the District Judge it is urged that it is not conclusive that the sale was for the minors' benefit as it was for a grossly inadequate consideration. The learned advocate contends that the learned Subordinate Judge had not approached the question as to valuation from a correct point of view, but upon an examination of the evidence adduced by the plaintiff we are of opinion that the plaintiffs have failed to prove that the sale was for a grossly inadequate consideration. Lastly it is urged that the plaintiffs have matured a title to the property by 12 years adverse possession. To this the defendant replied by urging that the plaintiffs' claim is barred by three years' limitation.

The learned Subordinate Judge has in our opinion by a curious process of reasoning, held that the plaintiffs' claim is barred by three years' limitation in that Kamta Rai plaintiff 1 had attained the age of majority long before the institution of the suit. It seems to us that the ruling in the case of *Jawahir Singh* v. *Udai Parkash* (2) is clearly applicable to the facts of the case. The learned Subordinate Judge has, in our opinion, gone wrong in referring to the cases that he has and in holding that Kamta Rai could give a "discharge." We fail to understand what the learned Subordinate Judge means by it because the word "discharge" suggests that he was thinking of S. 7, Lim. Act. S. 7, Lim. Act, clearly has got no application to any but the cases to which it is made applicable namely to debts and to execution of decrees. The plaintiff Kamta Rai might have been able to give a discharge of a debt due to the family but that does not mean that the claim of each individual member of a joint Hindu family is barred because the karta or manager did not choose to institute a suit to avoid any transfer that any other member could challenge. It seems to us that the Courts do not always bear in mind which they ought to, the observation of Lord Halsbury in *Queen* v. *Leatham* (3) (at p. 506) namely that a case is only an authority for what it actually decides and that every judgment must be read as applicable to the particular facts proved or assumed to be proved. We therefore think that the learned Subordinate Judge is wrong in holding that the plaintiffs' claim is barred by three years' limitation.

We have now to examine whether the plaintiffs have acquired by adverse possession any title to the property in suit. It seems to us that the plaintiffs cannot in any circumstances whatsoever proved in this case claim that they have acquired title by adverse possession. It may be true that the defendant Rani has never received a pie as profit of the estate but Ex. O proves that the plaintiffs impleaded the defendant Rani along with them in a suit for ejectment brought against some common tenants in the year 1919. In our opinion therefore the plaintiffs claim that they have acquired title by adverse possession, is a preposterous claim and no attention whatsoever can be paid to it.

The result therefore is that in our opinion there is no force in this appeal and we dismiss it with costs.

V.B./R.K. *Appeal dismissed.*

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(2) A. I. R. 1926 P. C. 16=93 I. C. 216=53 I. A. 36=48 All. 132.

(3) [1901] A. C. 495.

*A. I. R. 1931 Allahabad 401

MUKERJI AND BENNET, JJ.

In re *Har Krishna Das of Gola Gali, Benares.*

Misc. Case No. 590 of 1930, Decided on 26th February 1931.

(a) Interpretation of Statutes—Penalizing enactments—Powers of appellate Court to enhance penalty, must be in clear language—Income-tax Act (1922), S. 28.

A penalty is not, as a rule, to be enhanced in appeal by mere implication of language. When a person is subjected to a penalty and a right of appeal is given, he appeals in the hope that he would be able to have his sentence or punishment reduced. Where the appellate authority is given a power to enhance that penalty, one would expect that that power would be given to that authority in clear language. [P 402 C 1]

(b) Interpretation of Statutes — Fiscal enactments are to be construed in favour of subject—Income tax Act (1922).

The Income-tax Act is a fiscal enactment and in the case of an ambiguity, it is to be construed by the well-known principle in favour of the subject and not against the subject. [P 402 C 1]

***(c) Income-tax Act (1922), Ss. 28, 31 and 32—Assistant Commissioner cannot enhance penalty in appeal.**

Assistant Commissioner has no authority in law to enhance the penalty while hearing an appeal against imposition of penalty or imposition of assessment under S. 28, Income-tax Act. [P 402 C 2]

K. N. Katju and *M. N. Rama* — for Assessee.

U. S. Bajpai— for the Crown.

Mukerji, J.—The learned Commissioner of Income-tax has stated a case at the instance of one Rai Sahib Har Krishna Das under the following circumstances:

The firm Vaishnava Das Jiwan Das of which Rai Sahib Har Krishna Das is the head has been assessed to an enhanced assessment and was made to pay a penalty of Rs. 1,000 by the Income-tax Officer. It appears that a return was made which was found to be inadequate. The return shows an income of Rs. 12,000 odd while it was later found that the income was Rs. 90,000 odd. Thereupon the Income-tax Officer made an assessment of Rs. 8,000 odd as income-tax and Rs. 900 odd as super-tax. In addition to this enhanced taxation a penalty of Rs. 1,000 was imposed. The firm appealed against the assessment to the Assistant Commissioner of Income-tax and that learned officer dismissed the appeal so far as the assessment was concerned, but increased the penalty to a sum of Rs. 5,000. The penalty under the law, namely S. 28, Income-tax Act, could have been imposed to the maximum amount of the amount of assessment namely, Rs. 8,000 odd. The amount of penalty imposed by the Assistant Commissioner was therefore within the limit.

A further appeal was taken to the Commissioner and it was contended before him that the Assistant Commissioner was not authorized in law to enhance the penalty.

In the case stated, two questions have been formulated and the first question that we have to answer is :

> " Whether when a penalty has been imposed under S. 28 by the Income tax Officer, and an appeal has been filed against the imposition of the penalty, the Assistant Commissioner having regard to the wording of S. 31 (i) (d) has power to enhance the penalty ."

(The figures and letters " 31 (i) (d) " in the order of the Commissioner of Income-tax are, we take it, a slip for the figures and letters, 31 (3) (d).

The argument in favour of the assessee is as follows : In S. 31, sub-S. 3, Cl. (a), provision has been made for enhancement of assessment. When this provision for enhancement has been made, the clear word " enhancement " has been used. Again, in the last clause of S. 31 the provision has been made that no enhancement of assessment shall be made until the assessee has had a reasonable opportunity of showing cause against such an enhancement. We do not find in the case of enhancement of penalty any similar provision of hearing the assessee. It is argued that the legislature, if it had meant to authorize the Assistant Commissioner to enhance the penalty would have also provided for hearing the assessee before the penalty was raised. It is further argued that where an assessment is enhanced by the Assistant Commissioner hearing an appeal, a further appeal is provided for under S. 32 of the Act, but no such appeal is provided for in the case of an enhancement of penalty, if such penalty could be enhanced by the Assistant Commissioner on appeal. Another argument has been based on the language of the Civil Procedure Code, Sch. 1, O. 41, R. 31. We do not propose to consider this last mentioned argument, because we cannot really read one Act by the help of another Act.

On behalf of the Commissioner, the learned Government Advocate has urged that the powers of the Assistant Commissioner hearing an appeal are defined by the words, "affirm, cancel or vary." He argued and with a great deal of force that the word "vary" would mean both "reduce" and "enhance."

We have to choose between these two alternative arguments.

Before we read the language of Ss. 31 and 32 again, we might state, as a matter of general principle, that a penalty is not, as a rule, to be enhanced in appeal, by mere implication of language. When a person is made subject to a penalty and a right of appeal is given, he appeals in the hope that he would be able to have his sentence or punishment reduced. Where the appellate authority is given a power to enhance that penalty, one would expect that that power would be given to that authority in clear language. We can recall the provisions in the Criminal Procedure Code, not the language of the Criminal Procedure Code, but the principles on which the provisions are founded. The exceptional power of enhancing a sentence in a criminal case is given to the High Court and that too on hearing the convicted person. Ordinarily when an appeal is filed before a Sessions Judge or before the High Court, the Code provides for altering the sentence, but takes care to say that the alteration should not amount to an enhancement. It is only in the exercise of its revisional power that the High Court could enhance the sentence. As we have said, it is a very exceptional power given to the High Court.

We find that S. 31 is not oblivious of the fact that there is the word "enhance" or enhancement in the English language and does not fail to use it when the idea was that the assessment should be enhanced. If we see that the legislature has not used that word "enhance" or "enhancement" while dealing with a case of penalty, we can easily say that some different intention was intended to be conveyed. It is true that the word "vary" has been used in conjunction with the word "order" in Cl. (d), sub-S. 3, S. 31. But the idea could have been easily expressed by altering the sentence and using the unambiguous word "enhance" with respect to penalty. The fact that no provision was made for hearing the assessee before enhancing the penalty is a clear argument in support of the contention of the counsel for the assessee. The fact again that a further appeal is provided for in the case of an enhancement of assessment, but no further appeal is provided for in the case of an enhancement of penalty is another argument against the view that a penalty could be enhanced.

Section 28, last paragraph of sub-S. 1, provides that where a penalty is imposed there shall be no prosecution for an offence committed relating to income-tax. This shows that a choice lay between prosecution and imposition of penalty. The penalty must therefore be in the nature of a fine imposed by a criminal Court.

The Income-tax Act is a fiscal enactment and in the case of an ambiguity, it is to be construed by the well-known principle in favour of the subject and not against the subject. At best, the word "vary" used shortly after the word "enhance" in the same section is not conclusive of the idea that the penalty may be enhanced. In the case of an ambiguity the Act will have to be construed in favour of the subject and not in favour of the Crown.

We notice that no provision is to be found within the four corners of the Income-tax by which the department may ask by way of an appeal, any authority to enhance a penalty which has been imposed by the Income-tax Officer. This shows that if the assessee decides not to file an appeal against an order imposing penalty, the Department cannot seek to have the penalty enhanced. It was therefore not likely that the legislature meant that an opportunity might be taken of an appeal to enhance the penalty.

For all these reasons we are of opinion that the Assistant Commissioner had no authority in law to enhance the penalty while hearing an appeal against imposition of penalty or imposition of assessment under S. 28, Income-tax Act.

This is our answer to the first question. The second question must be answered in the affirmative as the learned counsel for the assessee has agreed that that must be the answer to be given to that question.

We direct that a copy of this judgment under the seal of the Court be sent to the Commissioner of Income-tax and that the assessee should have his costs of this reference. We assess the Government Advocate's fee at Rs. 200 and direct him to file his certificate of fees within a month. The fees of counsel for the successful assessee will also be taxed at Rs. 200.

V.B./R.K. *Reference answered.*

A. I. R. 1931 Allahabad 403

MUKERJI AND BENNET, JJ.

Mt. Maimuna Begam — Plaintiff—Appellant.

v.

Sharafat Ullah Khan—Defendant—Respondent.

First Appeal No. 249 of 1927, Decided on 22nd December 1930, from decision of Sub-Judge, Aligarh, D/- 14th February 1927.

(a) Mahomedan Law—Dower—Proportion as to prompt dower should be fixed having regard to status of family, amount of dower and custom.

In a suit for dower, the Court should fix the proportion to be treated as prompt dower having regard to the status of the family, the amount of dower and custom, if any prevailing in the plaintiff's family: 1 *All.* 483; 1 *All.* 506; 33 *All.* 291 and 41 *All.* 562, *Rel. on.* [P 403 C 2]

(b) Mahomedan Law — Dower — Wife claiming dower is in position of ordinary creditor and can claim interest — Interest Act, (1839).

The widow, who is in possession of her husband's property in lieu of her dower, is in the position of an ordinary creditor and is entitled on equitable grounds to interest. The dower ranks as a debt and the wife is entitled along with other creditors to have it satisfied on the death of the husband out of his estate. Her right however is no greater than that of other unsecured creditors. Whether interest is to be allowed or not may depend upon peculiar facts of a case: *A. I. R.* 1916 *P. C.* 46, *Rel. on.* [P 404 C 1, 2]

T. A. K. Sherwani and *Mahmudullah*—for Appellant.

M. A. Aziz and *S. M. Hadi*—for Respondent.

Mukerji, J.—This appeal arises out of a suit for dower instituted by the plaintiff against the defendant. It is common ground that the plaintiff's dower was fixed at Rs. 35,000 at the date of the marriage which took place on 21st March 1920. The plaintiff's case was that the prompt portion of her dower should be treated as one-half of the total dower and this should be decreed to her with arrears of interest. She said that she had demanded payment at the end of 1924 and in the middle of January 1925. She accordingly claimed a sum of rupees 1,930 as arrears of interest.

The defence was that no particular portion of the dower had been declared to be prompt at the time of the marriage, and that the plaintiff was not entitled to any interest.

The lower Court held that it was in the discretion of the Court having regard to all the circumstances of the case to say what proportion of the entire dower should be allowed as the prompt dower. The learned Judge refused any interest and decreed the claim for Rs. 11,000 and directed that it should be paid at the rate of Rs. 300 a month.

The plaintiff contends in appeal that her entire claim should have been decreed and that she should have been allowed the interest claimed by her.

The same authorities have cited before us on both sides as laying down the rule by which Courts are to be guided in finding out what proportion of the entire dower should be treated as the prompt dower in the absence of any definite contract on the point. These cases are *Eidan* v. *Mazhar Husain* (1); *Taufikunnissa* v. *Ghulam Kambar* (2); *Umda Begam* v. *Muhammadi Begam* (3) and *Muhammad Subhan Ullah* v. *Saghirunnissa Bibi* (4). The first-mentioned case was overruled by a later Full Bench case, but the point on which this decision was overruled was a different one.

These authorities lay down that the Court should fix the proportion to be treated as the prompt dower having regard to the status of the family, the amount of the dower and custom, if any prevailing in the plaintiff's family.

As to the evidence we have got the statement of the plaintiff's eldest sister, the husbands of two of her sisters and the statement of her brother to the effect that in the marriage of all the four sisters one-half of the total dower was declared to be prompt. The eldest of the four daughters, Musharraf Jahan Begam stated that she demanded one-half of the dower from her husband as prompt dower, but the husband who was a well-to-do man paid her the entire amount of Rs. 35,000.

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(1) [1878] 1 All. 483.
(2) [1878] 1 All. 506.
(3) [1911] 33 All. 291=9 I. C. 200.
(4) [1919] 41 All. 562=50 I. C. 740.

The husbands of the two other sisters swore against their own interest when they stated that the prompt dower of their wives was one-half of the total amount of Rs. 35,000. The plaintiff's brother also stated that although there was no clear contract to that effect, it had been made clear that one-half of the total dower was to be the prompt dower. The learned Subordinate Judge has disbelieved all this evidence on the ground that the Qazi's register does not show that one-half was fixed as the prompt dower. This may be true, but we have no reason to say that all these respectable witnesses chose to tell untruths for the sake of their sister who was bound to recover, in any case, a substantial proportion from the defendant as her prompt dower.

It is conceded that the plaintiff comes from a respectable family. The circumstances which have led to this unpleasant suit are rather painful. We have got it from the defendant's own letter, printed at p. 17 that unpleasantness between the husband and wife arose because the husband wanted to take a second wife and the plaintiff would not agree to that. The defendant wrote to a third party:

> "Unless she (the wife) comes to have the same ideas as I have on the point (the husband marrying a second time) and willingly permits me to marry another wife that unpleasantness cannot be removed."

It is not the case that the husband and wife could not live together on pleasant terms and it was on that account that the husband was seeking a second wife. The letter further shows that the defendant wanted to sever all connexion with his wife when he married for the second time. Having regard to all these circumstances of the case we think that the plaintiff is fully entitled to claim one-half share of the whole dower as the prompt dower.

As regards interest it is allowable under the Interest Act, being Act 32 of 1839. Their Lordships of the Privy Council in the case of *Hamira Bibi* v. *Zubaida Bibi* (5) said that the widow who was in possession of her husband's property in lieu of her dower was in the position of an ordinary creditor and was entitled on equitable grounds to interest. At p. 580 their Lordships say:

> "But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right however is no greater than that of any other unsecured creditor."

We have been told that in some cases the Court have refused to allow interest to the wife claiming her dower. This may be so. Each case has to be decided on its own peculiar facts. But if in any cases interest is to be allowed surely this is one of those cases.

As regards the date from which interest is to be paid, it has been alleged on behalf of the respondent that the latter did not know for certain what share of the dower he was bound to pay as the prompt dower, and therefore interest should not be allowed earlier than the date of the decree. We do not agree with this contention.

The result is that we modify the decree of the Court below by increasing the amount of the decree given to the plaintiff to the sum of Rs. 17,500. We allow interest on this amount at 6 per cent per annum from the date of the institution of the suit till recovery. We direct that the entire amount shall be paid by the defendant by the monthly instalments of Rs. 300. The costs decreed to the plaintiff would come first and then the interest from the amount paid and the balance will go to reduce the principal amount. The appellant will have her full costs of the litigation in both the Courts and the defendant will pay his own costs in both the Courts. In case of default of payment of any two instalments the whole decretal amount will become payable at once, We understand that there has already been some default in payment, but we are prepared to waive that, but in future every instalment shall be paid on the 10th of every month commencing with 10th January 1931 and any two defaults thereafter will entail a liability to pay the entire amount.

R.M./R.K. *Decree modified.*

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(5) A. I. R. 1916 P. C. 46=36 I. C. 87=43 I.A. 294=38 All. 581.

A. I. R. 1931 Allahabad 405 (1)

PULLAN, J.

Ibrahim Khan and *another*—Plaintiffs—Appellants.

v.

Abdul Ahad Khan—Defendant—Respondent.

Second Appeal No. 2002 of 1928, Decided on 10th January 1931, against decision of Dist. Judge, Shahjahanpur, D/- 18th May 1928.

Wajibularz—Date of division of profits in old wajibularz should be followed.

Date for division of profits mentioned in the "Dastur-dehi" representing the old wajibularz of a village should be followed, because it amounts to a determination and record of the date made by the Settlement Officer. [P 405 C 1, 2]

Harnandan Prasad—for Appellants.

Shiva Prasad Sinha—for Respondent.

Judgment.—This second appeal arises out of a suit for profits. The only question is one of limitation. The profits in question were for the year 1327 fasli and the suit was filed on 31st July 1923. If these profits could have been collected on a date later than 31st July 1920 the suit is within time, but if the last date for the collection of the profits is prior to 31st July 1920 the suit is beyond time. S. 163, Act 2 of 1901, lays down that in the absence of any determination of date by the Settlement Officer or of an express agreement among the cosharers, profits shall be divisible on such dates as the Local Government may prescribe, and the Local Government has prescribed those dates by rules framed under S. 203 of the same Act. The date prescribed by the Local Government is 1st August unless some other date has been agreed upon by the persons concerned or determined and recorded by a Settlement Officer.

In the present case the patwari has given evidence that the cosharers divide their profits in August, but the learned District Judge has relied upon the "dastur-dahi" representing the old wajibularz of this village which says that the last day for the division of profits is the last day of Asarh. In the year 1920 the last day of Asarh was 1st July. In my opinion the District Judge is right in holding that this must be taken to be the date determined for this village. No doubt the "dastur-dehi" is based on an agreement between the cosharers themselves, and if reliance was placed only on the agreement evidence could be given to show that the agreement was no longer acted upon. But in my opinion the "dastur-dehi" is more than this. It amounts to a determination and record of the date made by the Settlement Officer. In my opinion, therefore the decision of the Court below is correct, and I dismiss this appeal with costs.

I should like to note that there has been an astonishing delay in disposing of this appeal by the Court below. The suit was filed on 31st July 1923. It was decided by the Assistant Collector on 22nd April 1924. It was remanded on appeal by the District Judge on 31st March 1925. The remand finding is dated 14th December 1925. The remand finding should have been taken up at once by the District Judge. Instead of this I find that his decision is dated 18th May 1928.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 405 (2)

SULAIMAN AND KING, JJ.

Gaya Kurmi and *others*—Appellants.

v.

Ram Sahai Singh and *others*—Respondents.

First Appeal No. 25 of 1930, Decided on 16th January 1931, against order of Sub-Judge, Basti, D/- 21st November 1929.

Pre-emption—Cosharers—*S* dying leaving share in mahal to his widow—Sale by widow of the share—Reversioners of *S* on widow's death selling it to *R*—Possession not taken by *R*—Suit for possession by *R* by avoidance of sale deed by widow—Sale during pendency of suit of other portion of mahal on 16th July 1927—*R*'s suit decreed in October 1927 contingent on deposit of Rs. 93—Deposit made by *R*—Suit by *R* for pre-emption of property sold on 16th July 1927 held incompetent he not being cosharer on that date.

A small share in a mahal of ten pies belonging to *S* devolved on his death to his widow who sold it for Rs. 199. *A*, who on the death of the widow became reversioner entitled to succeed to the estate of *S*, sold the share along with other property to *R* in 1926. *R* however did not obtain actual possession nor was his name recorded. *R* filed a suit for possession of the share against the transferee by avoidance of the sale deed by the widow. During the pendency of suit other property of the mahal was sold on 16th July 1927. *R*'s suit was decreed in October 1929, the decree directing that *R* was to get possession on payment of Rs. 99 within two months from the date of the decree, otherwise the suit was to stand dismissed. *R* deposited the amount within time and then sued for pre-emption of the property sold by sale-deed of July 1927.

Held: that *R* was not entitled to pre-empt the property as he was not a cosharer entitled as proprietor to a share in the mahal on the date, i. e. 16th July 1927, when the sale deed was executed. The sale deed was not void ab initio but only voidable and held good so long as it was not avoided. It could only be avoided if the amount which was for legal necessity was paid in Court to the transferee. The property therefore did not vest in *R* until he made the deposit of the amount due to the transferee. [P 406 C 2]

Harnandan Prasad—for Appellants.

Benod Behari Lal—for Respondents.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for pre-emption. The only point in controversy is that the pre-emptor was a cosharer on the date of the sale deed, namely the 16th of July 1927.

It appears that a small share of ten pies belonged to Sheoraj and devolved on his widow Mt. Sarupa after his death. She sold this share for Rs. 199. On her death Ajudhia became the reversioner entitled to succeed to estate of Sheoraj. Early in 1926 Ajudhia sold this share along with some other property to Ram Sahai, the present plaintiff. But admittedly Ram Sahai did not obtain actual possession nor was his name recorded. He filed a suit for possession of this share against the transferee by avoidance of the sale deed of 1926.

While the suit was pending the property in dispute in this appeal was sold by the vendor under the sale deed dated 16th July 1927. Ram Sahai's suit was decreed on 28th October 1929 by the Court in the following terms, namely that the suit for possession be decreed on payment of Rs. 99 within two months from the date of the decree. If money was not paid within the fixed time the suit would stand dismissed. The plaintiff Ram Sahai deposited the amount within the time allowed. He then sued for pre-emption of this property.

The first Court considered that the sale deed by the widow was not a void transaction but a voidable one and it was not effectively avoided till the amount was deposited in Court by Ram Sahai. It accordingly held that the plaintiff was not a cosharer on the date when the sale deed in question was executed. The lower appellate Court has come to the conclusion that the sale was void as against the reversioner and its effect terminated on the death of the widow.

It seems to us that the view taken by the first Court is right. Had it been found that Ram Sahai was entitled to the property without the payment of any amount on the ground that the sale was wholly without any legal necessity the position might have been different. But in this case the Court found that Ram Sahai had no absolute right to avoid the sale deed and take possession. He could avoid it and obtain possession on payment of Rs. 99, and if he failed to deposit that amount within the time fixed his suit was to stand dismissed. It is therefore impossible to hold that the property had become vested in Ram Sahai before the deposit was made by him. The sale by the widow was not void ab initio but was voidable and held good so long as it was not avoided. The Court held that it could only be avoided if the amount which was for legal necessity was paid in Court to the credit of the transferee. We therefore agree with the Court of first instance that the property had not become vested in this particular case in Ram Sahai before the deposit of the amount due to the transferee.

It follows that the plaintiff Ram Sahai was not a cosharer entitled as proprietor to a share in the mahal on the date when the sale deed in question was executed. He therefore had no right to pre-empt the property.

We accordingly allow the appeal and setting aside the decree of the Court below restore that of the Court of first instance with costs in all Courts including in this Court fees on the higher scale.

R.M./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 406

PULLAN, J.

Ali Husain and *another* — Defendants —Appellants.

v.

Harhanga Lohar—Plaintiff— Respondent.

Second Appeal No. 325 of 1929, Decided on 26th February 1931, against decision of Sub-Judge, Ghazipur, D/- 10th December 1928.

(a) Jurisdiction—Civil and Revenue—Suit which can be decided by revenue Court should be decided by that Court only.

Where a Court has to decide whether civil Court has jurisdiction to try the suit or not, the proper question to be considered is not whether the plaint could be filed in a civil Court, but whether it was or was not a suit that could be decided by a revenue Court. Where a suit could be decided by the revenue Court, it should be decided by that Court and not by a civil Court. [P 407 C 1]

(b) Jurisdiction—Civil and Revenue—Objection regarding nature of Court can be raised in appeal for the first time.

Objection regarding jurisdiction referring to the nature of Court (civil or revenue) in which the suit should be brought, can be raised in appeal for the first time: *A. I. R.* 1931 *All.* 35 (*F. B.*) and *A. I. R.* 1924 *P. C.* 95 (*P. C.*), *Rel. on.* [P 407 C 1, 2]

Mukhtar Ahmad—for Appellants.

K. N. Malaviya—for Respondent.

Judgment.—This is an appeal from a decision of the Subordinate Judge of Ghazipur who had before him an appeal from a decision of the Munsif of Rasra in a suit between two persons who claimed to be sub-tenants of an agricultural holding. One of the points raised in appeal in the lower Court was that the suit was not cognizable by a civil Court. The learned Subordinate Judge without giving any reasons said that that plea had no force, and he decided the appeal on its merits. I cannot agree with the learned Subordinate Judge on the question of jurisdiction. He approached the matter from a wrong standpoint. He held that such a suit could be filed in the civil Court. What he should have considered was whether this was or was not a suit which could have been decided by the revenue Court. Both in form and substance this is a suit which could have been, and therefore should have been brought under S. 99 (b), Agra Tenancy Act. The civil Court therefore had no jurisdiction.

It has been argued on behalf of the respondent that as this plea of jurisdiction was not taken in the Court of first instance it should not be entertained in appeal. There is no provision of the Civil Procedure Code to debar an appellate Court from taking up a question of jurisdiction which was not raised in the Court of first instance except S. 21 of the Code which refers only to an objection made as to the place of suing and not as to the nature of the Court in which the suit has been filed. It was held by a Full Bench of this Court in the case of *Ram Kinkar Rai* v. *Tufani Ahir* (1) that questions involving jurisdiction can be raised in appeal even though they have not been raised in the Court below if such questions can be decided on the materials before the Court. There is also a decision of the Judicial Committee reported in *Ramlal Hargopal* v. *Kishanchand* (2) in which their Lordships held that

> "they were bound to take notice of an objection to the jurisdiction however late in the day it may be raised, if it be that on the facts admitted or proved it is manifest that there is a defect of jurisdiction."

In the present case the defect in jurisdiction is manifest, and I consider that I am at liberty to entertain this objection in second appeal.

Formerly there was a widespread opinion based on certain decisions of this Court that suits between tenants inter se should be decided by a civil Court. This is not now the law. But possibly the suit was brought in the civil Court under a justifiable misapprehension as to the present state of the law. Under the circumstances I do not consider that the suit should be entirely dismissed, and I direct the plaint to be returned for presentation to the revenue Court. Costs up to date must be borne by the respondents in this appeal.

S.N./R.K. *Appeal allowed.*

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(1) A.I.R. 1931 All. 35 (F.B.).

(2) A.I.R. 1924 P.C. 95=83 I.C. 531=51 I.A. 72=51 Cal. 361.

A. I. R. 1931 Allahabad 407

MUKERJI AND BENNET, JJ.

Balraj Singh—Plaintiff—Appellant.

v.

Jai Karan Singh and *others* — Defendants—Respondents.

First Appeal No. 484 of 1927, Decided on 19th March 1931, against decision of Small Cause Court Judge, Meerut, D/- 13th May 1927.

(a) Hindu Law— Marriage — Karao marriage.

Karao marriages can be made only with caste-women and not with non-caste women. [P 410 C 2]

(b) Hindu Law—Succession — Illegitimate daughter.

Among the Sudras an illegitimate daughter is not an heir of her father. The Hindu law recognizes an affiliation of an illegitimate daughter to her mother but not to her father: *A. I. R.* 1921 *Bom.* 137, *Foll.* [P 410 C 2]

(c) Custom—Adoption—Entry in Wajib-ul-arz regarding custom of adoption by widow—Consent of husband is not necessary.

An entry in the Wajibularz relating to the custom of adoption should be read as allowing a widow to adopt without the permission of the husband: *A. I. R.* 1923 *P. C.* 90, *Foll.* [P 411 C 1]

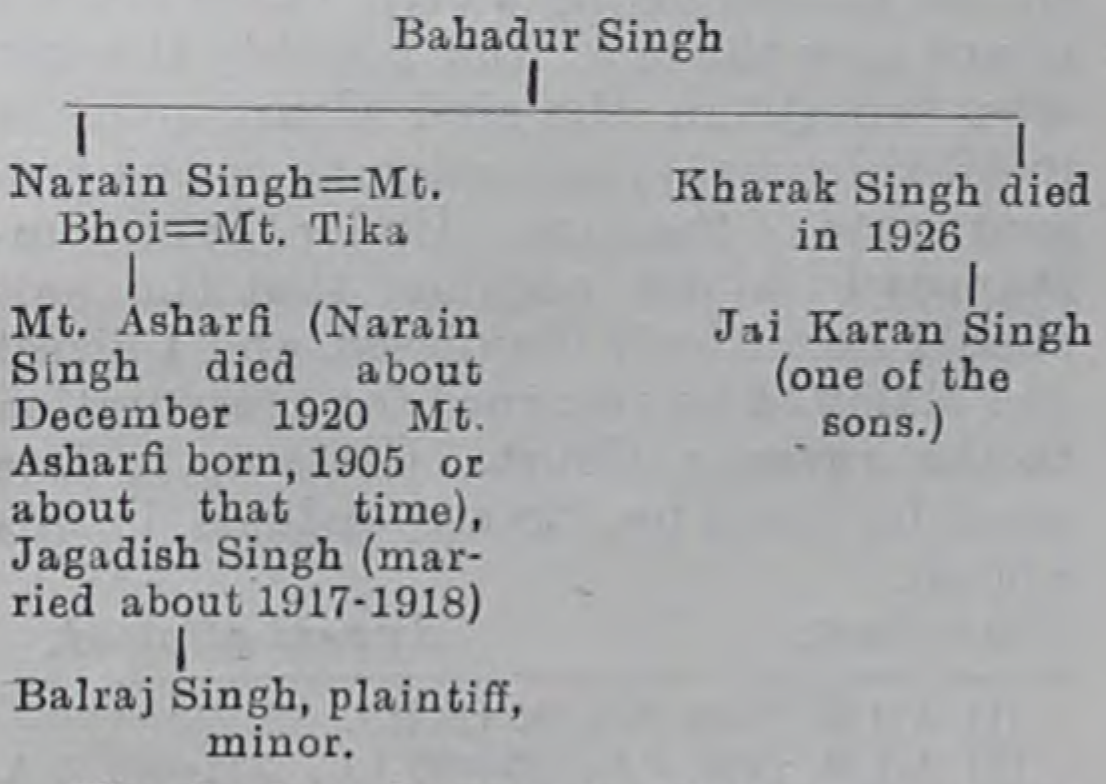
(d) Civil P. C. (1908), S. 11 — Judgment between a female heir representing estate and claimant operates as res judicata against reversioner if given in fair fight.

It is only a judgment of the Court, given in a fair fight between a female heir representing the estate and a claimant that can operate as res judicata against a more distant reversioner. [P 411 C 1]

K. N. Katju—for Appellant.

P. L. Banerji and *N. Upadhiya* — for Respondents.

Mukerji, J.—The following pedigree will be useful in appreciating the facts of the case, which are however not very complicated.


Bahadur Singh
Narain Singh=Mt. Bhoi=Mt. Tika
Kharak Singh died in 1926
Mt. Asharfi (Narain Singh died about December 1920 Mt. Asharfi born, 1905 or about that time), Jagadish Singh (married about 1917-1918)
Jai Karan Singh (one of the sons.)
Balraj Singh, plaintiff, minor.

The last male owner of the property in suit was Narain Singh. The plaintiff's case is that he is Narain Singh's daughter's son, being the son of Mt. Asharfi, who in her turn, was the daughter of Narain Singh by the wife Mt. Bhoi. There is a suggestion in the plaint that even if Mt. Asharfi was a daughter of Mt. Tika, the plaintiff was equally entitled to the property of Narain Singh. Defendant 1 calls himself an adopted son of Narain Singh. The plaintiff's case is that Jai Karan Singh defendant 1, who is a son of Karak Singh was neither adopted in fact nor in law by the widows of Narain Singh.

He also pleaded that Narain Singh never gave permission to his widows to adopt. Mt. Asharfi instituted a suit for recovery of the property, but she made a compromise which is not binding on the plaintiff. On these allegations the plaintiff seeks a declaration that defendant 1 is not an adopted son of Narain Singh. He asks for such further reliefs as the facts of the case might disclose his title thereto.

The two widows of Narain Singh and Mt. Asharfi were made parties to the suit. Jai Karan Singh alone defended the suit under the guardianship of Mt. Jahangir Kunwar, his natural mother. His natural father was dead at the date of the filing of the written statement.

The defence was that Mt. Tika was not a married wife of Narain Singh that she was by profession a prostitute belonging to the hill tribe of Naiks, that she was a mere concubine of Narain Singh, that Narain Singh could never contract a lawful marriage even in the Karao form with Mt. Tika, as she did not belong to the Gujar caste, that Mt. Asharfi, mother of the plaintiff, was Tika's daughter although by Narain Singh, that therefore Balraj Singh is no heir to Narain Singh, that Narain Singh gave authority to Mt. Bhao to make an adoption on his death, that there is a custom in the caste by which no authority from husband was needed to a Gujar widow to make an adoption to her husband, that the suit was barred as res judicata, and that there was an adoption perfectly valid in fact and in law.

The learned Subordinate Judge held that Mt. Tika was a woman belonging to the hill tribe of Naiks, that she was never married in the Karao form with Narain Singh, that such a Karao form of marriage would not be valid among the Gujars, that therefore the plaintiff was no heir to Barain Singh that Narain Singh gave no authority to Mt. Bhao to make an adoption, that the defendant had failed to prove a custom by which husband's authority in the matter of adoption could be dispensed with among the Gujars, that the adoption did take place as a matter of fact but for want of authority it was bad in law that the suit was barred as res judicata, having regard to the suit instituted by the plaintiff's mother and that as the plaintiff had no title he could not maintain a suit for a declaration.

In this Court in the appeal which is by the plaintiff the learned counsel has accepted the finding that Mt. Asharfi, the mother of the plaintiff, was the daughter of Mt. Tika and not of Mt. Bhoi. He however contends that there is enough evidence to show that Mt. Tika was a Gujar by caste and even if she was not a Gujar by caste a Gujar could lawfully make a Karao marriage with any woman of any caste except a Brahmin woman, that in any case Mt. Asharfi was treated and was in fact and in law a legitimate daughter of Narain Singh and that therefore Balraj Singh the plaintiff was entitled to succeed to Narain Singh. He also urged that the suit of Mt. Asharfi did not operate as res judicata.

The learned counsel for the respondent disputed the correctness of the finding that among the Gujars custom did not permit a widow to make a valid adoption to her husband without the permission of her husband. The learned counsel conceded that the decree in Mt. Asharfi's suit did not operate as res judicata. He maintained that the learned Judge was right in his other findings.

The first question that we have to consider is whether Mt. Tika was a Gujar woman, and if not to what caste she belonged, and whether in the case of not being a Gujar, a valid Karao marriage could take place between herself and Narain Singh, and further whether such Karao marriage did in fact take place.

On this point we have to observe to start with that Mt. Tika did not go into the witness box. She was the best person to tell us who she was, who were her parents and whence she came. It was not till the 15th witness on plaintiff's behalf was examined that it was disclosed that Mt. Tika was the widow of one Roshan Singh a Gujar of the village of Sunpura. No evidence however was led except that of the witness Bhikkhan Singh to prove that this was true. The learned Subordinate Judge had disbelieved Bhikkan Singh, and the learned counsel for the appellant has not asked us to believe him. On the other hand several witnesses have come from Sunpura to prove that Roshan Singh was never married to Mt. Tika. The defendant has also examined several witnesses to prove the antecedents of Mt. Tika. He examined Charar Singh, who professed to be a uterine brother of Mt. Tika herself. He said that he and his sister belonged to the Naik caste in the hills among whom the women take to the profession of prostitution. The defendant has adduced evidence to show that before Tika came to live with Narain Singh some 40 years before the present litigation she was actually plying the profession of a prostitute and a dancing girl. Certain amount of documentary evidence has also been adduced in support of this story. We discard the evidence afforded by the account-book produced by Bishan Sahai although it is supported by the witness Ram Partap Singh, but we have no reason to discredit the account-books filed on behalf of defendant 1 as books kept by Narain Singh and his brother Kharak Singh. There is nothing in the judgment of the Court below to show that the genuineness of these accounts had been challenged in the Court below. Extracts from these accounts books will be found printed at p. 157 and onwards. These show that Mt. Tika was in regular receipt of a pay of Rs. 30 per month. In the books she is described as a hill woman. The accounts also show that Hira son of the defendants' witness Chandan Singh used to live with Narain Singh and Narain Singh met the costs of his education. Among the witnesses examined there is one Ramchander, a Mukhtar. He was the legal adviser in revenue matters, of Narain Singh and he swore that he had known Mt. Tika since 1902. He also swears that Narain Singh found it difficult to get a suitable match for Mt. Asharfi as her mother had been a prostitute. Ramchander was requested by Narain Singh to see if a suitable match could be found from his Gujar clients.

As against all this documentary and oral evidence we have no direct evidence to support the plaintiff's case.

Reliance has been placed on the circumstance that Mt. Asharfi was married in a family which was respectable among the Gujars and a large number of caste-men and relations came to the marriage. The defendant's witness Ramchander himself says about 100 persons of Narain Singh's Biradari joined Mt. Asharfi's marriage. We have no reason to disbelieve Ram Chander, but the mere fact that Mt. Asharfi was well married would not necessarily prove that her mother was not a non-Gujar woman who had been in the keeping of Narain Singh. The marriage may have been brought by concealment of the fact that Mt. Asharfi was Tika's daughter, or it may be that, because of the fact that Tika had been living continuously for a long time with Narain Singh, the caste-people were not strict enough to visit the sin of the mother on the head of the child. Mr. Crooke, in his well-known book on Tribes and Castes, Vol. 2, at p. 44, points out that the Gujars were very lax in their matrimonial arrangements, and they took freely concubines from other castes and their offspring were, in most cases, recognized as legitimate. The present instance may have been one of the similar cases referred to by Mr. Crooke. But when all is said, we see no reason, on the evidence to differ from the finding of the learned Subordinate Judge that Mt. Tika was not a married wife of Narain Singh.

There is an admission of Narain Singh himself on the record, it appears that one Jairaj brought a complaint against a certain person, and Narain Singh appeared as a witness in the case. For the defence it was suggested that Jairaj was a man of no means and had been in the service of Narain Singh's prostitute, Jairaj's deposition in the criminal case will be found printed at p. 101 and the statement is at p. 102. At p. 105 is the statement of Narain Singh and he is reported to have stated : "Jairaj does not work for me or my prostitute." It has nowhere been suggested that Narain Singh had over and above two wives a prostitute in his keeping. The prostitute to whom Narain Singh refers must have been Tika herself, who has been described, as already mentioned by us, in the family account-books as a hill woman.

As regards the contention of the plaintiff that a valid marriage could be contracted between Mt. Tika and Narain Singh, we may point out that it was never pleaded that as a matter of custom a Gujar man could make a valid karao with any non-Gujar woman. Evidence however was adduced on both sides on this point, and we are satisfied that for a valid karao it is necessary that there should be a caste marriage and not an inter caste marriage. In the caste-ridden Hindu India it is almost inconceivable that a man of one caste could marry a woman of another caste, without infringing the caste rules. Even Mr. Crooke refers to non-caste women kept by Gujars as "concubines" and not as "karao wives." In the wajibularzes of the village Bhawapur and Baklana, which will be found printed at pp. 189 and 191 of the record, there are clear statements that karao marriages would be made only with caste-women and not with non-caste women. We have been told that these documents do not afford proper evidence of custom, but if these were not matters of custom, there was hardly any necessity for recording them at all. The wajibularz of Baklana at p. 191 distinctly states that the heading under which the statement comes relates to "customs relating to adoption, remarriage and inheritance." The Wajibularz of Bhawapur printed at p. 189 also relates to transfer of property and remarriage. There is a large number of witnesses examined by the defendant who have proved that all the karao marriages take place among the caste-people alone. For the plaintiff no instance of a non-caste marriage has been given and the explanation has been given, for want of instances, namely, all karao marriages are performed in secrecy and therefore witnesses are not available.

We hold that there was no marriage between Mt. Tika and Narain Singh, and even if there had been any such marriage, it would not have been valid according to custom and law. The presumption of marriage could arise only if the antecedents of Tika had not been known or if she had been a Gujar woman.

The next question is whether in spite of Tika being a mistress of Narain Singh Mt. Asharfi would be Narain Singh's legitimate daughter and would be in a position to make Balraj Singh an heir to Narain Singh, under the Hindu law. No authority has been cited for the proposition that even among the Sudras an illegitimate daughter is an heir of her father. The Hindu law recognizes an affiliation of an illegitimate daughter to her mother, but not to her father. The case of *Dandappa* v. *Bhemawa* (1) may be referred to on the point. The result is that the plaintiff has no right to ask a declaration that defendant 1 was not validly adopted.

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(1) A. I. R. 1921 Bom. 137=59 I. C. 561=45 Bom. 557.

In view of this finding of ours it is not necessary to enter into the question whether Mt. Bhoi could make a valid adoption to her husband in the absence of a permission from Narain Singh. On this point however there is a large body of evidence consisting of documents and witnesses. The wajibularaiz of Bhawapur (189), Baklana (191) Hadarpur (193), Ruknuddinpur (197), Fatehpur Thanaura (201), Dayalpur (205) and other places, all go to show that a Gujar widow has the right to adopt a son to her husband. In view of the possible argument that the custom recorded was nothing but a reiteration of the rule of Hindu law that a widow can adopt with the permission of the husband, the learned counsel for the respondent has cited the case of *Biswa Nath* v. *Jugul Kishore* (2). Their Lordships of the Privy Council held that the entry in the Wajibularz relating to the custom should be read as following a widow to adopt without the permission of the husband. The reason given was that if the husband's permission was necessary, there would be no sense in recording the custom at all.

The witnesses Sikandar Singh, Lalta, Bharat Singh, Ranjit Singh, Hira Singh and Basdeo Singh quote instances in which adoptions were made by widows without the previous permission of their husbands. We have thus at least eight instances of such adoptions.

We hold therefore that the adoption of the defendant is valid and Mt. Bhao did not stand in necessity of obtaining her husband's permission to the adoption.

We have already mentioned that the finding of res judicata has not been supported by the learned counsel for the respondent. We ourselves are of opinion that it is only a judgment of the Court, given in a fair fight between a female heir representing the estate and a claimant that can operate as res judicata against a more distant reversioner. In this case Mt. Asharfi's suit was compromised and the result cannot bind the hands of the plaintiff.

In the result, the appeal is dismissed with costs. Having regard to the fact that the parents of the plaintiff have not taken the trouble to file the suit on behalf of the minor plaintiff and that a third person Sohan Singh has filed the suit and on his own statement (see pp. 8 and 9 of the record) has undertaken to pay all the costs of the successful defendants, we direct that the costs of this appeal of defendant 1 be paid by Sohan Singh, the next friend of Balraj Singh the minor appellant. As there is no appeal by Jai Karan Singh we cannot disturb the order as to costs as made by the Court below.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 411

MUKERJI AND BENNET, JJ.

Banwari Lal—Appellant.

v.

Gopi Nath and *another*—Respondents.

Second Appeal No. 410 of 1928, Decided on 10th January 1931, against decision of Dist. Judge, Farrukhabad, D/-10th December 1927.

Evidence Act (amended by Act 31 of 1926), S. 68, Proviso—Proviso cannot be applied to cases decided prior to Act.

It is not correct to apply an Act which is passed subsequent to the trial of the case to the procedure in the case and S. 68, proviso, introduced by Act 31 of 1926 cannot be applied to a case decided on 10th February 1926 as the Act came into force on 18th September 1926. [P 412 C 2]

R. C. Ghatak—for Appellant.

N. P. Asthana—for Respondents.

Bennet, J.—This is a second appeal by a defendant Banwari Lal, against a decree of the learned District Judge of Farrukhabad who decreed the suit of the plaintiff for sale on a simple mortgage dated 10th April 1912. This deed purports to have been executed for Rs. 600 by one Mt. Bilaso in favour of Gopi Nath. The plaintiff sued Mangala Prasad as the legatee of Mt. Bilaso under a will. The appellant Banwari Lal applied to be made a defendant and claimed to be a reversioner of this property along with Mangala Prasad on the death of Mt. Bilaso. The last male owner being Parbhu Lal, the husband of Mt. Bilaso, the defendant claimed that Mt. Bilaso had only the right of a Hindu widow in this property, but the plaintiff claimed that she was the absolute owner and had full power to dispose of the property by will.

The questions which have been argued before us in appeal are firstly that there was no finding as to legal necessity and that Mt. Bilaso had only the rights of a

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(2) A. I. R. 1923 P. C. 90=73 I. C. 244=50 I. A. 179=26 O. C. 228.

Hindu widow, and secondly that it is not proved that the mortgage deed was duly executed. In regard to the first point it is a fact that the lower appellate Court and the Court of first instance stated that no finding as regards legal necessity was required although that was one of the issues, because those Courts considered that Mt. Bilaso had an absolute right as owner in this property. Without expressing any opinion on this matter we proceed to consider the second point argued in appeal.

The evidence which was tendered to prove the mortgage deed consisted firstly in calling a witness, Banwari Lal. He was one of the three persons whose signatures appear on the deed of mortgage as attesting witnesses. But when Banwari Lal was called he said that Mt. Bilaso had not put her thumb impression on the mortgage deed in his presence and that he merely put his signature on the mortgage deed as Mangali Prasad the karinda of the lady asked him to do so. It is clear therefore that Banwari Lal, although he signed as an attesting witness was not an attesting witness within the meaning of attesting witnesses laid down in S. 3, T. P. Act. The plaintiff also tendered his own evidence to the effect that Mt. Bilaso put her thumb impression on the mortgage deed in his presence and in the presence of Badri Prasad and Mangala Prasad defendant, whose names also appear as attesting witnesses on the document. But this evidence of the plaintiff is not sufficient for the purpose of S. 3, T. P. Act, because the plaintiff does not state that these attesting witnesses made their signatures in the presence of Mt. Bilaso. Moreover it has been pointed out by learned counsel for the appellant that this evidence is not admissible to prove the execution of the document under S. 71, Evidence Act, because S. 71 only applies :

> "if the attesting witness denies or does not recollect the execution of the document."

Now in the present case no attesting witness has been called because, as we have pointed out, Banwari Lal is not really an attesting witness. Accordingly before S. 71 could apply it was necessary for the plaintiff to comply with S. 68, Evidence Act, and to call as a witness one at least of the attesting witnesses.

We consider therefore that on the evidence on the record the document has not been properly proved. The learned District Judge considered that advantage could be taken by the plaintiff of the proviso introduced to S. 68, Evidence Act (Act 31 of 1926). But this Act did not come into force until 18th September 1926 and the present case was disposed of by the learned Munsif on 10th February 1926. Accordingly we consider that it would not be correct to apply an Act which was passed subsequent to the trial of the case to the procedure in the case.

A further argument was made that certain admissions had been made in the written statement of the defendant. It is true that the defendant Mangala Prasad did admit in para. 4 of the additional pleas that there had been execution of the document. But he said that it had been executed without Mt. Bilaso understanding the nature of the document. The appellant before us, Banwari Lal, specifically stated in para. 2 of the additional pleas that the execution of the document was not admitted. He then proceeded in para. 3 to plead that the deed of mortgage was without legal necessity and in para. 4 that undue advantage had been taken of Mt. Bilaso and execution of a fictitious document obtained.

We consider that it was perfectly regular for this defendant Banwari Lal to put forward these alternative pleas and that in view of his plea in para. 2 it must be taken that he did not admit the execution of the document.

In the circumstances of this case we consider that the proper course will be to set aside the decrees of the learned Munsif and of the learned District Judge and to send this case back to the Court of the Munsif with directions to re-admit it and to try it afresh and dispose of it according to law. Parties will be entitled to produce fresh evidence as if the trial were beginning a new from the date of filing the pleadings. We consider that the learned Munsif should consider the question of the title of Mt. Bilaso and he should also come to a finding on the question of legal necessity, that is, we consider that the Munsif should frame an additional issue as to whether Mt. Bilaso possessed only rights of a Hindu widow in the property or as to whether Mt. Bilaso was full owner of this property and we also consider that whatever his finding on this point, he should also come to a finding on the issue No. 2 as to whether there was any legal necessity for Mt. Bilaso to execute this mortgage. Costs incurred hitherto in the case will be costs in the case.

P.N./R.K. *Case remanded.*

A. I. R. 1931 Allahabad 413

PULLAN AND NIAMATULLAH, J.

Kesho Prasad Singh Bahadur of Dumraon—Plaintiff—Appellant.

v.

Bhau Nath Singh and *others*—Defendants—Respondents.

Second Appeal No. 729 of 1928, Decided on 15th January 1931, against decision of Dist. Judge, Ghazipur, D/- 31st January 1928.

Agra Tenancy Act (1901), S. 58—It is possible to have more than one tenancy in respect of same holding and landlord can eject one tenant while keeping in others.

The existence of two tenancies in respect of the same holding on different terms is a matter of rare occurrence; but there is nothing in law which makes it impossible that one of the several tenants should be liable to ejectment, whereas the others may not be so liable. It may be that the land to which the engagement of each refers is one and the same but in law each of them must be considered to possess a different tenure. Given the existence of the ground on which the law entitles the land holder to eject a nonoccupancy tenant, he has an unqualified right to eject such tenant and there is no legal bar to one of several tenants holding under different engagements being ejected, while the others, who are entitled under their engagements to continue as tenants, being left in the occupation of the land. So long as the nonoccupancy rights subsist a cotenant cannot successfully institute a suit against another tenant under a different engagement, but of the same holding. The landlord is the only person who can do it. [P 414 C 1,2]

Haribans Sahai—for Appellant.

Janaki Prasad and *A. P. Pandey*—for Respondents.

Niamatullah, J.—This appeal has arisen out of a suit brought by the plaintiff-appellant for ejectment of defendant 2 and, in the alternative for ejectment of all the defendants, six in number. The first Court decreed the suit for ejectment of defendant 2; but the lower appellate Court has dismissed it in toto. Hence this second appeal.

The suit was one under S. 58, Agra Tenancy Act, brought under very peculiar circumstances. The plaintiff, the Maharaja of Dumraon, leased 107 bighas odd to Madan Mohan Singh Bhau Nath Singh and Ram Khelawan Singh, the first three defendants for a term of seven years, 1316 to 1322 F., at a certain rent. The term reserved by the lease expired in 1322 F., but the lessees held over till 1327 F., when a fresh transaction, of which the nature and validity is in question in this case, was entered into. It appears that the original lessees and three other persons who are defendants 4, 5 and 6 negotiated with the plaintiff-appellant for a lease conferring rights of occupancy, not in the technical sense but rights of a more permanent character than those enjoyed by nonoccupancy tenants, on payment of a large sum as nazrana. For some reason, which is not clear from the record and is not material, defendant 2 Bhau Nath did not join the other defendants in the transaction. and a lease, dated 11th November 1918, was executed in favour of defendant 1 and defendants 3 to 6 conferring occupancy rights of the nature already described. Bhau Nath on the one hand did not vacate the land and on the other did not object to the introduction of the three new tenants into the holding. In course of the settlement operation which followed in 1329 F., a question arose as to whether defendant 2 should be recognized as a tenant or his rights had terminated with the execution of the lease already referred to. Eventually, the Commissioner decided, on 11th March 1925, that defendant 2, who was, before the execution of the lease, a nonoccupancy tenant, continued to be such, that he was in joint cultivating possession with the lessees and that he should be recorded as a nonoccupancy tenant with them. The suit which has given rise to the present appeal was instituted on the 30th September 1925 (before the passing of Act 3 of 1926 for ejectment of defendant 2 only, and in the alternative for ejectment of all the defendants on the nazrana paid by them being refunded by the plaintiff-appellant.

The lower appellate Court has refused to eject any of the defendants. The learned District Judge was of opinion that two separate tenancies cannot coexist and therefore defendant 2 who must be considered to be one of several tenants having a common holding, cannot be ejected. He also held that none of the defendants be ejected, because the lease conferring occupancy rights on defendant other than defendant 2 bars ejectment. He also expressed the opinion that the dispute being really one between co-tenants, the plaintiff landholder has no right to sue for ejectment. We may say at once that this view does not commend itself to us. If defendant 2 is liable to ejectment and if he is a non-occupancy tenant, the plaintiff landholder is entitled to eject him and is the only person who can eject him. So long as his nonoccupancy rights subsist, his cotenants cannot successfully institute a suit for ejectment either in the civil or the Court.

We have heard the learned counsel for defendant 2 at considerable length and are of opinion that the appeal must succeed. The existence of two tenancies in respect of the same holding on different terms is a matter of rare occurrence; but there is nothing in law which makes it impossible that one of the several tenants should be liable to ejectment whereas the others may not be so liable. It is conceivable that a number of tenants may have a right to cultivate a certain holding jointly, but their obligations to the landlord may vary. The learned advocate for the respondents has not referred us to any rule of law which precludes the possibility of such a state of things. His contention is based on the definitions of "tenant" and "holding." He argues that all the defendants collectively should be considered to be "tenants" with reference to this holding. Any of them individually is not. According to the definition of that term given in S. 4 (5), a tenant is a person by whom rent is or, but for a contract express or implied, would be liable to pay rent. All the requirements of this definition are made out in the case of defendant 2 who as a nonoccupancy tenant, as he claims to be, is liable to pay rent to the plaintiff-appellant. Indeed, the defendant insists on being allowed to stay on as tenant and be made liable to pay rent. "Holding" is defined in S. 4 (9) as meaning a parcel or parcels of land held under one tenure or one lease or engagement. There is no doubt that defendant 2 is holding over after the expiry of the tenancy created by the first lease for 1316 to 1322 F., whereas the other defendants are holding under a different engagement, namely, that embodied in the lease dated 11th November 1918. It may be that the land to which the engagement in case of each refers is one and the same, but in law each of them must be considered to possess a different tenure.

Section 58, Tenancy Act 2 of 1901 entitles a landholder to eject a non-occupancy tenant. Given the existence of the ground on which the law entitles the landholder to eject a nonoccupancy tenant, he has an unqualified right to eject his nonoccupancy tenant. There appears to be no legal bar to one of several tenants holding under different engagements being ejected, while the others, who are entitled under their engagements, to continue as tenants being left in the occupation of the land. One of the arguments addressed to us was that a new tenancy could not have been created by the plaintiff-appellant over the head of defendant 2, whose rights subsist. The logical result of the argument is that the subsequent engagement, in this case the lease dated 11th November 1918, was inoperative. We do not accept the correctness of this argument in the circumstances of this case; but assuming that the aforesaid lease is inoperative, all the defendants are nonocupancy tenants. And this is the contention of defendant 2. In that view the plaintiff-appellant is entitled to the second relief, viz. ejectment of all the defendants, as none of them acquired any right under the lease dated 11th November 1918, which is ex hypothesi abortive. In such a case there is nothing to prevent the plaintiff-appellant from obtaining ejectment of all the defendants in a formal manner, but simultaneously reaffirming the tenancy in favour of defendants 1 and 3 to 6 in terms of the lease. The argument therefore that one of several tenants in the position of the defendants cannot be ejected in law is demonstrably untenable.

It was strenuously contended before us that the Commissioner's decision, to which we have already referred, is conclusive as regards the status of defendants 1 and 3 to 6, who, according to the learned advocate for the appellant were declared by the Commissioner to be nonoccupancy tenants. Reliance is placed on Ss. 42, 54 and 57, Land Revenue Act, in support of this argument. On a reference to the Commissioner's order, it is clear to us that there was no dispute between the plaintiff-appellant on the one hand and defendants 1 and 3 to 6 on the other. Consequently, any expression of opinion as regards their status cannot be conclusive. As we read that order, the only question which the Commissioner was called upon to decide and did decide was whether defendant 2 was a co-tenant and was entitled to have his rights recorded in the revenue papers then in course of preparation. We hold therefore that that order does not, in any way, affect the rights of defendants 1 and 3 to 6.

For the foregoing reasons we are of opinion that this appeal must be allowed. The decree of the lower appellate Court is accordingly set aside and that of the Court of first instance is restored. The plaintiff-appellant shall have his costs from defendant 2. The costs will include counsel's fees in this Court on the higher scale.

B.V./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 415(1)

MUKERJI AND BENNET, JJ.

Sri Sheoji Maharaj Sarbarakar Baldeo Gir—Appellant.

v.

Beni Madho and *others*—Respondents.

First Appeal No. 195 of 1930, Decided on 23rd December 1930, against order of Addl. Dist. Judge, Ghaizpur, D/- 5th August 1930.

Agra Tenancy Act (1926). Ss. 249, 242 and 246—Appeal lies to High Court from original decrees under S. 242 or from appellate decrees under S. 246—No appeal lies from order of remand, it being order passed in appeal.

Appeals which lie to the High Court under the Act are either appeals from original decrees under S. 242 or appeals from appellate decrees under S. 246. An order of remand is an order passed in appeal and therefore no appeal lies to the High Court from such an order according to S. 249. [P 415 C 2]

Janki Prasad—for Appellant.

Bennet, J.—This purports to be a first appeal from an order passed in appeal by the learned District Judge of Azamgarh. The case was a case in a revenue Court being a suit for profits under S. 227, Agra Tenancy Act, Act 3 of 1926. The appellant before us is the defendant. The lower appellate Court set aside the decree of the Assistant Collector and remanded the case to the Assistant Collector for assessing profits under O. 41, R. 23, Civil P. C. Under S. 249, Agra Tenancy Act of 1926, "no appeal shall lie from any order passed in appeal." Accordingly no appeal lies to this Court. We may point out that appeals which lie to this Court under the Agra Tenancy Act of 1926 are either appeals from original decrees under S. 242 or appeals from appellate decrees under S. 246. The Act definitely states in S. 249 that there shall be no appeal from orders passed in appeal. An order of remand is an order passed in appeal. Accordingly, the present appeal does not lie to this Court. We have also examined the merits of the case for the appellant and consider that the decision of the lower appellate Court was correct. Accordingly we dismiss this appeal under O. 41, R. 11, Civil P. C.

R.M./R. K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 415(2)

MUKERJI AND BENNET, JJ.

Sheo Nath Singh and *another*—Defendants—Appellants.

v.

Lala Bansidhar—Plaintiff — Respondent.

Second Appeal No. 1207 of 1928, Decided on 11th March 1931, against the decision of 2nd Sub-Judge, Cawnpore, D/- 30th March 1928.

(a) Civil P. C. (1908), S. 2 (15)—Compromise — Vakalatnama authorizing pleader to appear—Pleader's statement of fact cannot be contradicted by party's mere allegation to contrary.

When a pleader, who is authorized by his vakalatnama to appear for a party, does appear and makes a statement of fact on behalf of that party, the mere allegation of that party to the contrary is not material sufficient to contradict his pleader. [P 416 C 2]

(b) Words and Phrases — "Moqadma" means "case" and also includes appeal.

The word "moqadma" is very general and should be translated by the word "case" and applies not only to an original suit but to an appeal. [P 416 C 2]

A. P. Dube, S. N. Seth and *Brij Narayan Mahrotra*—for Appellants.

N. P. Asthana—for Respondent.

Bennet, J.—This is a second appeal by the defendants against a decree of a lower appellate Court. The facts are that the plaintiff sued as zamindar of an entire mahal against the two defendants for certain acts of trespass alleged to have been committed by the defendants. The Court of first instance granted a relief in regard to para. (c) of the plaint only which was the removal of a brick-kiln from plot 322, area 2 bighas 9 biswas. The plaintiff filed an appeal, and that appeal was argued by the pleaders for the parties on 28th March 1928. The case was then adjourned to 30th March 1928 for judgment. On 30th March 1928 the pleaders for the parties appeared before the lower appellate Court accompanied by the plaintiff, and a statement was taken down by the Court at the dictation of the pleaders for the parties to the effect that the parties had come to terms and the terms were set forth. This statement was signed by the pleaders for each party, and by the plaintiff and by the lower appellate Court. The lower appellate Court then proceeded to pass a decree in the terms of this compromise.

The proceedings of the lower appellate Court were taken under O. 23, R. 3, Civil P. C. In second appeal various grounds have been taken to the effect that the defendants-appellants never intended to confer upon their pleader Pt. Mangali Parsad any authority to compromise the appeal, and that their vakalatnama had no such authority, and that he could not bind the defendants by a compromise which went beyond the subject-matter of the suit and the appeal. There is nothing on the record to sustain these allegations of the defendants. The defendants rely on an affidavit which they filed in certain proceedings by way of application for review of judgment, and that application was made on 10th April 1928. In the first place we are not sitting in appeal from the order refusing review of judgment; secondly, if we were sitting in appeal from that order, it is obvious that the mere affidavit of a defendant would not be sufficient material for us to come to a finding contrary to the finding of the lower appellate Court under O. 23, R. 3 that this suit had been adjusted by a compromise between the parties. It was open to the defendants to examine Pt. Mangali Parsad to prove the contention of the defendants that they did not intend to confer authority on him to compromise or that they did not give him instructions that the suit had been compromised. In view of the fact that the defendants made no attempt to examine their vakil on this point, we consider that the mere affidavit of the defendants would be altogether insufficient to establish these allegations of fact. When a pleader, who is authorized by his vakalatnama to appeal for a party, does appear and makes a statement of fact on behalf of that party, the mere allegation of that party to the contrary is not material sufficient to contradict his pleader.

The next point which was argued was in regard to the authority which is contained in the vakalatnama of Pt. Mangali Parsad. This vakalatnama clearly states in Cl. 2 that authority is given "*ya moqadma men tasfia karen.*" It was argued that this only applies to original suits, but the word "moqadma" is very much more general and should be translated by the word "case" and applies not only to an original suit but to an appeal. Further in Cl. 2 of the vakalatnama it is also stated "*ya pairavi moqadma ki karen.*" If the argument were correct, then the vakil would not have been authorized by his power of attorney to argue the appeal before the lower appellate Court. We consider that the vakalatnama clearly gives power to compromise cases to Pt. Mangali Parsad. Some reference was made to various rulings, but the circumstances of these rulings were entirely different and do not throw any light on the present case. As regards the allegation the compromise went beyond the subject-matter of the suit; it is founded on a statement in the terms of the compromise that the defendants should continue to pay Rs. 20 a year to the plaintiff for taking the produce of the trees. We do not consider that this matter travels beyond the subject-matter of the suit and in any case the compromise does not purport to be one which was made by the vakil but it purports to be one which was made by the party. Under these circumstances we consider that there is no force in this appeal and we dismiss it with costs.

B.V./R.K. *Appeal dismissed.*

* A. I. R. 1931 Allahabad 417

MUKERJI AND BENNET, JJ.

In the matter of *Ganga Sagar of Khurja, Bulandshahr.*

Civil Misc. Ref. Case No. 564 of 1930, Decided on 8th December 1930, made by Commissioner of Income-tax, Ghazipur, as per his Letter No. 75730/II, D/- 28th August 1930.

(a) Income-tax Act (1922), S. 66 (2)—Case stated to High Court—Commissioner failing to formulate only point of law arising on petition—High Court can frame and decide that point.

Where while stating the case to the High Court the Commissioner of Income-tax misunderstands the petition made before him and fails to formulate the only point of law that arises on the petition and on the decision of the Assistant Commissioner, the High Court can frame the issue of law and decide it: *A. I. R.* 1929 *All.* 819, *Rel. on.* [P 418 C 1]

*** (b) Income-tax Act (1922), S. 23 (3)—Assessment made on account books produced though other account books were not produced—Assessment is under S. 23 (3) and not under Income tax Act (1922), S. 23 (4).**

Where the assessee produces some of the account books but does not produce others, and the Income-tax Officer makes his assessment on examining the account books that were produced, the assessment is under S. 23 (3) and not under S 23 (4) and the assessee has a right of appeal in the regular way. [P 419 C 2]

(c) Income-tax Act (1922), S. 22 (4)—Word "require" means require as piece of relevant evidence.

The word "require" in S. 22 (4) means require as a piece of relevant evidence. It does not mean that the Income-tax Officer should ask for documents or account books which he does not think to be relevant at all. [P 419 C 1]

G. Agarwala and *K. N. Agarwala*—for Applicants.

U. S. Bajpai—for the Crown.

Mukerji, J.—This is a reference by the Income-tax Commissioner under S. 66 (2), Income-tax Act, made at the instance of one Seth Gangasagar. The facts leading to this reference, briefly, are these: Seth Gangadas was directed to produce his books in respect of his income for the "previous year" which commenced in Diwali 1984 and went up to the Diwali of 1985. He produced his account books, but failed to produce the account book of the year 1981 to 1982. He also failed to produce the account books of a certain firm known as Jogiram Jadki Prasad. The Income-tax Officer, Mr. Dhown, looked into the accounts submitted, calculated the income, allowed certain deductions, disallowed others and ultimately found that the total income which was taxable came to Rs. 7,00,000 odd. He calculated the income-tax and the super-tax and declared that the net amount came to Rs. 96,933-12-0 Having said so, the learned officer made the following remark:

> "The assessment is wholly based on accounts but is made under S. 23 (4), Income-tax Act, for the assessee's failure to comply with all the terms of the notice under S. 22 (4), in that the following accounts were deliberately withheld by the assessee, which according to general reputation the Rai Bahadur has got and which he could produce . . . ."

The assessee Seth Gangasagar thereupon filed an application under S. 27, Income-tax Act, before the same learned officer. It was disallowed and then the assessee went up in appeal to the Assistant Commissioner of Income tax. The appeal was under S. 31, Income tax Act. The appellate officer found that the assessee had really got in his possession the account books of the year 1981 to 1982 and had deliberately concealed them. As regards the other account books, he came to the conclusion that they were not in the assessee's possession. Then he considered the question whether the account books of the year 1981 to 1982 were relevant to the enquiry or not. He remarked:

> "The third point raises the question whether the books of account for the year 1981 to 1982 could be relevant to the assessment for the year 1929 to 1930. I think this question is not very material. An Income-tax Officer acts within his powers when he calls for the books of account of an assessee for three years prior to the year under assessment, which he is authorized to do under S. 22 (4), Income-tax Act."

In the result, the appeal was dismissed. Thereupon Seth Gangasagar made an application to the Income-tax Commissioner, as already stated, to state a case for the consideration of the High Court. In the application, the assessee said:

> "The view of law taken by the Income-tax Officer and the Assistant Commissioner of Income-tax that the assessment should be made under S. 23, Cl. 4, Income-tax Act, is incorrect, among others, for the following reasons . , . ."

We take it that the point of law that Seth Gangasagar wanted to raise was whether, in the circumstances of the case the assessment should be deemed to have been properly made under S. 23 (4) or whether it should have been treated as having been made under S. 23 (3) of the same Act.

The Commissioner of Income-tax thought that the petition of Seth Gangasagar did not raise any point of law at all and if any question did arise, it was the following, viz.:

> "Whether the findings of the Income-tax Officer and the Assistant Commissioner that the assessee could have produced the account books for the year 1981 to 1982, had he been so minded, were legally valid findings ?"

The question framed was a question of fact pure and simple and the High Court could not give any answer to such a question.

It has however been held in this Court in *Shiva Prasad Gupta* v. *Income-tax Officer, U.P., A. I. R.* 1929 *All.* 819, that when a case has been stated before the High Court by the Commissioner, the High Court can look into the facts and resettle the issues, as it were, and decide the issues of law that properly arose on the statement. The fact therefore that the Commissioner of Income-tax misunderstood the petition made before him and failed to formulate the only point of law that arose on the petition and on the decision of the Assistant Commissioner of Income-tax, does not preclude this Court from framing the issue of law that arose and to decide it. As stated above, the issue of law that arose in this case is as follows:

> " Whether in the circumstances of this case, the Income-tax Officer was right in calling his assessment an assessment under S. 23 (4) of the Act or whether in law the assessment was one under S. 23 (3) of the Act and whether in the latter case the assessee had a right of appeal in the regular way ?"

Now we come to the facts of the case. It appears that Seth Gangasagar was in the habit of submitting a statement of his income. For some time, the Income-tax Officer accepted his statement, but later Seth Gangasagar discontinued submitting the statement of his income. When he was required to state his income in a later year, he submitted a statement which was found to have been false and materially concealed his income. He was prosecuted and convicted for concealment of his income and he was assessed to the best of judgment by the then Income-tax Officer for the year 1927 to 1928. In that year, i. e., during the assessment for the year 1927 to 1928 a controversy arose as to whether the account books of the year 1981 to 1982 were in the possession of the assessee or not. The assessee asserted that the books had been lost in transit between Bombay and Khurja, but his statement was not believed. This statement formed the subject matter of a criminal prosecution, but no charge was framed and no conviction was obtained. In the following year, namely 1928 to 1929, the assessee was again called upon to produce among other documents the account books for the year 1981 to 1982. He reasserted what he had stated before, that the books were not in his possession or power and that they had been lost. His statement was disbelieved, and for the second time, an assessment to the best of the Income-tax Officer's judgment was made. We are now concerned with the third year, namely 1929 to 1930. In this year again, for the third time, the assessee has been asked to produce his account books of the year 1981 to 1982. The Sambat year 1981 to 1982 would correspond to the English year 1925 to 1926. The assessee again protested that his account books had been lost. This statement has again been disbelieved. The Income tax Officer, as already stated, based his assessment on the actual entries in the other books produced by the assessee and made his assessment. He did not believe that there was any extra income on which the assessee should have been assessed and that such income could have been discovered by the production of the books of the year 1981 to 1982. We have already quoted from the order of the Income-tax Officer. He said that this assessment was wholly based on accounts. But he thought that because the assessee had failed to produce the books for the year 1981 to 1982 the assessment should be treated as one under S. 23 (4), Income-tax Act.

The assessee's contention is that the books which were not forthcoming, namely of the year 1981 to 1982 were not required for the purposes of assessment and he should not have been called upon to produce them and that in any case, his statement that the books were lost, should have been believed. We are not in a position to say whether the books are actually in the possession of the assessee or whether they are lost, but we think that there is a good deal of strength in the contention that the books for the year 1981 to 1982 were not " required " within the meaning of S. 22 (4), Income-tax Act. An Income-tax Officer is entitled to call for documents which in his opinion would furnish him with relevant material for assessment of tax. Sub-S. 4, S. 22 runs as follows:

> "The Income-tax Officer may serve . . . . . . on any person upon whom a notice has been served under sub-S. 2, a notice requiring him . . . to produce . . . such accounts or documents as the Income-tax Officer may require."

The word "require" really means require as a piece of relevant evidence. The word "require" does not mean that the Income-tax Officer should ask for documents or account books which he does not think to be relevant at all. We have more than once pointed out the fact that the actual assessment was made on the account books which were actually produced before the Income-tax Officer. He did not say in his order that he guessed that any profit had been concealed by putting away the account books of the year 1981 to 1982. For the purposes of assessment therefore, the books of the year 1981 to 1982 are not "required." In the circumstances, the question arises whether the assessment is really under sub- S. 4, S. 23 or it is really under S. 23, sub-S. 3.

If we look to the principle on which the two subsections of S. 23 are based, we shall at once see why the two rules are different. Where the Income-tax Officer does not get proper material on which to find out the true income of an assessee, it is in the interest of the estate to guess the income of the assessee. The assessee cannot complain that he has been over-taxed, if owing to his own failure, the Income-tax Officer is not able to do justice towards him. It is the assessee who is in default and he has no right to complain. But where the proper materials are before the Income-tax Officer, he would utilize them and make assessment under S. 23 (3), which assessment would be liable to be re-examined by the appellate officer. When an assessment is made by the Income-tax Officer more or less on matters which have been guessed out, there cannot be any proper appeal to an appellate Court. The Income-tax Officer does very often possess extraneous information as to the income of a man and if he thinks that the assessee's proper income is at a certain figure, it is but right that his judgment should be final and there should be no appeal. There would be no sense in substituting the Income-tax Officer's "guess" by his superior Officer's "guess." It is on this principle that an appeal is shut out in the case of what has been called "best judgment assessment." It is true that all these reasons are not to be found within the four corners of the Income-tax Act, but one can easily see the reason for the rule.

If we are right in thinking that this is the principle on which the two rules, namely sub-S. 3 and sub-S. 4, S. 23, are framed, we can have no hesitation in coming to the conclusion that the assessment made in this particular case should not have been declared to have been an assessment under S. 23 (4). It should have been treated as an assessment under S. 23 (3). This therefore is our answer to the question which we have ourselves formulated.

As the applicant has succeeded entirely, we direct that he shall get his costs from the Government. We assess the fees payable to the learned counsel at Rs. 200. Let a copy of this judgment, under the seal of the Court be sent to the Commissioner of Income-tax. The Government Advocate is allowed a month's time within which to file a certificate of payment to him.

S.N./R.K. *Reference answered.*

A. I. R. 1931 Allahabad 419

SEN AND BENNET, JJ.

Babu Makund Lal — Defendant—Appellant.

v.

Bhola Rai and *others*—Plaintiffs—Respondents.

Second Appeal No. 1366 of 1930, Decided on 10th December 1930, against decision of Dist. Judge, Azamgarh, D/- 7th August 1930.

Limitation Act (1908), Art. 111 — Vendee to pay balance of purchase money to vendor's creditors, but not paying in reasonable time — Vendor suing for recovery — Suit governed is not by Art. 111 but by Art. 116— Vendor, though not compelled to pay, was justified in claiming refund—Limitation Act (1908), Art. 116.

Where in a sale deed there was a covenant that the vendee should pay the balance of purchase money to a certain specified number of vendor's creditors, but the vendee having failed to pay accordingly within a reasonable time, the vendor sued him for unpaid purchase money.

Held : that Art. 111 did not apply to the suit, for the covenant was not to pay to the vendor personally, the proper article applicable being Art. 116.

Held further : that the vendee could not say that no cause of action had arisen, the vendor not having been compelled to pay the sum. Vendor was justified in claiming the refund. [P 420 C 2]

Damodar Das—for Appellant.

Sen, **J.**—This is an appeal by the defendant and it arises out of a suit for recovery of unpaid purchase money together with interest. On 12th July 1926, Bhola Rai and others executed a sale deed of some zamindari share in favour of Rai Bahadur Babu Makund Lal appellant for Rs. 1,608-12-0. Rs. 308-12-0 were paid in cash at the time of registration. Rs. 1,300 were left with the vendee for payment of certain creditors.

It may be incidentally mentioned that the property sold was not burdened with any charge or mortgage in favour of the creditors for whom the sum of Rs. 1,300 was left.

The defendant vendee did not pay the amount to the creditors within a reasonable time and the result of it was that the present action was instituted on 4th October 1929.

The suit was resisted on the ground that it was barred by limitation under Art. 111, Lim. Act and that the plaintiff had not been compelled to pay the amount to the creditors and that no cause of action had accrued to the plaintiff inasmuch as the plaintiff had not to pay the money to the creditors. These pleas were repelled by the Court below. We are clearly of opinion that Art. 111, Lim. Act, is not applicable to the suit. Art.111 provides for a suit by a vendor of immovable property for personal payment of unpaid purchase money. There was no covenant in the sale deed dated 12th July 1926, for payment of Rs. 1,300 to the plaintiff personally. Art. 111 is therefore not applicable to the suit in hand. In our opinion the suit was in the nature of a claim "for compensation for the breach of a contract in writing registered." There was a registered covenant that the defendant would pay Rs. 1,300 to a number of specified creditors. The defendant did not pay that amount and there was clearly a breach of a covenant in writing registered within the meaning of Art. 116. The limitation provided for a suit under this article is six years from the date when the contract is broken. The suit having been instituted within six years of the breach of the covenant is therefore clearly within time.

It is next contended that no cause of action accrued for the suit because the plaintiff had not been compelled to pay the sum claimed to his creditors. There is clearly a fallacy underlying this argument. The money belonged to the plaintiff. The plaintiff had directed the defendant to spend the money for the plaintiff in a particular way but the defendant had failed to do so. The result of this act was that the plaintiff was damnified to this extent that the interest on the debts payable by the plaintiff was mounting up from day to day. Therefore there can be no doubt that a cause of action had accrued to the plaintiff and he was justified in claiming a refund of the money which belonged to him and which did not belong to the vendee. We overrule this plea. The result is that we dismiss this appeal under O. 41, R. 11, Civil P. C.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1931 Allahabad 420

SULAIMAN, AG. C. J. AND BAJPAI, J.

(Babu) Guru Charan Prashad and *others*—Petitioners.

v.

"Aj" Newspaper, Benares City—Opposite Party.

Misc. Case No. 194 of 1931, Decided on 16th March 1931.

*** Contempt — Will disputed in pending suit—Newspaper publishing it so as to prejudice party contesting it—Such publication amounts to contempt of Court.**

If before the disposal of a pending suit in which a will is disputed, newspapers are allowed to interfere by publishing the will by way of an advertisement in order to help to create an atmosphere in favour of the party relying upon it and adverse to those who are contesting it, a serious harm would be done to the fair administration of justice. The editor cannot claim a qualified privilege and the publication amounts to contempt of Court. [P 421 C 1]

K. N. Katju, Iqbal Ahmad and *K. Verma*—for Applicants.

K. D. Malaviya and *J. C. Mukerji*—for Opposite Party.

Sulaiman, Ag C J.—This is an application for taking proceedings against Babu Rao Vishnu Pararkar, Editor, Printer and Publisher of the "Aj" newspaper. The facts are not now in dispute and may be accepted as substantially set forth in the written statement filed by the editor. On 28th January 1931 one Beni Ram Shukul brought a certified copy of a document purporting to be a will of one Mt. Raj Rani and showed it to the assistant manager Sri Baldeo Das and requested him to publish it as an advertisement. Rs. 15 were paid for the costs of printing and the copy was published in the paper. We may assume in favour of the editor that the certified copy was actually shown to the assistant manager and was taken back after a copy of it had been retained in his office. The editor however does not deny that the assistant manager understood that this was a document filed in a suit pending in the Court of the Subordinate Judge of Benares. As a matter of fact the copy itself purported to have been taken from a document filed in that suit. It is also now an admitted fact that in the proceedings relating to the substitution of names in that suit the genuineness of the alleged will of Mt. Raj Rani was seriously disputed by the opposite party.

On these facts there cannot be the slightest doubt that the whole object of publishing the will in the advertisement column was to announce to the public that a will of Mt. Raj Rani existed and that the contents of it were as put in the paper. The whole purpose obviously must have been to make the public believe in the genuineness of the document and to act upon it. It is obvious that this was likely to prejudice the mind of the public against the party to the suit who was impugning the genuineness of the document. The publication undoubtedly helped to create an atmosphere in favour of the party relying upon it and adverse to them who were contesting it. If before the disposal of a pending suit in which a will is disputed newspapers are allowed to interfere in this way with a fair administration of justice there would be a serious harm done.

In Oswald's Contempt of Court (Edn. 3, p. 95) it is noted that

> "printing, even without comments, and circulating the brief, pleadings, petition, or evidence of one side only, is a contempt; and accounts of a case by notices, advertisements, or circulars, which misrepresent, or present mere ex parte statements of the case, are a contempt."

The publication of this will was in no sense the publication of a bona fide report of the proceedings of the Court. As a matter of fact it was not published as such. The editor therefore cannot claim a qualified privilege on that account. We are satisfied that the publication of this document if unchallenged would seriously prejudice the other party and he has a just right to complain.

We are satisfied that the act of the persons responsible for this paper amounted to a contempt of Court.

Before we pass our final order we would like to have a statement to be made on behalf of the Editor, Printer and Publisher of the "Aj" whether he is prepared to publish an unconditional apology in his paper without delay.

Mr. Malaviya on behalf of the editor states that the editor will be prepared to publish such an apology. Mr. Iqbal Ahmad states before us that in view of the fact that the editor has agreed to publish an apology he does not press for anything except nominal costs. We accordingly issue only a warning to Babu Rao Vishnu Pararkar the Editor, Printer and Publisher and order him to pay one rupee as nominal costs of the applicants.

V.B./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 421

MUKERJI AND BENNET, JJ.

In the matter of *Gur Charan Prasad, Khatri of Benares.*

Civil Misc. Ref. No. 433 of 1930, Decided on 5th December 1930, made by Commissioner of Income-tax, United Provinces D/- 18th June 1930.

(a) Income-tax Act (1922), S. 28—Income-tax Officer can impose penalty in proceedings under Income-tax Act (1922), S. 34.

The Income-tax Officer has jurisdiction to impose a penalty in the matter of income-tax in proceedings for assessment taken under S. 34. [P 422 C 1]

(b) Income-tax Act (1922), S. 28—Income-tax Officer cannot impose penalty in matter of super-tax.

The Income-tax Officer has no jurisdiction to impose a penalty in the matter of super-tax, for S. 58 (1) does not make S. 28 applicable to super-tax. [P 423 C 1]

(c) Income-tax Act (1922), S. 28—Word "income-tax" does not include "super-tax."

A section in regard to a penalty such as S. 28 must be strictly construed. It would not be correct to read the word "income-tax" in S. 28 as including "super-tax." [P.423 C 1]

(d) Income-tax Act (1922), S. 34 — Order of re-assessment is not necessary before issuing notice to show cause why penalty should not be imposed.

It is not necessary that an order of re-assessment should be made first before issuing notice to the assessee to show cause why a penalty should not be imposed on him. [P 423 C 2]

K. N. Katju and *K. Verma*—for Applicants.

U. S. Bajpai—for the Crown.

Bennet, J.—This is a reference by the Income-tax Commissioner of two points:

> (1) Has the Income-tax Officer jurisdiction to impose a penalty in the matter of income-tax in proceedings for assessment taken under S. 34, Income-tax Act?
>
> (2) Has the Income-tax Officer jurisdiction to impose a penalty in the matter of super-tax under the circumtances of this case?

The facts as found by the Income-tax Commissioner are that a certain assessee had made a return of income-tax and had been assessed on 27th February 1928; and subsequently on 15th March 1929, a notice was issued under S. 34 read with S. 22 (2), Income-tax Act, requiring the assessee to furnish a return, and on 20th April 1929 the applicant furnished the return showing the same figure Rs. 72,380 as his total income. This was the same figure which he had previously returned as is admitted before us. Subsequently the applicant's books were produced and his total income was found to have been Rs. 2,92,952 for the year in question. Accordingly the applicant was assessed to income-tax amounting to Rs. 27,265-13-0 and to super-tax Rs. 28,366. In addition to these assessments a penalty of Rs. 20,000 for income-tax and Rs. 20,000 for super-tax was imposed on the assessee under the provisions of S. 28.

The first question referred to us is whether the Income-tax Officer could impose the penalty of Rs. 20,000 under S. 28, Income-tax Act, in regard to the assessment of income-tax which he found to have been under-assessed by Rs. 27,265-13-0, less the original assessment of Rs. 6,635-3-0. The argument of the learned counsel for the assessee is to the effect that the penalty under S. 28 can only be imposed in the course of the original assessment proceedings, and that it cannot be imposed when the original assessment has been made and when further proceedings have been taken at a later date under S. 34, Income-tax Act. The argument is based on the fact that S. 28 does begin as follows:

> "If the Income-tax Officer . . . . in the course of any proceedings under this Act is satisfied that an assessee has concealed the particulars of his income. . . . ."

This shows that S. 23 is not merely intended by the Act to apply to an assessment under the preceding sections, but that it may refer to any proceeding whatever under the Income-tax Act. Now S. 34 is a section which lays down proceedings under the Income-tax Act and accordingly proceedings under S. 34 are proceedings in the course of which S. 28 may be applied.

Further S. 34 itself states that under that section there may be a notice under sub S. (2) and S. 22:

> "and the provisions of this Act shall, so far as may be apply accordingly as if the notice were a notice issued under that subsection."

Thus S. 34 also shows that proceedings taken under it follow the routine laid down by Chap. 4 for the original assessment of income to income-tax, and that S. 28, which is a part of that procedure, will also apply to the re-assessment proceedings under S. 34. We therefore answer the first question in the affirmative.

The second question is:

> "Has the Income-tax Officer jurisdiction to impose a penalty in the matter of super-tax under the circumstances of this case?"

As stated already the Income-tax Officer imposed a penalty of Rs. 20,000 in regard to super-tax as well as the penalty of Rs. 20,000 in regard to income-tax and he purported to impose this penalty for super-tax under the provisions of S. 28. Now for the Crown the argument as to the jurisdiction of the Income-tax Officer to impose this penalty for super-tax is stated as follows: Chap. 9, Income-tax Act, deals with super-tax and it states that super-tax is:

> "an additional duty of income-tax (in this Act referred to as super-tax)."

Section 58 (1) of that chapter is as follows:

> "All the provisions of this Act, except S. 3, the proviso to sub S. (1), S. 7, the proviso to S. 8, sub S. (2), S. 14 and Ss. 15, 17, 18, 19, 20, 21 and 48 shall apply, so far as may be, to the charge, assessment, collection and recovery of super-tax."

Now it is argued for the Crown that S. 28 is not one of the sections of the Act exempted from application to super-tax. On the other hand the learned counsel for the assessee points out that the provisions of the Act are by S. 58 (1) only to apply "so far as may be, to charge, assessment, collection and recovery of super-tax." There is nothing stated in regard to penalties. It was argued that penalty would come under the heading of assessment and no doubt S. 28 does come in Chap. 4 which is headed "deductions and assessment." But if that argument were accepted, then we would point to Chap. 6 which is headed "recovery of tax and penalties." Where S. 47 states that any sum imposed by way of penalty under S. 28 may be recovered in the manner provided by that chapter for the recovery of arrear of tax.

If therefore the argument were sound that S. 28 applied because Chap. 4 is headed "deductions and assessment," then the situation would be that the income-tax authorities could impose a penalty in regard to super-tax but could not recover that penalty. It is clear that the legislature could not have had such an intention. Now we consider that a section in regard to a penalty such as S. 28 must be strictly construed. The section states that

> "he may direct that the assessee shall, in addition to the income-tax payable by him, pay by way of penalty a sum not exceeding the amount of income-tax which would have been avoided if the income so returned by the assessee had been accepted as the correct income."

There is no word whatever in this section in regard to super-tax. If the legislature had intended that super-tax should also involve a penalty, we consider that the legislature would have clearly specified in this section: "in addition to the income-tax or super-tax if any payable by him." But in the absence of such precise words in the section we do not consider that the meaning should be read into this section by way of implication from S. 58 (1) and S. 55. The learned Government Advocate further referred to the fact that Act 11 of 1922 is known by the title of "Indian Income-tax Act." But the correct title of the Act is "an Act to consolidate and amend the law relating to income-tax and super-tax." The very title of the Act therefore observes the distinction to be drawn between income-tax and super-tax. Further in S. 2 of the Act there is no definition of income-tax as including super-tax. And the definition in S. 55, that super-tax is an additional duty of income-tax, also adds "in this Act referred to as super-tax." The Act therefore carefully states in S. 55 that super-tax is referred to in the Act as super-tax. It would therefore not be correct to read the word "income-tax" in S. 28 as including super-tax unless it were clearly laid down in S. 58 (1) that the provisions of the Act in regard to penalties would apply to super-tax. Accordingly we answer the second question in the negative. In argument before us a third point was raised in regard to procedure. We may observe at once that this point was not referred to us under S. 66, Income-tax Act. The point was that on 15th March 1929 the Income-tax Officer issued a notice to the assessee for re-assessment under S. 34. On 15th December 1929, having examined the books of the assessee he issued a further notice to the assessee to show cause on 19th December why a penalty should not be imposed on the assessee under S. 28. On 21st December 1929 the Income-tax Officer passed an order for re-assessment and also in the same order he directed that the assessee should pay a penalty under S. 28.

Now the point taken for the assessee is that S. 28 states that if the Income-tax Officer is satisfied that an assessee has concealed the particulars of his income he may impose a penalty. From these words it is argued that the order of re-assessment should have been made first, and then a notice should have issued to the assessee to show cause why a penalty should not be imposed on him. There is nothing whatever in S. 28 to indicate that this procedure is necessary. We consider that the requirements of S. 28 were fulfilled when, on 21st December 1929, the Income-tax Officer was satisfied that the assessee had concealed his income and he thereupon proceeded to impose the penalty under that section. The notice was only issued in compliance with the proviso in that section and that proviso does not say that the Income-tax Officer should be so satisfied when he issues the notice. We consider therefore that there was no defect in procedure and further it is not alleged that the assessee was in any way prejudiced by the procedure accepted. As the reference has been decided to an equal extent in the affirmative and in the negative, we direct that the parties shall pay their own costs. The learned Government Advocate states that he is entitled to a fee of Rs. 250 and we direct that that amount be taken as his fee.

S.N./R.K. *Reference answered.*

A. I. R. 1931 Allahabad 423

MUKERJI AND BENNET, JJ.

Lakhmi Chand—Appellant.

v.

B. Ram Lal Kapoor Vakil—Respondent.

Second Appeal No. 1045 of 1928, Decided on 3rd March 1931, against decision of Addl. Dist. Judge, Cawnpore, D/- 11th April 1928.

(a) Practice — Pleadings — " Not known " does not amount to " not admitted "—Civil P. C. O. 8, R. 5.

A pleading " not known " cannot be held tantamount to a pleading " not admitted." A defendant stating in the written statement that the contents of a paragraph in the plaint were not known to him cannot be held to have made the correct pleading laid down by O. 8, R. 5, Civil P. C. [P 424 C 1, 2]

(b) Succession Act (1925), S. 200—It is not necessary that curator must be specifically authorized by District Judge to institute or defend suits.

Section 200 does not state that a curator must be specifically authorized by the District Judge to institute or defend suits What S. 200 states is that the curator shall be subject to all the orders of District Judge, regarding the institution or defence of suits. [P 424 C 2]

(c) Succession Act (1925), S. 200, Proviso —Proviso does not relate to institution or defence of suits.

Proviso to S. 200 does not relate to the institution or defence of suits, but merely relates to what it specifically states, that is collection of debts or rents. [P 424 C 2]

(d) Succession Act (1925), S. 195—Termination of summary proceedings—Possession not delivered—Appointment of curator does not come to end.

The appointment of a curator does not come to an end when he had not handed over possession of the property, although the summary proceedings have terminated. [P 424 C 2]

K. N. Katju—for Appellants.

S. N. Seth—for Respondent.

Bennet, J.—This is a second appeal by the defendants against concurring orders of the two lower Courts that the plaintiff should be granted a decree on a claim for debt due from the defendants on a promissory note and on account books to the estate of one Bika Ram deceased. The only point which was argued before us was whether the suit was correctly brought in the name of B. Ramlal Kapoor, vakil, as curator of the property of Bika Ram, deceased. The plaint set forth that the plaintiff was appointed curator of this estate and that he was instructed by the Court of the Additional District Judge to realize the outstanding debts due to the deceased and that this order had been notified in the Government Gazette. In reply to this application the written statement, para. 1, stated that the contents of para. 1 were not known to the defendants. A distinction is to be drawn between this pleading of " not known " and the pleading in regard to the other paragraph of the plaintiff which was " not admitted." We consider that it cannot be held that the pleading " not known " is tantamount to the pleading " not admitted " and therefore we consider the defendants not having made the correct pleading laid down by O. 8, R. 5, cannot claim that the plaintiff was put to the proof of the allegations in para. 1 of the plaint. Para. 8 of the written statement pleaded:

> " The plaintiff has no right under the present circumstances to bring this suit, nor is the suit legally maintainable."

The judgments of the two lower Courts disclose that issue 1, which was framed on this pleading was argued on the point that according, to the defence the authority of the plaintiff had terminated because the summary proceeding contemplated by S. 193, Succession Act 1925, had terminated before the date of suit on 21st February 1927. That therefore is the only argument which should be raised by the defendant in second appeal and we consider that it is not open to the defendant to raise further arguments as to whether the plaintiff was expressly authorized by the District Judge to institute suits. We may however note in passing that S. 200, Succession Act 1925, does not state that a curator must be specifically authorized by the District Judge to institute or defend suits. What that section states is that the curator shall be subject to all orders of the District Judge regarding the institution or the defence of suits. Reliance was placed by learned counsel for the appellant defendant on the proviso to that section. But we consider that that proviso does not relate to the institution or defence of suits, but merely relates to what it specifically states, that is collection of debts or rents.

Now the curator gave evidence and he specifically stated that at the time of suit he had not handed over possession of the property although the proceedings on enquiry had terminated. S. 195, Succession Act 1925, states that the term of appointment of a curator shall be in no case beyond the determination of the summary proceedings and the confirmation or delivery of possession in consequence thereof.

Accordingly there is nothing in this section which would indicate that the appointment of the curator had come to an end at the time of suit. We consider therefore that the suit was correctly instituted. No other point was argued on the appeal. Therefore we dismiss this second appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 425

MUKERJI AND BENNET, JJ.

Jairaj Singh and *another*—Plaintiffs—Appellants.

v.

Mustafai Begum and *others* — Defendants—Respondents.

First Appeal No. 323 of 1927, Decided on 12th January 1931, against decision of Sub-Judge, Jaunpur, D/- 15th September 1926.

(a) Civil P C (1908), S. 115—Jurisdiction is power to hear and determine—It does not depend upon regular exercise of power or correctness of decision—Court has jurisdiction to decide wrong as well as right — Civil P. C. (1908), S. 11.

Since jurisdiction is the power to hear and determine it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. If the Court decides wrongly the wronged party can only take the course prescribed by the law for setting himself right and if that course is not taken the decision however wrong, cannot be disturbed : *A. I. R.* 1921 *Cal* 34 and 25 *Bom.* 337, *Foll.* [P 426 C 2]

(b) Civil P. C. (1908), O. 32, R. 7 — Mortgage suit compromised by guardian after obtaining sanction of Court—Sanction given after considering terms of compromise — Decree is binding on minor — Sanction of Court cannot be questioned.

Where in a suit for foreclosure of a mortgage a minor is represented by a guardian, who obtains permission of the Court to compromise the suit and duly signs the compromise on behalf of the minor and the sanction of the Court is given after the Judge has applied his mind to the terms of the compromise, the minor is bound by the decree in the foreclosure suit and the sanction of the Court cannot be questioned. [P 426 C 2]

K. N. Katju and *Gadadhar Prasad* — for Appellants.

Mushtaq Ahmad, *Zafar Mehdi* and *Haidar Mehdi*—for Respondents.

Bennet, J.—This is a first appeal by Jairaj Singh plaintiff 1 himself and his minor brother Ramdeo Singh plaintiff 2. These two plaintiffs are shown by the pedigree in the plaint at p. 7 of the typed book as being two of the five sons of Madho Singh and as members of a family which had several branches collateral with Madho Singh. The plaintiffs and other branches of the family owned certain property in four villages in Jaunpur District and the share of the family of Madho Singh in those villages was one-fifth. The claim of the plaintiffs in the present suit is that they should be placed in possession of the whole one-fifth share of the family of Madho Singh in these villages and that a deed of mortgage dated 12th June 1919 executed by certain members of the family in favour of defendant 1 should be declared invalid.

The history of the property in regard to this family is as follows:

On 17th August 1915 there was a mortgage by conditional sale for Rs. 8,628 executed by Madho Singh, father of the plaintiffs, and other collateral members of his family. On 30th August 1916 another mortgage for Rs. 750 was executed also by Madho Singh and others. These mortgages were in favour of defendant 1 Mt. Mustafai Begam. Defendant 1 brought a suit for foreclosure on these mortgages which was Suit No. 168 of 1919 instituted on 11th December 1919. In that suit plaintiff 1 Jairaj Singh remained ex parte. Other members of the family who were defendants came to terms of compromise with Mt. Mustafai Begam and an application was made on behalf of Ram Deo Singh minor and other minors by one Ram Karan Singh as guardian asking permission of the Court to compromise on certain terms. This application is shown on p. 15 of the supplemental typed book. The application sets forth that the suit for foreclosure had been brought on the basis of a valid bond with consideration and no good and proper defence could be put up on behalf of the minor defendant or any other defendants and if the matter be not compromised and a decree be passed, the property would be lost for ever and the defendants had no means to pay up the amount of the decree within the time which would be fixed by the Court in a decree for foreclosure:

> "Therefore the guardian of the defendants in the capacity of guardian along with other defendants executed a bond in favour of the plaintiff on 12th June 1919 and saved the property from the danger of being foreclosed, for ten years, and the defendants got a sufficient time to pay up the amount. This compromise has been entered into for the benefit of the minors."

On this application the Subordinate Judge granted permission to the guardian Ram Karan Singh to compromise, stating that:

"As the compromise is in the interest of the minors, it is ordered that permission to enter into a compromise be granted."

Accordingly, on 3rd September 1920, the Subordinate Judge passed a decree in this foreclosure suit stating that the compromise had been entered into by Ram Karan Singh on behalf of certain minors and as the other defendants were absent:

"against whom an ex parte decree was passed, it is ordered and decreed that a decree be passed in favour of the plaintiff to the effect that she shall remain in possession and occupation of the property claimed, under O 23, R. 3, Civil P. C., subject to the conditions laid down in the bond, dated 12th June 1919, and an ex parte decree be passed as against the defendants, who are absent according to the compromise given below."

Now the plaintiffs delayed until 6th May 1926 before they questioned this decree and on that date the plaintiffs filed the present suit. The plaintiffs took no steps to have the decree of 3rd September 1920 set aside either by an application for setting aside an ex parte decree on behalf of the major plaintiff Jairaj Singh or by way of appeal by the minor plaintiff Ram Deo Singh. The question before us is whether having allowed this decree to become final, it is open to the plaintiffs now to bring the present suit or whether the present suit is barred by the rule of res judicata under S. 11, Civil P. C.

On behalf of the appellant-plaintiffs it was argued by Dr. Katju that the decree of 3rd September 1920 in the suit for foreclosure was a decree which as regards the plaintiff Jairaj Singh, was passed without jurisdiction and therefore it was a nullity and should not be treated as res judicata under the provisions of S 11, Civil P. C. His argument was that because Jairaj Singh remained ex parte in that foreclosure suit therefore the only decree which the Subordinate Judge was competent to pass against Jairaj Singh was a decree for foreclosure, and that it was not competent to the Subordinate Judge to pass the decree which he did pass, that is, a decree stating that the plaintiff was to remain in possession on the terms of the mortgage executed on 12th June 1919.

It is to be noted that as found by the lower Court, a finding with which we are in agreement, Jairaj Singh was not a party to the execution of that mortgage. On the question of jurisdiction we may refer to *Hriday Nath Roy* v. *Ram Chandra Barna Sarma* (1). In this, the meaning of the word "jurisdiction" has been discussed at considerable length and we are in entire agreement with the meaning which has been assigned to that word in that judgment. On p. 148 it is stated:

"Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. As an authority for this proposition reference may be made to the celebrated dictum of Lord Hobhouse in *Malkarjun* v. *Narhari* (2) at p. 347:

'A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting himself right; and if that course is not taken, the decision however wrong, cannot be disturbed.' "

Applying this dictum to the present case, we are of opinion that although it might be argued that the decision of the learned Subordinate Judge of 3rd September 1920 in the suit for foreclosure was a wrong decision, it cannot be said that he was acting without jurisdiction in making the decree which he did make. It would have no doubt been open to the plaintiffs to question that decree in a Court of appeal. But the plaintiffs have not taken that course and they have come with a subsequent suit and rely on the argument that the decree of 3rd September 1920 was passed without jurisdiction. We consider that this plea is unsound and we consider that the plaintiff Jairaj Singh is bound by the decree of 3rd September 1920 and that as regards him it cannot be set aside in the present suit.

Now as regards the minor Ramdeo Singh, he was represented by a guardian Ram Karan Singh in the foreclosure suit of 1920 and that guardian obtained the permission of the Court to compromise their suit and the guardian duly signed the compromise on behalf of the minor. We consider therefore that the minor is also bound by the decree passed in the suit for foreclosure. It was argued that the sanction of the Judge to compromise might be questioned. Such a sanction could only be questioned on the ground that the Judge had failed to apply his mind to the terms of the compromise. We consider from the order of the Subordinate Judge that he did apply his mind to those terms and having considered whether the compromise was to the advantage of the minor he came to the conclusion that it was to his advantage and accordingly gave permission to compromise.

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(1) A. I. R. 1921 Cal. 34=48 Cal. 138 (F.B.).
(2) [1901] 25 Bom. 337 = 27 I. A. 216=7 Sar. 739 (P.C.).

The learned Subordinate Judge has dismissed the suit of the plaintiffs holding firstly that they are not entitled to possession and secondly that they are not entitled to redeem, because the mortgage which was embodied in the compromise decree of 3rd September 1920 gives the term of ten years for the mortgage to hold possession and the suit for redemption is therefore premature. We agree with this finding of the lower Court and we dismiss this appeal with costs.

As this was a pauper appeal, the court-fee payable to the Government on account of the appeal will be recoverable from the adult appellant Jairaj Singh.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 427

MEARS, C. J. AND SEN, J.

Mufassil Bank Ltd.—Defendant—Applicant.

v.

Molvi Subhan Ullah and *others*—Opposite Parties.

Civil Revn. No. 255 of 1929, Decided on 21st January 1931, against order of Munsif, Gorakhpur, D/- 6th April 1929.

Civil P. C., (1908), Ss. 151 and 152—Court has no authority to annual final decree passed in due process of law in exercise of assumed inherent jurisdiction.

Section 151 does not confer a new power in the Court but makes a statutory recognition of the inherent power of the Court to do certain things ex debito justitiae. But the Court has no authority to annul a final decree passed in favour of a party in due process of law in the exercise of an assumed inherent jurisdiction.

Subsequent mortgagee sued the prior mortgagee and the purchaser of the equity of redemption for redemption of prior mortgage. The preliminary decree provided that on failure to pay certain amount to prior mortgagee plaintiff will lose his right to redeem. In the final decree it was provided that plaintiff having failed to pay the amount the mortgaged property will be sold. The purchaser of the equity of redemption did not appeal against this decree but subsequently applied under Ss. 151 and 152 on the ground that the two decrees preliminary and final were at variance in essential particulars.

Held: that S. 152 was wholly inapplicable and that S. 151 also was equally inapplicable. [P 428 C 1,2]

G. Agarwala—for Applicant.

Mohammad Hussain—for Opposite Parties.

Sen, J.—This is an application for revision under S. 115, Civil P. C., and arises out of certain proceedings in a suit for redemption of a mortgage. On 23rd October 1918, Mt. Saghir-un-nissa in consideration of Rs. 2,500 made a usufructuary mortgage of the property in dispute in favour of a company known as the Salt Company. This Salt Company became subsequently amalgamated with the Mofussil Bank Limited.

In 1926, Mt. Saghir-un-nissa made a simple mortgage of the same property in favour of Hansraj Saithwar. She sold her equity of redemption to Moulvi Subhan Ullah. Hansraj brought a suit for redemption of the mortgage deed dated 23rd October 1918, and impleaded the Mufassil Bank, the Salt Company, Mt. Saghir-un-nisa and Subhan Ullah as defendants.

A preliminary decree was passed under O. 34, R. 7 on 30th April 1927. An application was made for the grant of a final decree on 22nd December 1927, and a final decree was obtained on 31st March 1928.

The preliminary decree provided that the property was to stand redeemed if the plaintiff Hansraj paid Rs. 11,976-8-0 to the Mufassil Bank on or before 30th October 1927, but that if the plaintiff failed to pay that amount within the time indicated, the plaintiff was to lose his right of redemption. In the final decree which was passed, it was provided that on plaintiff's failure to pay the amount, the mortgaged property was to be sold.

The final decree against Subhan Ullah was ex parte. An application was made to set aside this decree but it was dismissed as time barred. Subhan Ullah preferred no appeal from the final decree; and upon the expiry of the period for appeal, that decree became final and conclusive between the parties.

In the action as originally brought, Subhan Ullah and the Mufassil Bank Limited were ranged on the same side as defendants. When Hansraj did not deposit the amount as directed in the decree, the Mufassil Bank came forward with an application for the grant of a final decree. Subhan Ullah did not oppose this application and as we have seen, the final decree was passed against him ex parte.

On 19th January 1929, Subhan Ullah made a curious application purporting to be made under Ss. 151 and 152, Civil P. C. He contended that the two decrees preliminary and final were at variance in essential particulars and that the Court had exceeded its powers in directing a sale of the property. in the event of Hansraj not paying the decretal amount to the Mufassil Bank. The City Munsif of Gorakhpur has, by his order of 6th April 1929, allowed this application:

> "The result is that I allow application under Ss. 151 and 152 and quash the proceedings taken so far under the final decree and direct the decree-holder to apply for necessary correction of the decree. Execution will be taken out de novo."

The Mufassil Bank has applied to this Court for the revision of this order. The judgment of the Court below is a confused jumble of facts and law. The Court has not considered at all the provision of O. 34, R. 8, sub Cl. (3), under which it was open to a defendant to ask upon the happening of the contingency as has happened in this case, that the mortgaged property or a sufficient part thereof be sold. The Court below has not paid any regard to the fact that the right referred to above, is independent of the terms in which a preliminary decree for redemption should ordinarily be cast.

The Court below has assumed that the variation in the terms of the final decree must be treated as merely clerical or arithmetical mistakes or errors arising from an accidental slip or omission.

We are of opinion that S. 152, Civil P. C. is wholly inapplicable. S. 151 is equally inapplicable. This section does not confer a new power in the Court but makes a statutory recognition of the inherent power of the Court to do certain things ex debito justitiae. But the Court has no authority to annul a final decree passed in favour of a party in due process of law in the exercise of an assumed inherent jurisdiction. The Court has no inherent powers to bring about this result and the act of the Court amounts to an usurpation of authority. By lapse of time, an important right had accrued in favour of the Mufassil Bank and the Court below was not competent either to modify or annul the final decree. We were prepared to safeguard the interest of Subhan Ullah and we laid down certain conditions in our order dated 16th December 1930. Neither Mr. Muhammad Husain nor his client has appeared before us today and our directions have not been carried out. We allow this application for revision, set aside the order of the Court below dated 6th April 1929 and dismiss the application of Subhan Ullah dated 19th January 1929 with costs both here and heretofore.

S.N./R.K. *Order set aside.*

A. I. R. 1931 Allahabad 428

SEN, J.

Puttulal—Plaintiff—Applicant.

v.

Raj Narain— Defendant — Opposite Party.

Civil Revn. No. 420 of 1930, Decided on 28th January 1931, against order of Sm. C. C. Judge, Etah, D/- 26th July 1930.

Contract Act (1872), S. 23—Cosharer in same mahal withdrawing candidature for lambardarship in consideration for sum to be annually paid—Contract is against public policy.

An agreement by one cosharer in a mahal to pay a certain sum of money annually to another cosharer in the same mahal in consideration of the latter withdrawing his candidature for lambardarship in favour of the former amounts to an agreement to bargain or traffic relating to a public office, and as such is opposed to public policy : 85 *P. R.* 1893, *Rel. on.*

[P 429 C 2]

Krishna Murari Lal—for Applicant.

Baleshwari Prasad—for Opposite Party.

Judgment.—This is an application for revision under S. 25, Provincial Small Cause Courts Act, and has been filed by the plaintiff who had sued for recovery of Rs. 28 principal and interest from the defendant. Parties to the suit are brothers, who owned shares in mahal Banal in equal moieties. The office of lambardar having fallen vacant, both of them applied for appointment as lambardar. On

15th June 1925, an agreement was entered into between the parties, whereby Puttu Lal, the plaintiff withdrew his candidature for lambardarship in favour of his brother Raj Narain, and the latter agreed in consideration of this to pay the plaintiff Rs. 8 annually out of the collection dues in respect of the irrigation charges of the village Binal. There was a clause in the instrument that the aforesaid sum was payable by Raj Narain to Puttulal from year to year during the continuance of Raj Narain as lambardar. On 11th February 1930, Puttu Lal instituted a suit in the Court of Small Causes for recovery of the annuity for three years together with interest. The suit was resisted upon the ground that the agreement was opposed to public policy and as such was void in law. This contention was upheld by the Court below and his suit was dismissed.

It has been contended before me that the agreement in question is not opposed to public policy and is not void under S. 23, Contract Act. The office of a lambardar is a public office. Provision has been made in S. 45, Land Revenue Act (Act 3 of 1901, Local) for the appointment of the lambardar in any mahal or part of the mahal. Certain rules have been made by the Board of Revenue and sanctioned by the Local Government with reference to the appointment of the lambardar. These rules are to be found in Circular No. 8-iii sanctioned by the Local Government Order No. 555-333 F, dated 24th February 1902 and have the force of law. R. 9 provides that no person shall be appointed to be a lambardar: (a) who is not a cosharer of the mahal and in possession of his share (b) whose share is heavily burdened with mortgages or other encumbrances ; or (c) who in the opinion of the Collector is not competent to perform the duties of the office or whose appointment is inadmissible on account of his bad character. The eligibility for lambardarship therefore depends upon certain grounds of fitness recognized by the Government. Remuneration receivable by the lambardar has also been provided for in these rules. It does not appear whether the collection dues in respect of the irrigation charges of any village are dues which are associated with or dissociated from the office of the lambardar as such.

Any traffic or bargain relating to public offices is opposed to public policy upon the obvious principle that any agreement relating to such traffic or bargain is calculated to prejudice the interest of the public by obstructing or interfering with the selection in office of the most competent person. The agreement which is sought to be enforced in this case obviously infringes this principle. An agreement by one cosharer in a mahal to pay a certain sum of money annually to another cosharer in the same mahal in consideration of the latter withdrawing his candidature for lambardarship in favour of the former amounts to an agreement to bargain or traffic relating to a public office, and as such is opposed to public policy. I have been referred to a certain number of authorities. It will not be profitable to discuss them in detail, because the facts are not parallel to the facts of the present case. The nearest approach to the present case is a decision of the Chief Court of the Punjab in *Amir Khan* v. *Saheb Ali* (1). In this case the plaintiff sued to recover from the defendant damages for the breach of a contract the terms of which were as follows :

> " That the plaintiff should bear all the expenses to be incurred in a lambardari suit brought by himself and the defendant, that both should eventually bear the costs of such suit equally and that the successful party should pay to the other half the pachotra of the office."

It was held by Benson, J. that the agreement was void ab initio as it offended against the provisions of Ss. 23 and 24, Contract Act. This case supports the contention of the defendant. I dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

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(1) [1893] 86 P.R. 1893.

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* A. I. R. 1931 Allahabad 429

Special Bench

SULAIMAN, AG. C. J., SEN AND NIAMATULLAH, JJ.

B. Ram Karan Singh dead) and *others* —Plaintiffs —Appellants.

v.

Nakchhad Ahir and *others* — Defendants—Respondents.

Second Appeal No. 195 of 1928, (Connected with Second Appeal No. 583 of 1928), Decided on 6th May 1931, against decision of Dist. Judge, Azamgarh, D/- 2nd November 1927.

✲(a) Civil P. C. (1908), O. 2, R. 2—Suit for mesne profits accruing after institution of previous suit is not barred.

The claim for mesne profits accruing subsequent to the institution of the previous suit is a claim based on a different cause of action and is not barred by the provisions of O. 2, R. 2 : 60 *I.C.* 65; 21 *All.* 425 (*F.B.*) and 35 *All.* 512 (*F.B.*) *Foll* ; 17 *All.* 533 ; 12 *Cal.* 482 ; 30 *All* 225 and 36; *A.I.R.* 1927 *All.* 716 and *A.I.R.* 1924 *All.* 909 *Expl.* and *Diss. from* ; 38 *Mad.* 829, *Ref.*

[P 431 C 2]

✲(b) Civil P.C. (1908), O. 20, R. 12—O. 20 R. 12, being directory only, does not compel plaintiff to claim future mesne profits in suit for possession—Civil P.C O. 2, R. 2.

Although no doubt under O. 20, R. 12, a Court may pass a decree directing an enquiry into the future mesne profits, the provision is only directory and not mandatory giving the Court direction to pass a preliminary decree for mesne profits and does not compel a plaintiff to unite the claim for future mesne profits in a suit for recovery of possession of immovable property.

[P 432 C 2]

Shambhu Prasad for *Shiva Prasad Sinha*—for Appellants.

R. K. Malaviya, K. Verma, H.P. Agarwal and *Krishna Murari Lal*—for Respondents.

Sulaiman, Ag. C. J.—This case was referred to a Division Bench by a learned Judge of this Court, and has now been referred to a larger Bench on account of some conflict of opinion which has prevailed in this Court.

The present plaintiffs instituted a suit in 1925 for possession of the tenancy lands against the defendants treating them as trespassers. In that plaint they claimed mesne profits up to the date of the institution of the suit. The defence of the defendants was that they were the tenants of the plaintiffs. The defendants were accordingly referred to the revenue Court which held that the relationship of landlord and tenant was not established. In consequence of this finding the civil suit was decreed against the defendants. Possession of the land was delivered on 1st April 1927.

The plaintiffs then instituted the suit out of which this appeal arises for recovery of mesne profits from 24th August 1925, the date of the institution of the first suit till 1st April 1927, the date on which they obtained possession. It was pleaded in defence that the claim was barred by the provisions of O. 2, R. 2, Civil P C. There was a dispute as regards the amount of the mesne profits claimed by the plaintiffs but both the Courts below assessed it at Rs. 100. The Courts below relying on the ruling of this Court in the case of *Goswami Gordhan Lalji Maharaj* v. *Bishambhar Nath* (1), have held that O. 2, R. 2, Civil P. C., is a bar to the present claim.

Order 2, R. 2, requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action and that if he omits to sue in respect of any portion of his claim, he shall not afterwards be allowed to sue in respect of the portions so omitted. As pointed out by their Lordships of the Privy Council in *Saminathan* v. *Palaniappa* (2) at p. 148 (of 41 *I. A.*) in which the interpretation of S. 34, Ceylon Civil P. C., which corresponds exactly with O. 2, R. 2, of our Court was under consideration :

> "The section is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same cause of action of different causes of action, even though they arise from the same transactions. The plaintiff, although he is bound to include in his claim all the reliefs which he can claim in respect of the same cause of action, is not bound to include all causes of action for which he may have a remedy against the defendant even though they may arise from one and the same transaction. O. 2, R. 4, provides that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof etc."

It would seem as if there would have been no right to join the claim for mesne profits with a claim for recovery of immovable property if this provision were not to be found in the Civil Procedure Code. This was the view expressed by the learned Judges of this Court in two Full Bench cases, namely, *Ram Dayal* v. *Madan Mohan Lal* (3) at pp. 431 and 439, and *Nandan Singh* v. *Ganga Prasad* (4) at p. 516. If a plaintiff had been bound to claim future mesne profits in a suit for recovery of possession of his immovable property there would have been no necessity to provide an exception as is done in R. 2.

The Full Bench case *Nandan Singh* v. *Ganga Prasad* (4) was followed in *Mahomed Ishaq Khan* v. *Muhammad*

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(1) A. I. R. 1927 All. 716=49 All. 597.

(2) [1914] 41 I. A. 142 = 26 I. C. 228=(1914) A. C. 618 (P.C.).

(3) [1899] 21 All. 425 = (1899) A. W. N. 153 (F.B.).

(4) [1913] 35 All. 512=20 I. C. 892 (F.B.).

Rustam Ali Khan (5), a case which arose under the new Code and the same view was adhered to. It is unnecessary to consider cases bearing on suits for redemption of mortgages and subsequent suits for recovery of profits, for mortgages stand on an entirely different footing. Under O. 34, R. 7, it is incumbent upon a Court in a suit for redemption to fix a date for payment and to order accounts to be taken up to that date. That provision is mandatory. On the other hand under O. 20, R. 12, a discretion is given to the Court to pass a decree for mesne profits or direct an enquiry as to mesne profits from the institution of the suit to be made and then pass a final decree for the amount found due. This provision is directory and not mandatory.

Coming to the cases of this Court which alone we need consider and which have bearing on the question of mesne profits, we find that reliance has been placed in some of the subsequent cases on the cases of *Mewa Kuer* v. *Banarsi Prasad* (6). In that case, first, a suit for possession and for rent was brought and decreed. Subsequently a suit for mesne profits for a period which included a part of the period prior to the suit was filed. The Courts below gave a decree for the period subsequent to the institution of the suit. The Bench held that the claim for the mesne profits for the period prior to the suit was barred by the provisions of S. 43 of the old Code of Civil Procedure. That a subsequent claim for mesne profits prior to the suit would be barred is also apparent from the case decided by their Lordships of the Privy Council: *Madan Mohan Lal* v. *Sheo Shankar Sahai* (7). These cases are accordingly distinguishable from the present case in which that point does not arise. *Miyan Khan* v. *Sarfarz Khan* (8), decided by a Bench considering of Walsh, J., and one of us is a direct authority for the proposition that the claim for mesne profits accruing subsequent to the institution of the previous suit is a claim based on a different cause of action and is not barred by the provisions of O. 2, R. 2. There is however a single Judge decision in support of the view taken by the Courts below. Stuart, J., in *Girwar Singh* v. *Ram Piari Kuer* (9) came to the conclusion that inasmuch as

> "the law permits a plaintiff in a suit for possession to claim mesne profits not only up to the date of suit or decree but upto the date of delivery of possession, the failure of a plaintiff to make the claim in the suit for possession debars him from putting it forward in a separate suit."

He however relied on two cases reported in *Ramdin* v. *Bhup Singh* (10) and *Kashi* v. *Bajrang* (11), which related to suits for redemption of mortgages and which in our opinion, were not directly applicable. His attention was not drawn to the case of *Miyan Khan* (8) referred to above.

We now come to the other case relied upon by the Courts below, namely *Goswami Gordhan Lalji Maharaj* v *Bishambhar Nath* (1), decided by Walsh and Banerji, JJ. Unfortunately the respondent in that case was not represented and the case was heard ex parte. The attention of the learned Judges was not drawn to the previous case of *Miyan Khan* (8) decided by a Bench of which Walsh, J., himself was a member. The learned Judges felt considerable doubt as to the correctness of the contention put forward on behalf of the defendants-appellants in that case, for they remarked that there was a great deal to be said for the plaintiff. In fact they should have been disposed to take the same view themselves if they had been free to do so. They pointed out that O. 2, R. 2 (R. 4 ?) was directory and not mandatory and they also remarked that later on the question may be referred to a larger Bench for consideration. The learned Judges however felt that they could not depart from the practice of the Court as indicated by two cases, *Ram Din* v. *Bhup Singh* (10), and *Kashi* v. *Bajrang* (11), which as we have already pointed out, related to the redemption of mortgages, and the case of *Girwar Singh* v. *Ram Piari Kuer* (9) decided by a single Judge of this Court which we have noted above. This case therefore rather expresses the view of the Bench in favour of the appellant though the final decision of the case went against the defendant on the supposed ground that there was an established practice of the Court in favour of the bar of O. 2, R. 2.

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(5) [1918] 40 All. 292=44 I. C. 88.
(6) [1895] 17 All. 533.
(7) [1886] 12 Cal. 482.
(8) [1920] 60 I. C. 65.
(9) A.I.R. 1924 All. 909=78 I. C. 326.
(10) [1908] 30 All. 225=5 A. L. J. 192=(1908) A. W. N. 96.
(11) [1908] 30 All. 36=4 A. L. J. 763 = (1908) A. W. N. 281.

No other case of this High Court which relates to a subsequent suit for mesne profits has been brought to our notice.

We may point that the preponderance of opinion in the other High Courts is undoubtedly in favour of the view that there is no bar of O. 2, R. 2 in such cases. A Full Bench. of the Madras High Court in *Pannammal* v. *Ramamirda Aiyar* (12) has expressed that opinion categorically. It seems to us that the cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits. The provisions of O. 2, R. 4 indicate that the legislature thought it necessary to provide especially for joining a claim for mesne profits with one for recovery of possession of immovable property and that but for such an express provision such a combination might well have been disallowed. A suit for possession can be brought within twelve years of the date when the original dispossession took place and the cause of action for recovery of possession accrued. The claim for mesne profits can only be brought in respect of profits within three years of the institution of the suit and the date of the cause of action for mesne profits would in many cases be not identical with the original date of the cause of action for the recovery of possession. Mesne profits accrue from day to day and the cause of action is a continuing one, and arises out of the continued misappropriation of the profits to which the plaintiff is entitled. In many cases the plaintiff may not be in a position to anticipate the exact amount of mesne profits to which he may become entitled after the institution of the suit. The object of O. 2, R. 2 is the prevention of the splitting up of one cause of action and not to compel the plaintiff to seek all the remedies which he can claim against the same defendants on account of several causes of action in one and the same suit. In one case the multiplicity of suits is to be avoided and in the other multifariousness of the causes of action. It is also clear that the bundle of facts which would constitute the cause of action in favour of the plaintiff would not necessarily be identical in a suit for recovery of possession and in a suit for mesne profits. In a suit for possession the plaintiff need only prove his possession within 12 years and the defendant's occupation of the property without right. In a suit for mesne profits he had, in addition, to prove the duration of the whole period during which the dispossession continued including the date on which it terminated as well as the amount to which he is entitled by way of damages. Evidence to prove these latter facts would undoubtedly be different from that which would be required to prove the first set of facts. Again, if there are a number of defendants who are in possession of different portions of the property there may be considerable difficulty in ascertaining the amount which each is liable to pay and the plaintiff may think it convenient to postpone an enquiry of such a complicated nature to a suit after his right to possession has been fully established.

No doubt under O. 20, R. 12, a Court may pass a decree directing an enquiry into the future mesne profits. But this rule has been repeatedly interpreted to be only directory and not mandatory and as giving the Court discretion to pass a preliminary decree for mesne profits. Much less does it compel a plaintiff to unite the claim for future mesne profits in a suit for recovery of possession of immovable property.

We are therefore of opinion that in view of the weight of authority as well as the considerations noted above the decrees of the Courts below are wrong and the present suit for recovery of mesne profits, which accrued after the institution of the previous suit and which had neither been claimed nor refused by the Court is no bar to O. 2, R. 2. As the amount of the damages has already been ascertained, we allow the appeal and setting aside the decrees of the Courts below decree the plaintiffs' claim for recovery of Rs. 100 as mesne profits with proportionate costs in the first Court and full costs in the lower appellate Court and in this Court.

V.B./R.K. *Appeal allowed.*

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(12) [1915] 38 Mad. 829=27 I. C. 679 (F. B.).

A. I. R. 1931 Allahabad 433

KENDALL, J.

Raghunandan Prasad—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 828 of 1930, Decided on 16th March 1931 against order of Sessions Judge, Bareilly, D/- 13th August 1930.

(a) Criminal P. C. (1898), S. 133—"Community" means same as "neighbours" or "public".

The meaning of the word "community" as used in para 3, S. 133, cannot be distinguished from the words "public" or "neighbours". Hence an act found to be injurious to the physical comfort of the neighbours must be held to be so to the physical comfort of the "community": 57 *I. C.* 829; 34 *Cal.* 73 and 25 *Cal.* 425, *Rel. on.* [P 434 C 1]

(b) Criminal P. C. (1898), S. 539 (b)—Failure to record memorandum of observed facts at inspection would not vitiate proceedings unless it occasions failure of justice prejudicing accused.

Failure to record a memorandum of the relevant facts observed at the inspection in spite of the mandatory provisions of S. 539 (b), though an irregularity, would not be sufficient to vitiate the whole of the proceedings unless it occasions a failure of justice by prejudicing the accused. [P 434 C 1]

G. S. Pathak—for Applicant.

N. U. A. Siddiqi—for Opposite Party.

The Assistant Govt. Advocate—for the Crown.

Judgment—This is an application for the revision of an order of the City Magistrate of Bareilly made under S. 133, Criminal P. C., forbidding the applicant to work the engine of his factory from 9 p. m. to 5 a.m. The learned Sessions Judge after considering the case fully has declined to interfere with the orders passed. The applicant owns a factory in the city, the engine of which it appears, makes a considerable noise, but the factory has been working for a number of years. A complaint was made in March 1930 and the evidence produced before the Magistrate showed that although the factory had been working for some years in a congested part of the town, new machinery had been added from time to time and especially an oil engine had been replaced by a steam engine within the last two years. The complaint alleged that the noise made by this engine amounted to a public nuisance within the meaning of Ch. 10, Criminal P. C., and the question before the Court was whether in the circumstances of the case it could be held to be "injurious to the physical comfort of the community". The Sessions Judge has come to certain findings which may be summarized as follows:

> "It is impossible for the complainant to sleep at night or to concentrate on his work during the day. The factory has been in existence for a good many years and it is difficult to see how the Courts can order the removal of a well-established factory merely because it is a nuisance to its neighbours. The noise of the engine may, when it is working fully, be a great nuisance to the neighbours but it cannot be said that the noise of the steam engine in these days of hideous noises is so intolerable as to make the life of the neighbours impossible."

Assuming as I must do that these findings are corect, the question is whether the Magistrate was justified in interfering with the working of the engine under S. 133, Criminal P. C. It is not necessary to show that the noise made by the working of the engine is absolutely intolerable. The finding of the Sessions Judge is sufficient to show that it is a serious nuisance to the neighbours, and not only to the complainant. If it is a serious nuisance and if it is sufficient to prevent neighbours from sleeping at night and from concentrating on their work during the day, it must undoubtedly be held to be injurious to their physical comfort. The paragraph to which I have referred in S. 133, Criminal P. C., does not, it is true, mention the physical comfort of neighbours but the physical comfort of the community, and I have been asked on behalf of the opposite party to hold that the terms "neighbours" and "community" are for the purpose of this section interchangeable. Certain decisions have been pointed to, viz: *Krishna Mohan Banerji* v. *A. K. Guha* (1), *Berckefeld* v. *Emperor* (2), *Indra Nath Banerji* v. *Queen-Empress* (3), among others in which action has been taken under this section in somewhat similar circumstances, and in which so far as can be judged from the reports, the evidence related to the physical comfort of neighbours. Moreover it has been pointed out that Ch. 10 relates to "public nuisance" and although the words in the paragraph are not the physical comfort of the public it would be very difficult to hold, after reading the whole of the section, that the legislature really intended to discriminate between the public and the community.

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(1) [1920] 57 I.C. 829.
(2) [1907] 34 Cal. 73=5 Cr. L. J. 45.
(3) [1898] 25 Cal. 425.

In S. 268, I. P. C., a person is said to be guilty of a public nuisance:

> "Who does any act . . . . which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity."

If the public nuisances referred in Ch. 10, Criminal P. C. are equivalent to the public nuisances defined in S. 268, I. P. C., the public and again "people in general who dwell or occupy property in the vicinity", or in other words the neighbours, must be regarded as to all intents and purposes the same body of people. I can find no authority for distinguishing the meaning of the word "community" (which according to the dictionary is a relative term) either from the public or the "neighbours." It is certainly curious that the word "community" is used in para 3, S. 133, whereas references in other parts of the section are to the public or persons living or carrying on business in the neighbourhood, etc., but after considering the matter to the best of my ability I do not think that there is sufficient reason for making a definite distinction and for holding that a man may carry on a trade or occupation or keep goods or merchandise that is injurious to the health of physical comfort of his neighbours or of the public without becoming liable to an order under S. 133 merely on the ground that there may be some part of the community which is not affected.

Another point that has been taken in support of the application is that both the Magistrate and the Judge made a local inspection of the factory, but failed to record a memorandum of the relevant facts observed at the inspection in spite of the mandatory provisions of S. 539 (b), Criminal P. C. If there was a formal inspection under this section after due notice to both parties, as I understand there was, it was necessary to record the memorandum, and as none was recorded there was an irregularity in the proceedings. This however would not be sufficient to vitiate the whole of the proceedings unless it occasioned a failure of justice by prejudicing the accused. All that the Judge appears to have done was to go to the spot and observe the position of the factory. The Magistrate has given a full account of his inspection in the course of his judgment, and the mere fact that a separate note was not recorded can hardly have prejudiced the applicant who had a full opportunity of drawing attention to any inaccuracies in the Magistrate's description when he made his application to the Sessions Judge.

In these circumstances I do not think that there is any occasion for me to interfere with the orders passed. If the Magistrate could act under the section, as it seems to me he was justified in doing, no fault can be found with the nature of the order passed for regulating the conduct of the applicant's trade or occupation in such a way as to interfere as little as possible with the comfort of the neighbours. The application therefore fails and is dismissed.

S.N./R.K. *Application dismissed.*

A. I. R. 1931 Allahabad 434

KING, J.

Ram Ghulam—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 143 of 1931, Decided on 8th March 1931, made by Addl. Ses. Judge, Pilibhit, D/- 14th February 1931.

Criminal P. C. (1898), Ss. 347 and 210—Complaint under S. 363, I. P. C.—Examination and cross-examination of prosecution witnesses—Charge framed—Defence witnesses examined and cross-examined — Charge amended and accused committed to Sessions for offence under S. 366, I. P. C.—No right to accused of further examination and cross-examination to disprove amended charge—Procedure by Magistrate held to be right.

A complaint of an offence under S. 363, I. P. C., was filed. The prosecution witnesses were examined and cross-examined. A charge was framed and all the defence witnesses were also examined and cross-examined. Then the Magistrate acting under S. 347, Criminal P. C., amended and framed the charge under S. 366, I. P. C., and passed the commitment order.

Held: that the procedure of the Magistrate was not illegal. The accused had no right of further examination and cross-examination to disprove the amended charge as every possible defence had been given. The amended charge must be deemed to be framed under S. 210. After the commitment, the proceedings must be deemed to be in an inquiry under Chap. 18 and not in a trial. Further examination and cross-examination could be made in Court of Session: *A. I. R.* 1924 *All.* 665, *Expl.*

[P 435 C 1,2]

Order.—This is a reference for quashing an order of commitment under S. 215, Criminal P. C.

The case started on a complaint of an offence under S. 363, I. P. C. The prosecution witnesses were examined and cross-examined. A charge was framed under S. 363. All the defence witnesses whom the accused wished to produce were also examined and cross-examined and the case was closed. When the case was put up for passing orders next day the Magistrate came to the conclusion that the evidence disclosed a prima facie case under S. 366, I. P. C. which is exclusively triable by the Court of Session. Acting under S. 347, Criminal P. C., the Magistrate framed a charge under S. 366, I. P. C., and passed the commitment order which is the subject-matter of this reference.

The accused made an application complaining that he had been deprived of his right of further cross-examination of the prosecution witnesses and his right of producing further defence witnesses to disprove the amended charge. The learned Additional Sessions Judge held that the application was well founded and that the accused must be given an opportunity of further cross-examination and of producing further defence evidence before he could be committed for trial.

I do not think there is any illegality in the procedure adopted. Under S. 347, Criminal P. C., the Magistrate could commit the accused "under the provisions hereinbefore contained," i.e., the provisions contained in Chap. 18. He need not start proceedings de novo, but he must not deprive the accused of any right which he might have exercised under Chap. 18 if the case had been treated as an inquiry under that chapter from the outset.

But I cannot find that the accused has been deprived of any right which he might have exercised under Chap. 18. He has cross-examined all the prosecution witnesses. He has produced all the defence evidence that he wanted to produce. He had no further right of cross-examination after the framing of a charge under S. 210, Criminal P. C., and the amended charge must be deemed to have been framed under S. 210. He had no right to produce further defence witnesses in the Magistrate's Court, although if he had named any further defence witnesses the Magistrate might, under S. 212, have thought fit to summon and examine them. As a matter of fact the accused did not name any fresh defence witnesses, but asked that the witnesses already examined should be summoned to give evidence on his trial.

The Additional Sessions Judge relied upon the ruling *Mohan Lal* v. *Emperor* (1) which certainly does support his view. The facts of that case were very similar and a single Judge took the view that S. 231, Criminal P. C. was applicable and the accused must, after the amendment of the charge, be allowed to recall prosecution witnesses for further cross-examination and to produce further defence evidence. With due respect to the learned Judge I do not think S. 231 applies to the facts of this case. It only applies to the alteration of a charge after the commencement of the trial. But all the proceedings in the Magistrate's Court must be held to be proceedings in an inquiry under Chap. 18, and not proceedings in a trial, as soon as the Magistrate decides under S. 347 to commit the accused for trial in the Court of Session. The accused has exercised every right he could have exercised in an inquiry under Chap. 18. He will be tried in the Court of Session where he will have the opportunity of cross-examining all the prosecution witnesses over again. All his defence witnesses will also be examined over again. If he now wishes to produce fresh defence witnesses, whose names did not occur to him when he was asked for a list under S. 211 (1), the Magistrate has discretion to summon such fresh witnesses.

In my opinion the procedure was not illegal or irregular and the accused has not been prejudiced in any way.

I reject the reference. The order of commitment will hold good.

B.V./R.K. *Reference rejected.*

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(1) A. I. R. 1924 All. 665=81 I. C. 318=25 Cr. L. J. 798.

* A. I. R. 1931 Allahabad 435

YOUNG, J.

Daulat Ram Asthana—Applicant.

v.

Emperor—Opposite party.

Criminal Revn. No. 777 of 1930, Decided on 13th March 1931, against order of Second Addl. Sessions Judge, Gorakhpur, D/- 31st October 1930.

*** Criminal P.C. (1898), S. 528 (1)—No Sessions Judge and much less Additional Sessions Judge has jurisdiction to transfer ap-**

peal on file of Additional Sessions Judge to his own file.

The Sessions Judge has no jurisdiction, either under the provisions of the Criminal P. C., or under his inherent powers, to transfer an appeal from the file of an Additional Sessions Judge to his own file. Much less therefore can another Additional Sessions Judge, purporting to act as the Sessions Judge under S. 17 (4) transfer such an appeal to the file of the Sessions Judge. [P 436 C 2]

Iqbal Ahmad, Saila Nath Mukerji and *Harnandan Prasad*—for Applicant.

Assistant Govt. Advocate — for the Crown.

Judgment.—This is an application in revision against an order of the Second Additional Sessions Judge of Gorakhpur purporting to act as the Sessions Judge of Gorakhpur, whereby he transferred a criminal appeal filed by one Mr. Daulat Ram Asthana from the file of the First Additional Sessions Judge of Gorakhpur sitting at Basti to the file of the Sessions Judge.

Mr. Daulat Ram Asthana was charged before a Subdivisional Magistrate of the First Class, Mr. Ahmad Hasan, under Ss. 12 and 13, Printing Press and Registration of Books Act (Act 25 of 1860). It appears that the press had been under the control of the District Board itself, and the Chairman of that Board had in due course made the proper declaration, as required by the Act. The District Board however thought it would be more convenient that the press should be in the charge of the Education Committee, and the press was put in the charge of the Education Committee who in turn asked Mr. Asthana, an advocate practising at Basti, and also a member of the District Board and Education Committee, to take charge of the press. The Chairman of the District Board, for some reason or other not disclosed, thought it his duty to draw the attention of the District Magistrate to the fact that the District Board had delegated its authority over the press to the Education Committee, and went so far as to suggest that the declaration given by himself as Chairman would not now be operative. It is difficult to understand the reason of such a communication from the Chairman to the District Magistrate, and one can only speculate; but the District Magistrate made a complaint concerning Mr. Asthana for not filing a declaration. The case was sent for trial to the Subdivisional Magistrate, Mr. Ahmad Hasan, and after trial Mr. Asthana was convicted and sentenced in all to six months' simple imprisonment and a fine of Rs. 1,000. Mr. Asthana filed an appeal in the Court of the Additional Sessions Judge of Basti, and for some reason or other, which reason again is not apparent, this transfer was made by the Second Additional Sessions Judge at Gorakhpur, of the appeal from the file of the Additional Sessions Judge at Basti to the file of the Sessions Judge.

Mr. Iqbal Ahmad, on behalf of the applicant, contends that the order was made without any jurisdiction, and without any notice, to him and that it is ultra vires. I am satisfied that the contention of counsel for the applicant is sound. I can find nothing in the Criminal Procedure Code which gives jurisdiction to the Sessions Judge himself to transfer an appeal from the file of an Additional Sessions Judge to his own file, and even supposing a Sessions Judge had such jurisdiction, counsel who appears for the Crown cannot point out any provision in the Criminal Procedure Code by which an Additional Sessions Judge can issue such an order to another Judge of equal jurisdiction to himself. On this latter point it is suggested that authority is given under S. 17 (4), Criminal P. C., to a Sessions Judge, when he himself is unavoidably absent or incapable of acting to make provision for the disposal of any urgent application ay an Additional or an Assistant Sessions Judge. That is the only provision of the Criminal Procedure Code to which I am referred for the proposition that an Additional Sessions Judge can transfer cases from the file of a brother Additional Sessions Judge to that of the Sessions Judge. It is admitted by counsel for the Crown that there was no application in this case at all. An application within the meaning of S. 17 (4) must be an application which is recognized by law, that is, a document properly stamped. There was not even an oral application in Court. In fact it is one of the peculiarities of this case that no one appears to know how this matter came to the attention of Mr. Ziaul Hasain at all. At any rate, it is clear there was neither an application in the proper sense of the word nor an oral application by counsel in Court. There certainly was no urgency about it. So it is perfectly clear that S. 17 (4) cannot give jurisdiction in this matter to the Second Additional Sessions Judge who passed the order.

It is, in my opinion, also clear, even supposing it could be shown that Mr. Ziaul Hasan had authority to act judicially for the Sessions Judge, that the Sessions Judge himself had no jurisdiction to make any such order. The only section in the Criminal Procedure Code which deals with the power of a Sessions Judge to transfer a case is S. 528 (1), which enacts that any Sessions Judge may

> " withdraw any case from, or recall any case which he had made over to, any Assistant Sessions Judge subordinate to him."

Nothing whatever is said as to any power to withdraw any case or recall any case from an Additional Sessions Judge. In fact, if one refers to S. 17 (3), Criminal P. C., it is seen that the Code itself enacts that Assistant Sessions Judges shall be subordinate to the Sessions Judge ; but does not enact, for the purposes of that section at any rate, that the Additional Sessions Judge shall be subordinate to him. There is a distinction made between the position of an Additional Sessions Judge and that of an Assistant Sessions Judge. Counsel for the Crown is forced to rely upon what he calls the inherent jurisdiction of a Sessions Judge, from the very nature of his office, to transfer cases from the Court of an Additional Sessions Judge to his own Court. Where however the powers of transfer of the Sessions Judge are expressly set out in S. 528 (1) it is impossible to allow any further " inherent " powers of transfer.

A further point has been taken by counsel for the applicant that jurisdiction has been given by a Gazette Notification of the Government on 2nd January 1926, to the First Additional Sessions Judge of Gorakhpur at Basti to try cases and appeals arising from judgments passed by the Magistrate of the Basti District. The actual words of the notification, which of course has the effect of law, are that

> "the First Additional Sessions Judge of Gorakhpur at Basti shall try cases admitted and appeals arising from judgments passed by the Magistrate of Basti . . . . . . etc."

It is contended that the word "shall" must be construed as it would be construed in any statute, that it is mandatory, and that it is impossible to read " shall " as " may." There is another notification which deals with the work of the First Additional Sessions Judge of Gorakhpur sitting at Gorakhpur of the same date, which enacts that he

> " shall try all those cases committed and appeals arising from judgments passed by the Magistrates of Gorakhpur District which are not tried by the Sessions Judge himself or which are transferred by the Sessions Judge to his file."

It appears to me that there is force in this contention. It is difficult to associate the provision that the Judge of Gorakhpur at Basti shall try appeals from the Magistrates of the Basti District with any concurrent jurisdiction of the Sessions Judge at Gorakhpur in the same matters. While the word "shall" is used the notification is subject always to all the provisions prescribed in the Criminal Procedure Code, which means that the powers of the High Court as regards transfer are not interfered with in any shape or form by the notification. I am therefore, satisfied that the orders complained of, dated 25th October and 31st October 1930, are without jurisdiction and must be quashed. The case will go back to the First Additional Sessions Judge of Gorakhpur at Basti to be heard and concluded according to law. If there is any real reason for a transfer of this case to any other Court, a proper application supported by affidavit will no doubt be made in the High Court.

S.N./R.K. *Orders quashed.*

✻ A. I. R. 1931 Allahabad 437

PULLAN, J.

Bangi Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 860 of 1930, Decided on 7th April 1931, against order of Sessions Judge, Ghazipur.

✻Criminal P. C. (1898), S. 110 — Case of troublesome and ill-tempered person who at times has thrown brick bats at others is not covered by S. 110.

A man may be quarrelsome. He may have objected to an order of a Municipal Board closing his shop ; he may have even threatened the members of the Board because of the action taken by them, but this does not make him a desperate character or one who is dangerous to the community. Even if he throws bricks into people's houses or on to the streets, this does not make him a dangerous or desperate character, though it certainly arouses suspicions of his sanity and his case does not come under S. 110 : 5 *C. W. N.* 249, *Ref.* [P 438 C 2]

K. D. Malaviya—for the Applicant.

Assistant Govt. Advocate — for the Crown.

Order.—This is an application in revision of an order of the Sessions Judge of Ghazipur who has upheld the order of a Magistrate of the First Class binding over the applicant Bangi Lal under S. 110, Criminal P. C.

A report was made against this man by the police of Ballia that he was a dangerous and desperate character and his being at large without security was hazardous to,the community. No less than 43 witnesses were examined for the prosecution in order to show that this man is a dangerous and desperate character and he produced 47 witnesses in his defence to show that he was not. The Magistrate who tried the case went through all these witnesses in detail and believed those who were called for the prosecution in preference to those who were called for the defence. The Sessions Judge says that he carefully considered the evidence and heard arguments on both sides, but in his judgment he does not make mention of any single witness for the defence although one of them pays land revenue to the amount of Rs. 850 and a municipal tax of Rs. 55; another is the head master of a school and two at least are assessors of the Judge's Court. All these persons .give definite evidence to the effect that the man is of good character, that he is not .even quarrelsome and that they never heard that he indulges in the peculiar habit of brick-throwing with which he is credited by the prosecution witnesses. I have been carefully through the whole evidence in this case and I have very grave doubts as to whether this is a case which falls within the meaning of Cl. (f), S. 110, Criminal P. C. The evidence against this Bangi Lal amounts to this. The man used to keep a pan shop in Ballia city.

An objection was made to his manner of keeping the shop and the company which assembled there, and the Municipal Board ordered the shop to be closed. He apparently was very angry at this order, and he subsequently obtained a modification of the order, for the shop was reopened in the name of his brother. Incidentally this Bangi Lal is the son of a chaprasi of the Munsif's Court, he is himself a candidate for a similar post, and nothing is known against his character in the Munsif's Court. It does not appear that any one has told the District Judge that he is an unsuitable person to be a chaprasi. The persons who give evidence against him are first and foremost the Chairman and other members of the Municipal Board, and, secondly, persons who are clearly under their influence. They are able to show that he has been engaged in some petty assaults with his neighbours, and he is in particular charged with threatening the cook of one Nanku Prasad. The cook is not a witness, but Nanku Prasad complained about the conduct of this man towards his cook. All this evidence may be true.

The man may be quarrelsome ; he may have objected to the order of the Municipal Board closing his shop; he may have even threatened the members of the Board because of the action taken by them; but this does not make him a desperate character or one who is dangerous to the community. Even if he throws bricks into people's houses or on to the streets, though his allegation is far from being proved, I am not certain that this makes him a dangerous or desperate character, though it certainly arouses suspicions of his sanity. This view is supported by the case of *Akhoy Kumar* v. *Queen Empress* (1). My own opinion of the evidence is that the allegation against this man that he habitually throws bricks is overstated. He may have once thrown bricks at somebody or into somebody's house, but I cannot believe that a person who makes a habit of so doing could obtain the support of a considerable number of his neighbours who totally deny that he throws bricks or that they ever heard that anybody was frightened of him. I consider that this case has been greatly exaggerated and that it was no case for the operation of S. 110, Criminal P. C. If the accused has assaulted anybody those persons should proceed against him in the ordinary course on the specific charges which they are prepared to allege. In my opinion this is an improper attempt to bring within the very vide provision of S. 110, Criminal P. C., a man possibly a troublesome and illtempered man who has managed to fall foul of some persons in high places in the town in which he lives. I allow the application, set aside the whole proceeding and order that the applicant be discharged and the bonds executed be cancelled

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(1) [1901] 5 C. W. N. 249.

B.V./R.K. *Application allowed.*

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* A. I. R. 1931 Allahabad 439

YOUNG AND SEN, JJ.

Emperor

v.

Ram Adhin Singh and *others* — Accused.

Criminal Appeal No. 656 of 1930 (connected with Criminal Appeals Nos. 701 and 930 of 1930) Decided on 9th April 1931, against order of Addl. Sess. Judge, Benares, at Jaunpur, D/- 11th August 1930.

*** (a) Criminal P. C. (1898), S. 417—In appeal on acquittal there is always presumption in favour of innocence of accused.**

The rules and the limitations affecting appeals from acquittals are on a par with those relating to appeals from convictions. An appeal from the verdict of the jury stands upon a different basis. In an appeal from an order of acquittal there is always a presumption in favour of the innocence of the accused. This presumption very materially affects the question of onus, which except within a limited range of cases lies upon the Crown, and where the finding of the subordinate tribunal is in favour of the accused, the burden lies upon the prosecution to prove that the finding reached by the Court below, was not justified by the evidence. Where the evidence against the accused is too scanty or insufficient to support the charge, the finding of the Court below cannot be displaced. Again, where the case is somewhere on the border line or very near it and it was possible for the Court, upon a balance of probabilities, to hold a person guilty or not guilty, the reversal of the order of acquittal is not only undesirable and inexpedient but is calculated to cause a miscarriage of justice. Where however the balance of evidence is distinctly against the accused or where material evidence has been misappreciated, overlooked or ignored, the High Court is bound to step in as much in the interest of the administration of justice as of the public generally: 20 *All.* 459. *Foll.* [P 441 C 2; P 442 C 1]

(b) Criminal P. C. (1898), S. 417—Appeal on acquittal should not be allowed unless lower Court's judgment is perverse — Criminal P. C. (1898), S. 272.

It is not because a Judge or a Magistrate has taken a view of a case in which Government does not coincide, and has acquitted accused persons, that an appeal from his decision must necessarily prevail, or that the High Court should be called upon to disturb the ordinary course of justice, by putting in force the arbitrary powers conferred on it by S. 272. The doing so should be limited to those instances in which the lower Court has so obviously blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interest of the public: 4 *All.* 148, *Rel. on.*; 9 *All.* 528 (*F. B.*); 16 *All.* 212 and 21 *All.* 122, *Ref.* [P 442 C 1]

(c) Penal Code (1860), S. 148 — Where there is conflicting and perjured evidence brought before Court, one sure ground for conviction or acquittal is to proceed by marks of injury on person of accused.

In a case under S. 148, where the evidence is entirely conflicting where both the parties have consciously produced before the Court perjured evidence and where the real motives, which led to the fight between the parties cannot be known nor can it be ascertained with anything like reasonable certainty as to whose lathi or spear struck whom, the one sure ground upon which the Judge can proceed is by the marks of injury upon the persons of those who are charged with the offence. [P 442 C 2]

The Government Advocate — for the Crown.

Captain K. O. Carleton—for Accused.

Sen, J. — Baldeo Koeri, Bisheshar, Sahadeo, Hemraj, Lurkhur, Ramdeo, Munnu, Deoraj, Sukhraj, Khurkhur, Jaisri, Jhullar, Girja Dasaundhi and Ramadhar were committed to the Court of Session at Jaunpur to take their trial under Ss. 307/149 and 148, I. P. C. Of the above persons Baldeo was also charged of an offence under S. 302, I. P. C.

Twelve of these persons are residents of Pindri, they are koeris by caste and are related. Two of the accused, namely Girja and Ramadhar are Dasaundhis by caste. They have got no interest in mauza Pindri. They are residents of mauza Nageshra.

The learned Sessions Judge acquitted Baldeo under S. 302, I. P. C. He acquitted all the accused persons of the offence under Ss. 307/149, I. P. C. He also acquitted Baldeo, Jaisri, Jhullar, Girja and Ramadhar of the offence under S. 148, I. P. C., but convicted Bisheshar, Sahdeo, Hemraj alias Hannu, Lurkhur, Ramdeo, Munnu, Deoraj, Sukhraj and Khurkur under S. 148, I. P. C., and sentenced them to various terms of imprisonment.

The Local Government has appealed from the order of the Sessions Judge (1) acquitting Baldeo under Ss. 302/149 and 148, I. P. C., (2) acquitting the remaining 13 persons of the offence under S. 307/149, I. P. C., and (3) acquitting Jaisri, Jhullar, Girja and Ram Adhar of offences under S. 148, I. P. C. This is Criminal Appeal No. 930 of 1930.

Bisheshar and eight others, who have been convicted under S. 148, I. P. C., and sentenced to various terms of imprisonment, have also appealed to this Court. Their appeal is No. 701 of 1930.

There is yet another appeal. This is Criminal Appeal No. 656 of 1930. A counter charge under S. 148 was preferred against certain thakurs who were residents of Patti Kiratrai. The learned Sessions Judge convicted five of the thakurs, namely Ramadhin Singh, Bindeshri Singh, Parsidhi Singh, Chulbul Singh and Ram Lal Singh and sentenced them to various terms of imprisonment. These five persons have challenged the legality and correctness of the conviction.

On 21st March 1930, a serious riot undoubtedly took place in mauza Pindri, which is 18 miles from the city of Jaunpur. In the course of this riot, one Murao Singh thakur, of Patti Kiratrai was killed. Two other thakurs, Bindeshri Singh and Chulbul Singh, who were related to Murao Singh, were injured. On 22nd March 1930 a post-mortem examination was held on the corpse of Murao Singh and it was found that he had received a penetrating wound 2/3" x ¼" in the third intercostal space, near sternum. The Civil Surgeon was of opinion that the cause of death was the penetrating wound of the heart. Bindeshri Singh had received two injuries and Chulbul Singh had received no less than eight injuries, two of which have been described to be dangerous.

The charge of murder was brought against Baldeo and it was alleged that he was responsible for the fatal injury caused to Murao Singh. The charge of attempt to commit murder was brought against the 14 accused upon the ground that the injury sustained by Chulbul Singh was so very serious as was likely to cause death and that the said injury had been caused in pursuance of a common object.

The evidence on the record proves to our satisfaction that there has been in the past considerable strained relations between the thakurs of Patti Kiratrai and the Koeris of mauza Pindri. It is very difficult to say as to what was the exact cause which led up to the riot. The evidence produced by the parties assigns different reasons as to the origin of the fight. We find it extremely difficult to believe the evidence of one party or the other. The result is that the origin of the quarrel must remain for ever shrouded up in mystery.

There can however be no doubt that there was a fight between the thakurs and the koeris Amongst the koeris, the persons who were hurt were Hemraj, Sahdeo, Munnu, Bisheshar, Khurkhur, Sukhraj and Lurkhur. Amongst the thakurs, the persons, who received hurt were Murao Singh, the deceased, Bindeshri Singh and Chulbul Singh.

The thakurs lodged a police report at the Rampur thana on the day of the occurrence, but this report was made after unusual delay and the cause for the delay has not been accounted for. This is a suspicious circumstance. In such cases there is always a strong temptation to conceal the truth, to exaggerate matters and to drag the names of as many opponents as possible into the net. This appears to have been done in this case. Bindeshri Singh did not go to the police station in person. He sent up a written note through Sarju Dharkar. The report was made against nine persons and the persons alleged to have taken part in the riot are Baldeo Koeri, Lurkhur Koeri, Sukhraj, Deoraj, Hannu, Bisheshar, Khurkhur, Girja Dasaundhi and Ram Adhar Dasaundhi. It was not alleged that Sahdeo, Ramdeo, Munnu, Jaisri and Jhuliar had taken part in the riot. When the case came up before the Magistrate it appears that the case had gathered embroidery and five additional means were introduced and the last five mentioned persons were also alleged to have taken part in the riot from the side of the koeris.

Mauza Pindri appears to be a hamlet of Mauza Patti Kiratrai. The village appears to be torn by factions which are led by the chief of the koeris and the head of the thakurs. An attempt has been made in this case to involve in the riot almost all the members belonging to the family of Baldeo Koeri.

Upon the evidence which has been produced in this case it is very difficult to find out either the cause of the quarrel or the fact as to which of the two parties was the aggressor in the fight. We are convinced however that there was a free fight between the koeris and the thakurs and it is not unlikely that the koeris outnumbered the thakurs. The learned Sessions Judge did not believe that the two Dasaundhis, Girja and Ram Adhar had taken part in the fight. They were persons belonging to a different caste. They belong to a different village and they had no interest in the dispute between the koeris and the thakurs. In agreement with the Sessions Judge we hold that no case has been made out against the two Dasaundhis. One of the witnesses for the prosecution states that these two Dasaundhis were on terms of intimacy with Baldeo but this statement is evidently based on hearsay.

In the fight, the thakurs and the koeris appear to have been armed with lathis and a few spears. Puchai Ahir one of the witnesses for the prosecution states :

> "I do not know which of the accused persons had spears and which lathis . . . . I do not know if Lurkhur, Deoraj, Bisheshar, Sahdeo, Ramdeo, Girja and Ram Adhar used spears or lathis."

It is doubtful if Baldeo Koeri was present at the riot at all. He is a fairly old man. There are no marks of injury on his person. Murao Singh was a pahalwan and an expert lathi fighter. Baldeo could not seriously think of engaging himself in a fight with Murao Singh. The Sub-Inspector in the course of the investigation in this case is alleged to have discovered a spear-stick from a stack of bhusa in Baldeo's house. Curiously enough, this discovery was not followed up to its legitimate conclusion. The spear was not sent to the Chemical Examiner and the Imperial Serologist. There is no evidence that the spear had any marks of blood which it was bound to have, if this spear had been used in killing one man and seriously injuring another as alleged by the prosecution.

We have, no doubt, that, on the evidence as it stands, it was extremely unsafe to convict Baldeo of an offence under S. 302, I. P. C., or of any other offence with which he stood charged.

* * *

The case for the prosecution rests mainly upon the statements of six eye-witnesses. Two of them, Bindeshri Singh and Chulbul Singh, are highly interested witnesses. The remaining four are men of no status or position ; one of them, Munnu, is a Chamar by caste and is resident of a hamlet close to the residence of the thakurs. The other three witnesses are Ram Kishore barber, Khirodhar Lohar and Phuchai Ahir. All these witnesses are residents of Patti Kiratrai. Ram Kishore and Puchai are the parjas of the thakurs. Bindeshri Singh is the mukhia of the village. These witnesses are clearly amenable to the influences of the thakurs.

It appears from the statements of the prosecution witnesses that at the time of the riot, people, other than those, who were residents of Patti Kiratrai, were also present. It has not been explained why these witnesses have not been produced by the prosecution. We are of opinion that we should not interfere with the order of acquittal. The offences under Ss. 307/149 have not been brought home to any of the respondents. The case against Baldeo has not been proved under any of the three sections under which he stood charged. Upon the evidence on the record, it will be extremely unsafe to interfere with the finding of acquittal recorded by the Sessions Judge with reference to Jaisri, Jhullar, Girja and Ram Adhar. We would therefore dismiss this appeal (Criminal Appeal No. 930 of 1930).

In Criminal Appeal No. 817 of 1928 which was decided by the learned Chief Justice and one of us on 25th November 1929, the principles, which should guide this Court in entertaining an appeal from acquittal by the Local Government, have been discussed at some length. We would reproduce the following passage from the judgment. An appeal from an acquittal is an extraordinary remedy and the right to appeal received a statutory recognition for the first time in the year 1872. Certain conditions peculiar to this country called for this provision of law. The rules and the limitations affecting appeals from acquittals are on a par with those relating to appeals from convictions : see *Queen-Empress* v. *Pragdut* (1) and the plain language of S. 423, Criminal P. C., clearly indicates that the legislature never intended to recognize any difference between the two. An appeal from the verdict of the jury stands upon a different basis

In an appeal from an order of acquittal it ought to be remembered that there is always a presumption in favour of the innocence of the accused. This presumption very materially affects the question of onus, which except within a limited range of cases lies upon the Crown, and where the finding of the subordinate tribunal is in favour of the accused, the burden lies upon the prosecution to prove that the finding, reached by the Court below, was not justified by the evidence. Where the evidence against the accused is too scanty or insufficient to support the charge, the finding of the Court below cannot be displaced. Again, where the case is somewhere on the border line or very near it and it was possible for the Court, upon a balance of probabilities, to hold a person guilty or not guilty, the reversal of the order of acquittal is not only undesirable and inexpedient but is calculated to cause a miscarriage of justice. Where however the balance of evidence is distinctly against the accused or where material evidence has been misappreciated, overlooked or ignored, this Court is bound to step in as much in the interest of the administration of justice as of the public generally. Certain principles, therefore have been laid down by this Court indicating the course which should be followed for the adjudication of the Government appeals. In *Empress* v. *Gayadin* (2) Straight, J., is reported to have observed:

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(1) [1898] 20 All. 459.

> "It is not because a Judge or a Magistrate has taken a view of a case in which Government does not coincide, and has acquitted accused persons, that an appeal from his decision must necessarily prevail, or that this Court should be called upon to disturb the ordinary course of justice, by putting in force the arbitrary powers conferred on it by S. 272. The doing so should be limited to those instances in which the lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public."

We accept this statement of law with a slight variation. If the lower Court has obviously blundered, we have a clear duty to interfere. It is not necessary that the lower Court should have "obstinately blundered" or erred in its conclusion "egregiously and foolishly." The aforesaid decision was followed in *Queen-Empress* v. *Gobardhan* (3). In *Empress* v. *Robinson* (4) Tyrrell and Blair, JJ., have adopted with approval the following view which was expressed in Gayadin's case.

> "In considering an appeal by Government against an order of acquittal, it is not for the High Court to say whether, if it had been trying the case, it might not have taken a view opposed to that of the lower Court. That is not the test to be applied to determine such an appeal. While the High Court recognizes the necessity for the existence of such powers in the Local Government in this country, it is equally clear that those powers should be most sparingly enforced; and, in respect to pure questions of fact, only in those cases where, through the incompetence, stupidity or perversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from evidence as to produce a positive miscarriage of justice. In *Queen-Empress* v. *Timmal* (5), at p. 126, Knox,, Ag. C. J., and Banerji, J., emphasized upon the proposition that the right vested in the Local Government is a right which should be advanced with care and caution. At the same time it should undoubtedly be exercised when the need for it is apparent."

We approve of what has been said above. Applying the canons laid down in the decided cases of this Court, we are clearly of opinion that the appeal filed by the Local Government could not be supported. If we were sitting in this case as a Court of first instance, it might have been possible for us to take a view of the evidence, in certain aspects, different from that of the Court below. We are not however in a position to state that the view of the learned Session Judge was not a possible view or that his judgment is perverse. In a case like the present where the evidence is entirely conflicting, where both the parties have consciously produced before the Court perjured evidence and where the real motives, which led to the fight between the Thakurs and Koeris, cannot be known nor can it be ascertained with anything like reasonable certainty as to whose lathi or spear struck whom, the one sure ground upon which the learned Sessions Judge could have proceeded is by the marks of injury upon the persons of those, who were charged with the offence. In the midst of uncertainties, this was the one certain factor to go upon. The learned Sessions Judge was therefore justified in giving proper weight to this one important circumstance.

We have already noticed that he has convicted nine of the Koeris of an offence under S. 148, I. P. C. The learned Sessions Judge has not however taken into consideration the fact that two of these persons, namely Ram Deo and Deoraj, had no marks of injury. We are of opinion that it could not be said about these two persons with anything like reasonable certainty that they had taken part in the riot. We would therefore give them the benefit of the doubt. We accordingly allow the appeals of Ramdeo and Deoraj. As to Bisheshar, we are of opinion that he is also entitled to the benefit of the doubt. The learned Sessions Judge observes about him that he is an old man of 60 and is nearly blind. We do not think that it could be at all probable for Bisheshar to have taken part in the riot. It is true that he had some marks of injury upon his person. It is not improbable that he might have been made a victim of the assault on the part of the Thakurs, and the marks of injury were due to this fact and not to the fact that he had himself taken part in the assault. We would accordingly allow his appeal, set aside his conviction and sentence and direct his release. We dismiss the appeals of Sahdeo, Hemraj alias Hannu, Lurkhur, Mannu, Sukhraj and Khurkhur. We are informed that these persons are on their bail. We direct that they must surrender to their bail. Sahdeo Singh has not been admitted to bail and has already served the sentence imposed upon him of six months imprisonment. Let him be released forthwith, provided he is not required for any other offence.

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(2) [1882] 4 All. 148.

(3) [1887] 9 All. 528 (F. B.).

(4) [1894] 16 All. 212=(1894) A. W. N. 49.

(5) [1898] 21 All. 122=(1898) A. W. N. 208.

Lastly, we come to the appeal of the Thakurs. Upon the evidence, there can be no reasonable doubt that the Thakurs took part in the riot. The origin of the quarrel not being known, it could not be said that one or other of the party had the right of private defence. It is true that there is no evidence to show that the fight was either pre-arranged or premeditated. At the same time there can be no doubt judging from the manner in which the attacks were made by one party upon the other that the fight was deliberate. We are convinced that Bindeshri Singh and Chulbul Singh had taken part in the fight. The marks of injury upon their persons are sufficient proof of the fact that they were participators in the assault. The learned Sessions Judge was not justified in convicting Parsidhi Singh and Ramlal Singh. Their case is on the same footing as those of Ramdeo and Deoraj Koeris. They had no marks of injury on their persons and are entitled to the benefit of the doubt. We accordingly allow their appeals and set aside their convictions and sentences under S. 148, I. P. C.

The only mark of injury upon the person of Ramadhin Singh is a very minute scratch near his eyelid measuring no more than 3/10 of an inch by 1/10 of an inch. The explanation of Ramadhin Singh is that the scratch was caused by a child whom he was carrying in his arms. There is nothing improbable in this explanation. The trivial injury might have been caused by anything. It would be absurd and preposterous to hold that a scratch of this description is proof of the fact that Ramadhin Singh had taken part in the riot. There is no other evidence against him on which we could rely. We accordingly allow his appeal and set aside the conviction and sentence passed against him. The result is that we dismiss Appeal No. 930 of 1930 and allow Appeals Nos. 656 and 701 of 1930 to the extent indicated above, and we dismiss the rest of the appeals.

B.V./R.K. *Order accordingly.*

✲ ✲ A. I. R. 1931 Allahabad 443

Special Bench

MUKERJI, YOUNG AND KING, JJ.

Emperor

v.

Raja Kushal Pal Singh—Opposite Party.

Misc. Case No. 122 of 1931, Decided on 14th April 1931.

✲ ✲ **(a) Criminal P. C. (1898), Ss. 195 and 476 — Ss. 476 and 195 must be read together.**

Sections 476 and 195 have the same scope and must be read together with the result that it is not open to a Court to file a complaint under S. 195 when it is not so open under S. 476. [P 446 C 2]

(b) Criminal P. C. (1898), S. 476—There is no inherent power to file complaint.

A complaint outside the provisions of S. 476 cannot be filed by any civil, revenue or criminal Court under its inherent powers, except in the case of the High Court under S. 561-A. [P 447 C 1]

✲ ✲ **(c) Criminal P. C (1898), S. 195 (c)—"Party," meaning.**

An offence which has already been committed by a person who does not become a party till, say, 30 years after the commission of the offence, cannot be said to have been committed "by a party" within the meaning of Cl. (c). [P 447 C 1]

*** (d) Criminal P. C. (1898), S. 195 (c)— Scope.**

Clause (c), S. 195, applies only to cases where an offence is committed by a party, as such, to a proceeding in any Court in respect of a document which has been produced or given in evidence in such proceeding. [P 447 C 2]

Sankar Saran—for the Crown.

K. N. Katju, Iqbal Ahmad, Kumuda Prasad and *Baleshwari Prasad* — for Opposite Party.

Mukerji, J.—A point of law mixed with facts has been referred to a Bench of three Judges owing to a difference of opinion occurring between two learned Judges who heard the First Appeals Nos. 349 and 449 of 1925. The point that has been referred to us for decision is worded as follows:

> "Whether S. 195 (1) (c) is applicable so as to render a complaint of a Court necessary before a prosecution for abetment of forgery can be lodged in respect of High Court Exs. 4 to 7 or any of them."

As it would be necessary to know the nature of the exhibits in order to answer the question I will, very briefly, give a description and history of these exhibits.

In these provinces there is a large landed property known as the Kotla Estate. It was owned by one Thakur Chaturbhuj Singh who died on 4th November 1844. He was succeeded by his widow Mt. Mahtab Kuer who died in 1889. When Thakur Chaturbhuj Singh died, a young man Umrao Singh, who was probably one of his collaterals, was a minor. Umrao Singh, having attained majority in 1866, brought a suit against Mahtab Kuer for recovery of the estate on the allegation that he, Umrao Singh, had been adopted by Mahtab Kuer. The case was fought up to appeal in the High Court and was ultimately dismissed. The principal parties to the litigation out of which the present proceedings have arisen, are sons of Umrao Singh. The opposite party in these proceedings Raja Kushal Pal Singh, is a step-brother to four persons, Jogendra Pal Singh, Mahendra Pal Singh, Bhawan Pal Singh and Lakshman Pal Singh.

On the death of Mt. Mahtab Kuar, the widow of Chaturbhuj Singh, her daughter Lali Jas Kuar became entitled to the estate and went into possession. The one idea which dominated the mind of Umrao Singh was to get this large property for himself or his family. It is said that the opposite party Raja Kushal Pal Singh was of the same mind and he conceived certain schemes and in pursuance of those schemes, brought into existence certain documents in order that he might establish a claim to the estate. It is said that the document No. 4 is a note book written and prepared by Raja Kushal Pal Singh in which a scheme how to obtain the property was written. Ex. 6 is another note-book, six pages of which have been written on, it is said by the opposite party. The writing suggests that it was in the mind of Raja Kushal Pal Singh that he would get certain documents put into certain records, these documents being in the shape of certain depositions stating that he had been adopted by Lali Jas Kuar. Certain drafts of spurious depositions are also to be found in this document. Ex. 7 is another copybook which contains final drafts of the proposed depositions. Ex. 5 is an envelope and contains certain documents, said to be spurious documents, purporting to be certified copies of depositions. On the face of the envelope there is an index showing its contents.

These documents, it is said, were brought into existence some time in 1898. It is nobody's case that these documents were ever used and it appears that there was never any occasion to use these documents.

In 1905, Raja Kushal Pal Singh obtained by a gift the Kotla Estate, from Lali Jas Kuar. The gift was supported by documents executed by all the persons believed to be next reversioners at the time. It is by virtue of this document that Raja Kushal Pal Singh is in possession of the Kotla Estate.

The suit out of which the two appeals arose was instituted by one of the step-brothers of Raja Kushal Pal Singh, namely, by Jogendra Pal Singh, and it was for the partition of the estate. Jogendra Pal Singh contended that the estate was really the property of his late father Umrao Singh and the deed of gift was really meant for Umrao Singh and Kushal Pal Singh was a benami holder for the whole family. He asked for other reliefs, but we are not concerned with them.

To this suit, the documents which I have described, were irrelevant. These documents were not produced by the plaintiff, Jogendra Pal Singh, when he filed his plaint, nor did he file them at the first hearing when he filed his other documents. An attempt was made to file these documents by summoning them through the defendant Mahendra Pal Singh, plaintiff's own brothers, and they were brought into Court by the defendant Bhawanpal Singh. The learned Subordinate Judge who was trying the case rejected the documents as being irrelevant, on 18th September 1923. The documents were again put in when Raja Khushalpal Singh was in the witness-box, but the Subordinate Judge again rejected them.

The suit was decided and the parties to the suit filed separate appeals. This is why two appeals were before this Court. When the appeals were being heard, an application was made on behalf of Jogendrapal Singh, appellant in in one case and respondent in another, for permission to file the documents sought to be produced in Court below, together with four others. After some difference of opinion between the learned Judges who heard the appeals, the documents were allowed to be put in. As the documents had not been proved by any formal evidence, to have been in the handwriting of Raja Khushalpal Singh and because it had not been proved that they or some of them had been brought about or procured by him, a question of taking further evidence in the appeal arose. The learned counsel appearing for Raja Khushalpal Singh in order to avoid a delay in the disposal of the appeals, admitted the documents, for the purposes of the appeals alone. He admitted that the documents, which were said to be in the handwriting of Raja Khushalpal Singh, were in his handwriting. The appeals were decided, but as can be easily seen, no reference was made to the documents now in question and they were not relied on for the purposes of the appeal by the party who produced them.

As it had been admitted before the Division Bench hearing the appeals that the documents had been written by Raja Khushalpal Singh, two notices were issued to him, to show cause why he should not be prosecuted for committing certain offences in respect of the documents. The learned Judges came to the conclusion that the proceedings should be dropped with respect to one document. But, in respect of the documents described above and four additional documents, which had been produced in appeal and which purported to be certified copies of certain depositions, there happened to be a difference of opinion. The learned Judges were agreed that they could not proceed under S. 476, Criminal P. C. One of the learned Judges expressed the opinion that it was not open to him to proceed under S. 195, sub-S. (1), Cl (c), independently of S. 476, Criminal P. C. The other learned Judge thought that these documents came within the purview of the said provision of law (S. 195 (1) (c), Criminal P. C.) and except for a complaint filed by this Court no prosecution could be entertained by a Magistrate. Owing to this difference of opinion the matter has been put before a larger Bench constituted apparently under Cl. 27, Letters Patent of this High Court.

It is clear, that if our answer to the question put before us be in the affirmative, it will be necessary for the Division Bench which issued the rule, to consider whether it would be in the interest of justice to lodge complaint under S. 195, sub-S. (1), Cl. (c). But we, here, have nothing to do with that portion of the case. Nor have we anything to do with the question whether it was open or not to the learned Judges to proceed under S. 476, Criminal P. C. On that point the learned Judges are unanimous and that is, again, a matter not before us.

I shall therefore confine myself only to the question that has been put to us.

Section 195, Criminal P. C., is one of the sections which prohibits a Court from taking cognizance of certain offences unless and until a complaint has been made by some particular anthority or person. The other sections dealing with similar matters are Ss. 196 to 199-A, Criminal P. C. These sections do not lay down any rule of procedure. They only create a bar and say that unless some requirement has been complied with no Court shall take cognizance of the offences described in those sections.

In sub-S. 1, Cl. (a), S. 195, certain offences are described and it is stated that no Court shall take cognizance of those offences unless the public servant concerned files a complaint.

Clause (b), sub-S. 1 of the same section describes certain offences, but it lays down that only when those offences are committed in certain circumstances, i. e. in, or in relation to, any proceeding in any Court, then the cognizance of those offences shall be barred by Cl. (b). An offence under S. 193, for example, may be committed in Court and out of Court. It is only when an offence under S. 193, I. P. C., is alleged to have been committed in or in relation to any proceeding in any Court that a complaint by the Court would be necessary before cognizance is taken of that offence. Similarly, in all other cases enumerated in Cl. (b) the bar arises only when the offences are committed in or in relation to any proceeding in any Court.

Coming to Cl. (c), sub-S. 1, S. 195, a bar is mentioned in particular cases. It is not in the case of offences generally, mentioned in Ss. 463, 471, 475 and 476, I. P. C., that a cognizance is barred. But it is barred when

"such offence is alleged to have been committed by a party to a proceeding in any Court in respect of a document produced or given in evidence in such proceeding."

The question is : What is the meaning of this rule of law ? This rule has been variously interpreted by various Courts and a similar rule has been in existence in the Criminal Procedure Code since the year 1861. The language was recast in 1923 and a particular policy, to be mentioned later on was adopted in that year. It is not my purpose to investigate the language of the rule as it existed in the old Codes. Nor is it my purpose to go into the possible intention of the legislature as considered apart from the legislation itself.

Coming to the language of Cl. (c), sub-S. 1, S. 195, it may be interpreted in two ways. It may be read that when an offence which is described in S. 463 (we are concerned with that section alone, here), is alleged to have been committed by a person, who has, subsequently to the commission of the offence, become a party to any proceeding in any Court, a complaint would be necessary in order to prosecute him. Another way of reading it is to say that the offence would be cognizable without a complaint, except when it is committed by a person, who is already a party to a proceeding in Court, in respect of a document produced or given in evidence in such proceeding. The question is: Which of the two interpretations should be accepted ? The present policy of law undoubtedly is that there can be no complaint by a private person and all complaints that can be filed in respect of offences mentioned in S. 195 (1), Cls. (b) and (c) must be filed by the Court. The rule which lays down the procedure for a civil Court to file a complaint is to be found in S. 476 of the Code. There, the following words occur:

"which appears to have been committed in or in relation to a proceeding in the Court,"

with reference to an offence referred to in S. 195. If, then, it be the case that S. 195 lays down the bar and S. 476 lays down the method for removing the bar, I take it, we must read the two sections together.

It has been urged that S. 476 may not be exhaustive and it may be open to a Court to file a complaint although it may not be possible for it to file a complaint under S. 476, Criminal P. C. This argument does not appeal to me and for various reasons. A Court is a creature of law and can act only in the manner laid down in law. Abstract notions of justice cannot persuade a Court to act contrary to rules laid down by law. Further, the responsibility of initiating a prosecution is immense. A person who takes upon himself the responsibility of initiating a prosecution may be himself prosecuted if it is found that the prosecution was lightly and without sufficient cause launched, or if there was a malice in his mind. He may be made civilly liable in damages. In the case of a complaint by the Court all this is not possible and even when the prosecution fails the person prosecuted has no remedy. If therefore a prosecuted person is to have no remedy it is necessary that a Court should act within the rule of law laid down for its guidance and not outside it.

As to inherent jurisdiction, it cannot be said that a Court, especially a civil Court, has an inherent jurisdiction to file a complaint. That is not the ordinary function of a civil or any Court. The power to file a complaint is given by the Criminal Procedure Code and this does not indicate existence of any inherent jurisdiction, except that of a High Court: S. 561-A. But if we lay down that there is a power to make a complaint outside S. 476, Criminal P. C., we must lay it down for subordinate Courts also. S. 151, Civil P. C., cannot be read as authorizing the filing of a criminal complaint, a matter which is not at all dealt with in that Code. It seems to me therefore to be tolerably clear that a complaint, outside the provisions of S. 476, cannot be filed by any civil, revenue or criminal Court under its inherent jurisdiction.

This being my opinion, I would read S. 476 and Cl. (c), S. 195, as having the same scope. In other words I would not read Cl. (c), S. 195, so as to make it comprehensive of offences which would be outside the purview of S. 476, unless the language is such as would compel me to put a construction which cannot be reconciled in the manner indicated.

Going back to the language of Cl. (c), S. 195, I find that the offence should be one which has been committed by a party to a proceeding. Now an offence which has already been committed by a person who does not become a party till, say, 30 years after the commission of the offence, cannot be said to have been committed "by a party" within the meaning of Cl. (c). The word "party" must mean a party and nothing else. If we lay a little emphasis on the word "party" or if we add the words "as such" after the word "party," the meaning of Cl. (c) would be quite in keeping with the provisions of S. 476, Criminal P. C.

It is to be noticed that the words "in or in relation to a proceeding" to be found in Cl. (b), S. 195 and in S. 476 but do not find a place in Cl. (c), S. 195. It has been argued that the omission of the words "in or in relation to" from Cl. (c), is intentional and is meant to give Cl. (c) a wide application. In my opinion it is not difficult to see why these words "in or in relation to" have been omitted from Cl. (c). If the sense which is produced by the words "in or in relation to" is already there and is perfectly conveyed by the language of the words used in Cl. (c), it would not be necessary to use those words again.

I have already pointed out that in the case of Cl. (b) the offences described therein by the several sections of the Penal Code are of various kinds and it is only with respect to a limited kind of offences that Cl. (b) applies. It was to limit the cases that it became necessary to use the words "in or in relation to" in Cl. (b). In the case of Cl. (c) the use of the words "committed by a party to a proceeding" brought the offences on the same line with the offences as described in Cl. (b) or with offences as described in S. 476 of the Code. It was therefore not necessary to introduce the words "in or in relation to" in Cl. (c).

Let us consider some of the consequences that would follow if we give a wider interpretation to Cl. (c), S. 195. When a civil or revenue or a criminal Court, not being a Court of highest jurisdiction, proceeds under S. 476, an appeal is provided for and the proceeding is subject to re-examination by the appellate Court. If there be any case to which S. 195 (1) (c) is applicable and to which S. 476 does not apply, the result would be that there will be some offences for which a Court would be entitled to file a complaint (assuming that a Court can file such a complaint), but there will be no check by way of an appeal in those cases. It can hardly have been contemplated by the legislature that, while it deliberately provided for appeals in some cases, it failed to provide for appeals in certain other cases. Before the amendment of 1923 every sanction to prosecute, granted by a Court under S. 195 (1) (c), was appealable.

For these reasons I would hold that Cl. (c), S. 195, applies only to cases where an offence is committed by a party, as such, to a proceeding in any Court in respect of a document which has been produced or given in evidence in such proceeding.

In this view of the law, the documents which we have to consider could not come within the purview of S. 195 (1) (c). These documents were forged (supposing they were forged) some time in 1898 and by a person who did not become a party to the present proceedings till the year 1922 when the suit was filed. My answer therefore to the question is in the negative.

Young, J.—I concur and have nothing to add.

King, J.—I concur.

V.B./R.K. *Question answeredin negative.*

A. I. R. 1931 Allahabad 447

SEN AND BENNET, JJ.

Ram Lal—Plaintiff—Appellant.

v.

Mahomed Faiyaz Ali Khan—Defendant—Respondent.

Second Adpeal No. 1114 of 1928, Decided on 16th March 1931, against decision of Addl. Dist. Judge, Aligarh, D/- 20th March 1928.

Pre-emption — Property acquired under decree subject to burden or charge—Interest or profits on mortgage amount or property cannot be asked for by pre-emptor from original vendee between date of sale deed and delivery of possession.

Where under a pre-emption decree, a person acquires a property subject to a burden or charge he is not entitled to ask the original vendee to either account for all his realizations between the date of his sale deed and the date of delivery of possession to him; nor is he entitled to a decree for the amount of interest on the mortgage money for the period between the date of the sale and the date of the delivery of possession: *A. I. R.* 1916 *P. C.* 179, *Rel. on.* [P 448 C 2]

P. L. Banerji and *S. S. Sastry*—for Appellant.

Iqbal Ahmad—for Respondent.

Sen, J.—This is an appeal by the plaintiff and arises out of a suit for recovery of Rs. 1,365 as damages from the defendant. The claim which gave rise to this appeal was somewhat peculiar. On 30th September 1919, certain pardanashin ladies sold a zamindari property to Faiyaz Ali defendant for an ostensible consideration of Rs. 25,000. On the date of the sale, the property was burdened with a mortgage, which had merged in a decree, dated 28th July 1909. Under this decree, the mortgagors were liable to pay to the mortgagees, a sum of Rs. 9,516. This amount was left with the vendee for payment to the mortgagee decree-holders, namely, Ram Lal and Puran Mal. Faiyaz Ali vendee did not pay this amount to the decree-holders. Ram Lal, one of the decree-holders, instituted a suit for pre-emption against Faiyaz Ali and obtained a decree on 9th March 1921. The decree was conditional upon his paying to Faiyaz Ali Rs. 2,474-4-0 in addition to Rs. 9,516 which has already been adverted to. These sums were paid and Ram Lal got possession over the property on 18th May 1921.

Ram Lal seeks to recover from Faiyaz Ali vendee the interest on the sum of Rs. 9,516 for the period between the date of the sale deed, i. e., 30th September 1919 and the date of Ram Lal's getting possession of the property under the pre-emption decree, i. e., 15th May 1921.

The suit was resisted inter alia upon the ground that no cause of action had accrued to the plaintiff and that the suit was not maintainable. This plea was repelled by the trial Court, which gave the plaintiff a decree for Rs. 1,185. The lower appellate Court on appeal has reversed this decision and dismissed the suit upon the ground that no cause of action had accrued to the plaintiff for the suit against the vendee for damages, under the circumstances set out above. We are clearly of opinion that the view of the Court below is correct. Faiyaz Ali Khan purchased the property subject to a certain encumbrance. The property was liable for the entire debt which was charged upon the same. The right of pre-emption is a right of substitution, and Ram Lal by reason of his pre-emption decree was entitled to take the property subject to such burden as existed on the date when he deposited the decretal amount in Court. Where under a pre-emption decree, a person acquires a property subject to a burden or charge, he is not entitled to ask the original vendee to either account for all his realizations between the date of his sale deed and the date of the delivery of possession to him; nor is he entitled to a decree for the amount of interest on the mortgage money for the period between the date of the sale and the date of the delivery of possession. In *Deonandan Prasad Singh* v. *Rumdhari Chowdhri* (1), their Lordships of the Judicial Committee have ruled that where a pre-emption suit is brought, it is on payment of the purchase money on the specified date that the plaintiff obtains possession of the property, and until that time, the original purchaser retains possession and is entitled to the rents and profits. It follows as an inference from this decision that the pre-emptor is not entitled to call for an account from the original vendee or to charge interest on such amount as may have fallen due between the date of the sale and the date of the delivery of possession to him.

We are in agreement with the view taken by the Court below. We accordingly dismiss this appeal with costs.

B.V./R.K. *Appeal dismissed.*

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(1) A. I. R. 1916 P. C. 179=39 I. C. 958=44 I. A. 80=44 Cal. 675 (P.C.).

A. I. R. 1931 Allahabad 449 (1)

MUKERJI AND BENNET, JJ.

Tulshi Prasad — Defendant — Appellant.

v.

Mathura Prasad—Plaintiff—Respondent.

Second Appeal No. 1014 of 1928, Decided on 11th March 1931, against decision of Addl. Dist. Judge, Aligarh, D/- 10th March 1928.

Hindu Law—Debts—Necessity—Canal dues stand on same footing as land revenue—Northern India Canal and Drainage Act (1873).

Canal dues under the Northern India Canal and Drainage Act stand on the same footing as land revenue as regards the question of legal necessity. [P 449 C 2]

G. Agarwala and *Joti Sarup Gupta*—for Appellant.

K. N. Katju—for Respondent.

Bennet, J.—This is a second appeal by a defendant against a decree of the lower appellate Court under which the plaintiff-respondent was decreed recovery of certain sum of money on a mortgage bond of 23rd July 1915. This mortgage bond was for Rs. 500 and was executed by one Mt. Mohani Kunwar, maternal grandmother of the appellant-defendant. In second appeal it has been argued that in regard to Rs. 366-7-0 of this Rs. 500 mortgage money there was no legal necessity. This sum has been proved to have been taken for the payment of canal dues and it was proved by the evidence of a clerk from the treasury that this money was paid on 8th September 1915 by Mt. Mohani Kunwar into the Treasury for canal dues. The ground taken in second appeal is that this payment did not stand on the same footing as the payment of Government revenue and that it could have been collected only from defaulting tenants. The assumption of learned counsel for the appellant is that this sum was paid by Mt. Mohani Kunwar as a lambardar on behalf of tenants and not on behalf of herself. There is nothing at all on the record to support such an assumption. Mt. Mohani Kunwar was admitted in the written statement of the appellant—para. 5, additional pleas—to have a very large income from zamindari properties.

We have not been shown under the Northern India Canal and Drainage Act (Act 8 of 1873), to which learned counsel referred, that proceedings can be taken against a lambardar for canal dues due from tenants. On the contrary that Act lays down that canal dues should be recovered from the occupiers under S. 36 and in S. 45 it is provided that any sum which has remained unpaid shall be recoverable by the Collector from the persons liable as if it was an arrear of land revenue. We consider therefore that canal dues stand on the same footing as land revenue for the question of legal necessity. Accordingly we hold that the lower appellate Court was correct in its decision and we dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

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* A. I. R. 1931 Allahabad 449 (2)

SEN, J.

Syed Ibne Hasan—Applicant.

v.

Din Dayal and *another* — Opposite Parties.

Civil Revn. No. 498 of 1930, Decided on 12th February 1931, against decree of Addl. Sub-Judge, Moradabad, D/- 20th May 1930.

*** (a) Civil P. C. (1908), O. 21, R. 89—Deposit made by person looking after judgment-debtor's property within Court's jurisdiction does not comply with R. 89.**

Person looking after the zamindary property of the judgment-debtor within the jurisdiction of the Court is not the recognized agent of the judgment-debtor and hence deposit made by him does not comply with O. 21, R. 89 and is consequently invalid: 13 *I. C.* 401, *Appl.* [P 450 C 1]

(b) Civil P. C. (1908), O. 21, R. 89—Application under R. 89 rejected as deposit not made by proper person—No revision lies.

Rejection of application made under R. 89, O. 21 on the ground that deposit was not made by proper person does not attract the operation of S. 115. [P 450 C 1]

Mukhtar Ahmad—for Applicant.

B. Malik—for Opposite Parties.

Judgment.—The property belonging to the applicant was sold in execution of a decree on 21st October 1929. One Siraj Ahmad, who did not hold any special or general power-of-attorney from the applicant, deposited the decretal amount and other costs under O. 21, R. 89, Civil P.C., on 12th November 1929 and applied to have the sale set aside. Ibne Hasan appeared on the scene on 14th December 1929. Both Siraj Ahmad and Ibne Hasan filed affidavits to the effect that the deposit made by Siraj Ahmad was on account of the judgment-debtor, viz., Ibne Hasan. The auction-purchaser contested the claim on the ground that no valid deposit having been made by the judgment-debtor or by an authorized agent on his behalf within the statutory period of limitation, the sale was not open to avoidance. The learned Munsif acceded to this contention and dismissed the application: hence this application for revision under S. 115, Civil P. C.

It has been held by this Court in *Sarvi Begum* v. *Haidar Shah* (1) that a tender by a person who was neither an attorney general or special, nor a vakil or mukhtar for the owner of immovable property sold does not comply with the provisions of O. 21, R. 89, Civil P. C., and is consequently invalid. This ruling is clearly applicable to the facts of the case. It has been contended that Siraj Ahmad looks after the zamindari property belonging to Ibne Hasan within the jurisdiction of the Munsif of Moradabad and must be taken to be a recognized agent of Ibne Hasan within the meaning of O. 3, R. 2, sub-Cl. (3), Civil P. C. A person looking after the zamindari property of the judgment-debtor from time to time is not a person carrying on trade or business for a party who is not a resident within the local limits of the jurisdiction of the Court. The decision referred to above is clearly applicable to the facts of the case. But even assuming that the Munsif had erred in dismissing the application by relying upon the abovementioned ruling, no facts have been brought out to attract the operation of S. 115, Civil P. C. The application for setting aside the sale was clearly entertainable by the Munsif. Assuming that there has been an error of judgment on his part in rejecting the application, it could not be said that the Munsif had exercised a jurisdiction which was not vested in him in law or had failed to exercise jurisdiction or had been guilty of irregularity in the exercise of jurisdiction in a way so as to affect the merits of the case. I dismiss this application with costs.

S.N./R.K. *Revision dismissed.*

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(1) [1912] 13 I.C. 404.

A. I. R. 1931 Allahabad 450

MUKERJI AND BENNET, JJ.

Shankar Lal—Plaintiff—Appellant.

v.

Damodar Das—Defendant—Respondent.

Second Appeal No. 1039 of 1928, Decided on 9th March 1931, against decision of Asst. Sessions and Sub-Judge, Meerut, D/- 10th March 1928.

(a) **Hindu Law—Widow—Mere fact that Hindu woman holds property does not imply that she holds it for her benefit—She may hold it on behalf of her husband or son.**

The mere fact that a Hindu woman holds property need not necessarily imply that she holds it for her benefit. She may hold it on behalf of her husband's estate or on behalf of her son's estate. Where she does not hold for herself but for the benefit of her husband's estate, she by adverse possession matures in favour of her husband's heirs an estate in the property: *A. I. R.* 1924 *P. C.* 121, *Foll.* [P 451 C 2]

(b) **Ejectment—Person professing to be reversioner making gift to school in the name of its manager—Manager can sue to eject pure trespasser.**

Where a person professing to be the next reversioner makes a gift in favour of a school, which is in existence, and in the name of *X* who is one of the managers of the school, *X* is entitled to maintain a suit to eject one who is a pure trespasser: 38 *I. C.* 183, *Dist.* [P 451 C 1]

N. C. Vaish, *S. C. Goyel* and *S. B. L. Gour*—for Appellant.

S. N. Gupta—for Respondent.

Mukerji, J.—The facts which have given rise to this appeal are as follows according to the decision of the lower Court: One Sarbu was the owner of the property in suit. He retired from the world having become a sanyasi, and thus died a civil death. This was about 35 years ago. His wife Mt. Gobindi took possession of the property and she died some 19 or 20 years previously to the institution of the suit. Sarbu's brother Makundi died in the lifetime of Gobindi. On the death of Gobindi Mt. Basanti the widow of Makundi took possession of the property in suit. In 1922 Mt. Basanti executed a registered will professing to give the property after her death to one Niadar. Subsequently she changed her mind and sold the property to Damodar Das on 6th January 1929. She died shortly after this sale deed, and one Debi Sahai professing to be the next reversioner to the estate of Makundi on the death of Mt. Basanti executed a deed of gift in favour of school described as Sanatan Dharam

School under the managership of L. Shankar Lal, the plaintiff-appellant.

The suit succeeded in the Court of first instance but was dismissed by the learned appellate Judge. The suit was dismissed on two grounds: (1) the plaintiff was not competent to maintain the suit; and (2) that Mt. Basanti held adversely to the reversioner of the estate of Makundi and therefore when she died, there was no title which could revert to Debi Sahai, as the next reversioner of the estate of Makundi, if there is any such estate. On appeal both the points are controverted, and we have to see if the decision is right. As regards the title of the plaintiff to maintain the suit, this is a matter of construction of a document, pure and simple. The school known as Sri Sanatan Dharam School does exist in Ghaziabad, and it is managed by certain gentlemen one of whom is the appellant L. Shankar Lal, described in the deed as the manager. The transfer by gift is in favour of the school under the managership of L. Shankar Lal, and it is further stated that the possession is being delivered to the said manager who was to hold as the proprietor (*misl zat khas malik ke malikana qabiz dakhil honge*). On behalf of the respondent, Mr. Panna Lal has relied on the case of *Mathura Kuer* v. *Dharam Samaj* (1). That case is clearly distinguishable from the case before us. In that case an endowment was created in favour of something which never existed. Just to give an appearance it was described that the entity in whose favour the endowment was being created was a Dharam Samaj. It was held that the gift was void, and the Dharam Samaj having no existence could not accept any gift. In the present case L. Shankar Lal, is mentioned by name and he is directed to hold the property on behalf of the school. If we hold, as we shall, that the defendant is a rank trespasser, we do not see why L. Shankar Lal should not be allowed to maintain the suit and eject a pure trespasser.

As regards the second question, it appears that the learned appellate Judge has overlooked the will dated 17th July 1922 executed by Mt. Basanti. The document is mentioned by the first Court but it is not at all noticed by the lower appellate Court. In this document Mt. Basanti states that she inherited the property (the house) from her husband Makundi. This is the clearest possible admission and might have induced the learned Judge, if he had read it, to hold that as a matter of fact Makundi survived Mt. Gobindi, and thus became a reversioner to the estate of Sarbu. We are however bound by the finding of fact that Makundi died before Mt. Gobindi, and we have no quarrel with that finding. The fact remains that in her will which was executed nearly three years prior to the sale deed in favour of Damodar Das, Mt. Basanti made a clear statement that she was holding as the heir to her husband. Then she stated that she had no reversioner to the estate of her husband (waris audi). This statement again implies that if there had been a reversioner to the estate of her late husband, the property would have gone to him. In the face of these admissions it cannot be said with any show of reason that Mt. Basanti was holding the property for herself as her stridhan and not as representing the estate of her late husband Makundi. The mere fact that a Hindu woman holds a property need not necessarily imply that she holds it for her own benefit. She may hold it on behalf of her husband's estate or on behalf of her sons' estate as the case may be. This was clearly recognized in the case of *Lajwanti* v. *Safachand* (2), by their Lordships of the Privy Council. We hold therefore that Mt. Basanti held not for herself but for the benefit of her husband's estate and thus by adverse possession matured in favour of her husband's heirs, an estate in the property in question. It follows that on the death of Mt. Basanti the property would go to the reversioner of Makundi's estate. In the result we allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. The appellant will have his costs throughout.

S.N./R.K. *Decree set aside.*

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar

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(1) [1916] 38 I. C. 183.

(2) A. I. R. 1924 P. C. 121=80 I. C. 788=5 Lah. 192=51 I. A. 171.

A. I. R. 1931 Allahabad 452

MEARS, C. J. AND SEN, J.

Krishna Saroop—Defendant — Applicant.

v.

Raj Bahadur Singh — Plaintiff — Opposite Party.

Civil Revn. Applns. Nos. 244 to 246 of 1929, Decided on 9th December 1930, from order of First Class Asst. Collector, Mainpuri, D/- 4th April 1929.

Civil P.C., (1908), O. 9, R. 9—Order setting aside order of dismissal without considering evidence is vitiated by material irregularity.

Where a Court sets aside an order of dismissal without considering the evidence produced by the parties and without any reference to the pleadings involved in the case and without determining the crucial issue whether or not there was any sufficient cause for the non-appearance of the plaintiff on the date fixed, the order in question is vitiated by a material irregularity. [P 452 C 2]

Harnandan Prasad—for Applicant.

Shiva Prasad Sinha — for Opposite Party.

Sen, J.—This and the connected two applications for revision arise out of three suits instituted by Misir Raj Bahadur Singh minor with Mt. Maharaj Kunwar as his next friend in the Court of the parganna officer of Tehsil Karhal for recovery of profits from the defendant who is a lambardar. The case was adjourned from time to time. On 25th September 1928 the parties were not ready with their evidence. On 2nd November 1928, the plaintiff had no evidence ready in Court. An order was passed on that date distinctly intimating to the plaintiff that he was to be ready with his evidence on 9th November 1928 and if he failed to do so, no further indulgence would be allowed. On 9th November 1928, there was no appearance on behalf of the plaintiff and this suit and the connected two suits Nos. 16 and 22 of 1928 were dismissed for default of appearance under O. 9, R. 9, Civil P. C.

On 10th December 1928, an application was presented in each of the three suits for setting aside the order, dated 9th November 1928 and restoring these suits. Notice of these applications was duly served upon the defendant. He filed his objections on 16th March 1929. On 4th April 1929, the suits were restored with the following order "Restored on payment of Rs. 20 as costs. Same order in Cases Nos. 17 and 22."

It has been contended on behalf of the defendant who has filed this revision under S. 115, Civil P. C. that the order directing the restoration of the suits was one passed without jurisdiction. The Assistant Collector was competent to entertain the application dated 8th December 1928. But he was bound by the provisions of O. 9, R. 9, Civil P. C., and in the event of the plaintiff satisfying the Court that he was precluded from appearing for a sufficient cause, the Court could set aside the order, dismissing the suit for default, and could reinstate the suits. In the present case, the application for restoration was supported by an affidavit which states that the minor plaintiff was ill and that his next friend is a pardanashin lady. The affidavit does not go beyond this. But it is stated in the application that on account of the illness of Raj Bahadur Singh, Mt. Maharaj Kunwar, the mother could not make any arrangement through anybody for the due prosecution of the suits. Neither in the application nor in the affidavit there is a mention of the date when the illness began. The fact whether any doctor was in attendance or not is not disclosed. Further there is no mention in the affidavit that because of the illness of the son, the mother found herself in such a state of embarrassment as not to be able to send a person to the headquarters to instruct her legal practitioner, engaged in the case. We are of opinion that the materials before the Court were insufficient to justify the setting aside of the order of dismissal. The learned Assistant Collector ought to have determined the crucial issue whether or not there was any sufficient cause for the non-appearance of the plaintiff on the date fixed.

He ought to have applied a judicial mind to the materials before him and arrived at a clear and determinate finding. He has not considered the objections of the defendant at all. Where a Court sets aside an order of dismissal without considering the evidence produced by the parties and without any reference to the pleading involved in the case, the order in question is vitiated by a material irregularity. We are of opinion that the order dated 4th April 1929 cannot and ought not to stand. We accordingly allow this application for revision, set aside the order, dated 4th April 1929 and restore that of 9th November 1928. It has been strongly pressed upon us that the plaintiff in this case is a minor and that her guardian is a pardanashin lady, and persons so situated, are entitled to some indulgence. We regret we cannot extend our sympathy to persons who had received a definite and distinct order from the Court to be ready with their evidence on 9th November 1928. If there was a reasonable cause for the non-appearance of the plaintiff through a properly constituted agent there ought to have been distinct materials before the Court to prove it. The plaintiff had the opportunity of proving this and has eminently failed in his effort.

We make no order as to costs.

K.N./R.K. *Order accordingly.*

✲ A. I. R. 1931 Allahabad 453

MUKERJI AND BENNET, JJ.

Bankey Lal and *another*—Defendants—Appellants.

v.

Chotey Miyan Abdul Shakur—Plaintiff—Respondent.

Second Appeal No. 811 of 1928, Decided on 24th February 1931, against decision of Dist. Judge, Agra, D/- 11th April 1928.

(a) Civil P. C. (1908), Sch. 2, Para. 16—Judgment delivered according to award but without giving ten days for objection—Judgment cannot be reversed—Civil P. C. (1908), S. 99.

If a judgment is delivered according to award giving less than ten days for filing objection, failure to give full ten days' time is not an irregularity vitiating the judgment and the judgment cannot be reversed unless such failure affects the merits of the case. [P 454 C 1]

✲ (b) Civil P. C. (1908), Sch. 2, Para. 1—All parties to contesting suit are not necessary parties to arbitration.

Paragraph 1 does not mean that all parties who are combating a suit must necessarily join in arbitration, but where interest of defendants may be severed there is no bar to some of the contesting defendants joining with the plaintiff in referring the matter between them to arbitration: *A.I.R.* 1924 *Pat.* 33, *Foll.* [P 454 C 2]

U. S. Bajpai and *J. P. Bhargava*—for Appellants.

N. P. Asthana—for Respondent.

Mukerji, J.—This is an appeal by the defendants in a suit, for money being the price of certain goods supplied, instituted by the respondents against the appellants. The appellants were two in number, Bankey Lal and Munna Lal. On 20th December 1927, the plaintiffs and one of the defendants Bankey Lal agreed to refer the matter in difference between the parties to the arbitration of one Achal Singh. Achal Singh filed a written award on 16th January 1928. Before the award arrived 21st January 1928 had been fixed for hearing of the case. When the award arrived, the learned Munsif directed that the parties should be informed of the fact that their award had arrived and he further directed the parties to file objections if any. No objections were filed and the case was taken up on 21st January 1928 and a judgment was pronounced in terms of the award.

The defendants went up in appeal to the learned District Judge and substantially two points were taken against the judgment One was that ten days' time should have been allowed to the defendants to file objection to the award and the second was that Munna Lal not having joined in the arbitration the whole arbitration proceeding was bad and no decree could be made on the award. In the appellate Court, the plaintiffs exempted Munna Lal from all liability. Thereupon the learned District Judge came to the conclusion that the award was a good one so far as the plaintiffs and Bankey Lal were concerned. The learned Judge accordingly dismissed the appeal except in this that he exempted Munna Lal from all liability but ordered that he should pay his own costs.

The defendants have come up in second appeal and Munna Lal's grievance is that, having been exempted from the claim, he should have got his own costs. The learned counsel for the respondent has not been able to satisfy us that Munna Lal should not get his costs. We accordingly allow Munna Lal's appeal and direct that he shall recover his costs throughout the litigation. Where Munna Lal and Bankey Lal have jointly incurred expenses, one half of the costs will be taken as having been incurred by Munna Lal alone. This is for the drawing up of the decree.

So far as Bankey Lal's appeal is concerned, the preliminary objection is taken that no appeal lies. In view of this objection, we have been asked by the learned counsel for the appellant that, if we decide that no appeal lies, we should take up the matter in revision and do justice in the case.

It has been urged that the appeal is competent, inasmuch as the learned Judge failed to comply with the provisions of para. 16, Sch. 2, Civil P. C., inasmuch as he did not wait for ten days for a party in arbitration to file his objections. Reliance is placed on certain observations of one of us in the case of *Tursi Ram* v. *Basdeo* (1), to be found (at p. 708 of 24 *A.L.J.*). There is no doubt a good deal is said there which would support the argument of the learned counsel for the appellant that an appeal would be competent. But this is not a definite declaration of the law, because the Court found that there was another matter, namely, a decision by the Judge himself which made an appeal maintainable. In this particular case we do not propose to pronounce any definite opinion as to whether in the circumstances of this case, namely, because the Court has failed to give full ten days' time, an appeal is competent or not? Supposing that an appeal is competent, we are not prepared to reverse the judgment of the Court below because full ten days' time has not been given. S. 99, Civil P. C., lays down that no irregularity in any proceeding in a suit not affecting the merits of the case should be permitted to reverse or substantially vary a judgment. The learned counsel has not been able to point out on the record any objection which his client could validly have taken to the award if full ten days time had been given to him. We have already noted that he had five days' time and when the case was taken up he did not tell the learned Munsif that he should have five days more time under the law and as a matter of fact he wanted five days more time to formulate his objections.

The second point is as to whether the arbitration itself was invalid because Munna Lal did not join in the reference. The defendants according to the plaint were jointly and severally liable to the plaintiffs. If one of the two defendants who were jointly and severally liable and the plaintiffs agree that there should be a reference to arbitration, the mere fact that defendant 2 did not join will debar parties agreeing to an arbitration from making a reference to arbitration. Para. 1, Sch. 2, Civil P. C., reads as follows:

> "Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration . . . ."

This does not mean that all the parites who are contesting a suit must necessarily join in arbitration. There may be cases in which it would not be possible to decide a case by compartments, i. e., where an arbitrator may be appointed to decide a part of the case and the Court should decide the rest of it, such a case would be a suit for partition, for example. But where the interest of the defendants may be severed, as in this case, there does not appear to be any bar to some of the contesting defendants joining with the plaintiffs in referring the matter in difference between them to arbitration. There is a decision to that effect in the case of *Raghunath Sukul* v. *Ramrup Raut* (2). In this view we do not think that the arbitration is in any way vitiated.

There is no other point to be decided in this case and we dismiss the appeal of Bankey Lal with costs. For order in Munna Lal's appeal see p. 453.

V.B./R.K. *Appeal dismissed.*

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(1) A.I.R. 1926 All. 567=96 I.C. 531.

(2) A.I.R. 1924 Pat. 33=76 I.C. 2=2 Pat. 777.

✲ A. I. R. 1931 Allahabad 454

SEN AND NIAMATULLAH, JJ.

Raghubir Saran and *another*—Defendants—Appellants.

v.

Hori Lal and *another*—Plaintiffs—Respondents.

Second Appeal No. 618 of 1928, Decided on 20th January 1931, against decision of Addl. Sub-Judge, Moradabad, D/- 31st January 1928.

✲ **(a) Civil P. C. (1908), S. 21—Jurisdiction—Absence of—Consent or waiver do not legalize jurisdiction—S. 21 does not bar agitation of such question by independent suit.**

It is settled law that where a Court has no jurisdiction as to the subject-matter or with reference to the temporary value of the suit, the jurisdiction of the Court cannot be legalised by the consent or by the waiver of the parties. Generally, the same rule is applicable with reference to territorial jurisdiction. But an exception has been grafted upon the general principle by the provision of S. 21. S. 21 does not provide against the question of jurisdiction being agitated by means of an independent suit. No legal sanction can attach to a decree which rests upon a usurpation of jurisdiction. If a party who had the right and the opportunity of raising the plea of jurisdiction has failed to avail himself of it at the earliest possible opportunity, he is penalized to this extent by an express bar raised by S. 21, that he cannot be permitted to raise that question in a later stage of that suit before the appellate Court or before the Court of revision. There is no provision in the Civil Procedure Code which either expressly or by necessary implication deprives the plaintiff of his right of suit. Where a plaintiff is threatened with an encroachment over his property in execution of a decree which has been passed by a Court without jurisdiction, a cause of action undoubtedly accrues to the plaintiff, and it would be a most unfortunate and deplorable circumstance if the threatened wrong were not open to a redress by a properly constituted tribunal. Neither the Code nor any other statute provides against the maintainability of a suit of this description. S. 21 is based upon a principle of expediency and the object clearly is that an inquiry into an extraneous matter should not ordinarily be let in for the first time in appeal or revision where the party aggrieved did not choose to challenge the jurisdiction of the Court at the earliest possible opportunity. It is open to the plaintiff to challenge by a suit a decree which has been passed by a Court which did not possess the territorial jurisdiction over the subject-matter of the suit. It is not legitimate to extend the bar of S. 21 beyond the limits expressly provided for by that section. If it was the intention of the legislature to make the bar general for all purposes it could and should have said so. It would be unjust to take away from a party his right of suit upon speculative reasoning relating to the principle underlying S. 21: 40 *All.* 423, *Ref.*; *A. I. R.* 1925 *Mad.* 117 and 43 *Mad.* 675, *Diss. from.* [P 456 C 2, P 457 C 2]

(b) Civil P. C (5 of 1908), S. 11—Judgment by Court without jurisdiction is not conclusive between parties.

No judgment can operate as res judicata unless it has been passed by a Court of competent jurisdiction, and where the judgment is issued by a Court without jurisdiction, it cannot be conclusive between the parties under S. 11. S. 11, Expl. 4, can have no application to such a case: 47 *Cal.* 770, *Foll.* [P 458 C 1]

S. N. Seth—for Appellants.

Panna Lal—for Respondents.

Sen, J.—Lalas Raghubir Saran and Badri Prasad had instituted a suit in the Court of the Munsif of Sambhal against two minors Hori Lal and Kanahi Lal under the guardianship of one Budh Sen for enforcement of a mortgage dated 28th November 1913. This suit was registered under the number 897 of 1925. No part of the property comprised in the mortgage was situate within the jurisdiction of the Munsif of Sambhal. The defendants did not raise the plea that the suit was instituted in a Court without jurisdiction. The guardian of the minors absented himself on the final date of hearing, and eventually, an ex-parte decree was passed against the minors on 25th February 1926.

The property sought to be sold under the decree consisted of certain zamindari shares, a house and a shop. These were situate within the jurisdiction of the Munsif of Chandausi. Upon the application of the decree-holders, the decree was transferred for execution to the Court last mentioned. The minor judgment-debtors contested the application for execution, inter alia, on the ground that the decree passed against them was a nullity inasmuch as the mortgaged property was outside the territorial jurisdiction of the Munsif of Sambhal. The executing Court, by its order dated 5th February 1927, refused to entertain the plea and directed the minor judgment-debtors to file a regular suit. This led to the institution of the present suit on 25th April 1927.

The plaintiffs filed the suit with their mother Mt. Gango as their next friend. They challenged the legality and validity of the decree in Suit No. 897 of 1925, upon the ground that it was passed by a Court without jurisdiction and was void, that it was vitiated by fraud and had been obtained in collusion with Budh Sen, the guardian ad litem, who had moreover acted with gross negligence and had not properly looked after the interest of the minors. The suit was resisted upon a variety of grounds. Fraud and collusion were denied and it was contended that the decree was not void on the ground that no portion of the mortgaged property was located within the jurisdiction of the Munsif of Sambhal and that the suit was barred by Ss. 11, 21 and 47, Civil P. C. The trial Court dismissed the suit. It overruled the contention of the defendants that the suit was barred by Ss. 11, 21 and 47, Civil P.C., but held that there was nothing on the record to show that any fraud had been practised by the defendants and that the decree was not null and void simply because the mortgaged property was outside the jurisdiction of the Munsif of Sambhal. Dealing with Ss. 11, 21 and 47, Civil P. C., the trial Court made the following observation:

> "The present suit was brought on the basis of fraud and negligence on the part of the guardian ad litem of the plaintiffs in the previous suit. Such a question was never decided before and hence I fail to understand how S. 11 can apply to it. S. 21, Civil P. C., lays down that no objection as to the place of suing shall be allowed by any appellate or revisional Court. Since I am neither sitting as a Court of appeal nor as a revisional Court, hence S. 21 has no bearing at all. S. 47 deals with questions relating to execution. The question of the validity of a decree does not relate to the execution, discharge or satisfaction of the decree, and hence it cannot be tried in execution proceedings. Such a question can only be tried in a regular suit brought for a purpose (sic)."

In dismissing the suit, the trial Court purported to follow a decision of this Court in *Re. Beni Prasad* v. *Lajjaram* (1) in which it had been held that a decree obtained against an infant properly made a party and properly represented in the case could not be set aside by means of a separate suit except upon proof of fraud or collusion on the part of the guardian. The lower appellate Court reversed the decision and decreed the suit.

The defendants have appealed to this Court.

The only two points, which have been argued and which emerge for decision in this appeal are: (1) whether the plaintiffs who had not challenged the jurisdiction of the Munsif of Sambhal in the previous suit can be allowed to do so by means of a separate suit? and (2) whether the claim is barred by S. 11, Expl. 4, Civil P. C.

It has not been contested that the Munsif of Sambhal had no jurisdiction to entertain the former suit which related to property wholly beyond his territorial jurisdiction. It is settled law that where a Court has no jurisdiction as to the subject-matter or with reference to the temporary value of the suit, the jurisdiction of the Court cannot be legalized by the consent or by the waiver of the parties. Generally, the same rule is applicable with reference to territorial jurisdiction. But an exception has been grafted upon the general principle by the provision of S. 21, Civil P. C. This section runs thus:

> "No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice."

Under this section a party is precluded from raising the question of jurisdiction in appellate and revisional Courts unless the question was raised at the earliest possible opportunity and unless a failure of justice was occasioned thereby.

Section 21 is not in terms applicable to the case, as it does not provide against the question of jurisdiction being agitated by means of an independent suit.

No legal sanction can attach to a decree which rests upon a usurpation of jurisdiction. If a party who had the right and the opportunity of raising the plea of jurisdiction has failed to avail himself of it at the earliest possible opportunity, he is penalized to this extent by an express bar raised by S. 21 that he cannot be permitted to raise that question in a later stage of that suit before the appellate Court or before the Court of revision. There is no provision in the Code of the Civil Procedure which either expressly or by necessary implication deprives the plaintiff of his right of suit. Where a plaintiff is threatened with an encroachment over his property in execution of a decree which has been passed by a Court without jurisdiction, a cause of action undoubtedly accrues to the plaintiff, and it would be a most unfortunate and deplorable circumstance if the threatened wrong were not open to a redress by a properly constituted tribunal. Neither the Code of Civil Procedure nor any other statute which we know of provides against the maintainability of a suit of this description. S. 21 is based upon a principle of expediency and the object clearly is that an inquiry into an extraneous matter should not ordinarily be let in for the first time in appeal or revision where the party aggrieved did not choose to challenge the jurisdiction of the Court at the earliest possible opportunity.

The appellant in support of his contention has drawn our attention to *Jaya Veera Rama Vencatashwara* v. *Chidambaram Chetty* (2). This was not a case in which the decree was sought to be avoided by means of an independent suit. The facts were that the preliminary decree in a mortgage suit was passed by a Court of competent jurisdiction, but the final decree was passed by a Court which had no jurisdiction over the suit property. There was therefore no doubt that the latter Court had passed the decree without any jurisdiction. No plea of jurisdiction was raised before it. Later on, when the decree was sought to be executed, one of the defendants judgment-debtors challenged it upon the ground that it had been passed by a Court without jurisdiction and was therefore a nullity. It was held that a party who did not raise an objection to jurisdiction when a preliminary mortgage decree was made absolute was not entitled to plead in execution that the order was passed without jurisdiction. The decision has been founded upon the principle that the Court executing the decree is not competent to go behind the decree and it has been expressly ruled that

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(1) [1916] 38 All. 452=35 I. C. 63.

(2) [1920] 43 Mad. 675=58 I. C. 871 (F. B.).

> "an objection to the jurisdiction is a ground for setting aside a decree and is not one of the questions relating to the execution, discharge or satisfaction of the decree, required by S. 47 to be dealt with in execution."

The decisions of the Courts in this country are not, by any means, uniform on the question of the competency of the Court executing the decree to probe into the jurisdiction of the Court which had passed the decree. On one side are the cases like the following: *S. Veeraraghava Ayyar* v. *J. D. Muga Sait* (3), *Hari Govind Kalkundri* v. *Narsingrao Konherrao Deshpande* (4) and *Kalipada Sarkar* v. *Hari Mohan Dalal* (5).

On the other side of the line are cases like *Gora Chand Halder* v. *Profulla Kumar Roy* (6) and *Kunjamohan Chakraverty* v. *Manindra Chandra Roy Chowdhury* (7).

In the case of *Sripat Narain Roy* v. *Tribeni Missir* (8) all that was held by this Court was that it was a good answer to an application for execution against the alleged representatives of the judgment-debtors to show that the judgment-debtor was dead at the time when the decree was passed and that by reason of this vital defect the decree was void and incapable of execution. The following fact was emphasized in the judgment :

> "No question of jurisdiction of the Court to make the decree arises, because no Court can make a decree against a dead man and a decree so made is a nullity."

These cases are no authority for the proposition that it is not open to a plaintiff to challenge by a suit a decree which has been passed by a Court which did not possess the territorial jurisdiction over the subject-matter. The point has not been argued and we express no opinion on the question whether the matter could be raised before the Court executing the decree. The plaintiffs sought to raise it before the executing Court, but upon the objection of the defendants they were referred to a regular suit. It must be borne in mind that the question of jurisdiction has not been sought to be raised in the later stages of the same suit before an appellate or a revisional Court. S. 21, Civil P. C., has therefore no application.

But it has been contended that although S. 21 is not applicable in terms, the principle underlying that section is applicable and reliance has been placed upon the following observations in the judgment of Wallis, C. J., in the Madras case already referred to ; *Jaya Veera Rama Venkatashwara* v. *Chidambaram Chetty* (2) at p. 686 :

> "The effect of the section in my opinion is that objections which the appellate or revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the passing of the decree in the original Court."

It is respectfully submitted that it is not legitimate to extend the bar of S. 21 beyond the limits expressly provided for by that section. If it was the intention of the legislature to make the bar general "for all purposes" it could and should have said so. It would be unjust to take away from a party his right of suit upon speculative reasoning relating to the principle underlying S. 21, Civil P. C. We are clearly of opinion that there are no such underlying principles which can operate as a bar against the plaintiffs.

In *Chokkalinga Pillay* v. *Valayudha Mudaliar, A. I. R.* 1925 *Mad.* 117, a suit for sale on a mortgage was properly instituted in the Kumbakonam Sub-Court and a preliminary decree was obtained from that Court. In 1907 the subject-matter of the suit was transferred to the Mayavaram Court. The plaintiff however applied for and obtained a final decree from the Kumbakonam Court. The defendant brought a suit to set aside the final decree on the ground that the Kumbakonam Court, on the date of the passing of the decree, had ceased to possess territorial jurisdiction over the property in dispute. It was held that the suit was not maintainable because, although S. 21 did not apply, it was argued that the principle underlying that section was of general application and if the objection could not be heard in appeal or revision, it would be consistent that the decree could not be attacked by a collateral proceeding. The learned Judges in arriving at this conclusion adopted the statement of law in *Jaya Veera Rama Venkateshwara* v. *Chidambaram Chetty* (2). For reasons already given we cannot accept this view.

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(3) [1916] 39 Mad. 24=26 I. C. 287.
(4) [1914] 38 Bom. 194=23 I. C. 123.
(5) [1917] 44 Cal. 627=35 I. C. 856.
(6) A. I. R. 1925 Cal. 907=89 I. C. 685=53 Cal. 166.
(7) A. I. R. 1923 Cal. 619=77 I. C. 253.
(8) [1918] 40 All. 423=45 I. C. 21.

We overrule the contention of the appellant and hold that where a decree has been passed by a Court having no territorial jurisdiction over the matter in controversy, the plaintiff is entitled to maintain an independent suit for its avoidance.

Both the Courts below have overruled the contention of the appellants that the suit is barred by the rule of res judicata. We have no doubt about the correctness of this view. No judgment can operate as res judicata unless it has been passed by a Court of competent jurisdiction. It follows therefore that where the judgment is issued by a Court without jurisdiction it cannot be conclusive between the parties under S. 11, Civil P. C. S. 11, Expln. 4, Civil P. C., can have no application to such a case. The principle has been discussed by Mukerji, J., in *Re. Krishna Kishore Dey* v. *Amar Nath Kshettry* (9), at p. 780 and we respectfully adopt the following statement of law :

> "In this case . . . . . the question of jurisdiction is neither raised nor decided; the position might have been different, if the question had been raised and decided, for where a Court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction over the case, the decision is conclusive till it is set aside in an appropriate proceeding. But where there has been no such adjudication, the decree remains a decree without jurisdiction and cannot operate as res judicata."

The result is that we dismiss this appeal with costs, including in this Court fees on the higher scale.

K.N./R.K. *Appeal dismissed.*

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(9) [1920] 47 Cal. 770=56 I. C. 532.

A. I. R. 1931 Allahabad 458 (1)

SEN, J.

Pragilal Kanhaiya Lal—Applicant.

v.

Ratan Lal Mathra Prasad—Opposite Party.

Civil Revn. No. 496 of 1930, Decided on 12th February 1931, against order of Second Sub-Judge, Small Cause Court, Judge, Cawnpore, D/- 18th July 1930.

Contract Act (1872), S. 23—Money borrowed with definite intention of utilising in gambling—Plaintiff not proved to be privy of intention—S. 23 is no bar to recovering it.

Where the defendant borrows money from the plaintiff with the clear intention of utilizing the money for the purpose of gambling but there is nothing to indicate that the plaintiff was privy to this intention, there is nothing to preclude the plaintiff from recovering the amount from the defendant by suit. [P 458 C 2]

I. B. Banerji for *S. N. Gupta*—for Applicant.

Baij Nath Sahai—for Opposite Party.

Judgment.—This is an application for revision by the defendant under S. 25, Provincial Small Cause Courts Act. Defendant borrowed from the plaintiff Rs. 300 on the Divali day. The suit was for recovery of that sum together with interest. The Court below found that the money had been borrowed on the Divali day for the purpose of gambling. This was not a circumstance which vitiated the debt and a suit for its recovery was maintainable. The Court therefore gave the plaintiff a decree. It has been contended by Mr. Surendra Nath Gupta who holds the brief for Mr. Indu Bhushan Banerji that a claim for enforcement of a loan of this character is opposed to public policy under S. 23, Contract Act. I am clearly of opinion that this contention has no force. Where the defendant borrows money from the plaintiff with the clear intention of utilizing the money for the purpose of gambling but there is nothing to indicate that the plaintiff was privy to this intention, there is nothing to preclude the plaintiff from recovering the amount from the defendant by suit.

I dismiss this application with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1931 Allahabad 458 (2)

SULAIMAN AND NIAMATULLAH, JJ.

Prem Narain and *another*—Judgment-debtors—Appellants.

v.

Ganga Ram and *others*—Decree-holders—Respondents.

Execution First Appeal No. 195 of 1930, Decided on 11th February 1931, against decision of Sub-Judge, Farrukhabad, D/- 7th February 1930.

Limitation Act (1908), Art. 181—On 24th April 1926 decree-holder and judgment-debtor agreeing that latter should be given three months' time for payment—On failure to pay, execution to proceed—Court striking off execution for the time being—Judgment-debtor failing to pay—Decree-holder making fresh application for execution on 24th July

1929—Fresh application held to be one for revival of execution proceeding and held not barred by limitation.

On 24th July 1926, decree-holder and judgment-debtor compromised and agreed that the judgment-debtor should be given three months' time for payment, and that if he failed to pay within that time the execution should proceed. On this the Court ordered: "The execution case be struck off for the present." The judgment-debtor did not pay the amount within the time agreed and an application purporting to be one for execution was filed by the decree-holder on 24th July 1929. The judgment-debtor pleaded bar of limitation.

Held: that under the circumstances the application, though ostensibly a fresh application for execution, should be treated as one for revival of execution proceedings. As such it was not barred by limitation even assuming that Art. 181 applied to an application for revival of execution proceedings: 27 *All.* 334 (*P.C.*); *A.I.R.* 1927 *All.* 16 (*F.B.*); *A. I. R.* 1927 *All.* 165 (*F.B.*); 8 *Cal.* 420 and 19 *Cal.* 132 (*F.B.*), *Rel. on.* [P 460 C 1]

R. C. Ghatak—for Appellant.

U. S. Bajpai, *B. Malik* and *S. N. Seth*—for Respondents.

Sulaiman, J.—This is a judgment-debtors' appeal arising out of an execution proceeding consequent upon the passing of an ex parte mortgage decree dated 24th January 1924 which was made absolute on 10th January 1925. An application for execution was filed on 7th August 1925 and while it was pending the judgment-debtors applied for the setting aside of the ex parte decree on 13th October 1925. There was an interim order staying execution passed on that date. On 24th April 1926 the decree-holder and the judgment-debtors compromised and agreed that the judgment-debtors should be given three months' time to pay up the amount by selling a part of the mortgaged property and that if they failed to pay the amount within the time allowed the execution should proceed. This was a written compromise filed in Court and was verified by the parties on 12th May 1926.

On 22nd May 1926 the Court passed an order striking off the application for the setting aside of the ex parte decree on the ground that the matter had been compromised. Subsequently on 4th June 1926 the office put up a report before the Court referring to the purport of the compromise and pointing out that the decree was to remain in execution for the time being and that the decree-holder would be entitled to sell the property if the amount was not paid within three months. On this the Court ordered:

> "the execution case be struck off for the present without payment being entered. The costs to be borne by the judgment-debtors."

There is nothing to suggest that the decree-holder agreed to the striking off of his application or that he was informed of it on that date.

The judgment-debtors did not deposit the amount within the period which expired on 24th July 1926. The present application purporting to be an application for execution of the decree was filed by the decree-holder on 24th July 1929. The judgment-debtors took the objection that it was barred by time. The execution Court has held that the application is in time, although it has not given its reasons in full. It is quite clear that under the compromise between the parties it was agreed that the execution proceedings should remain pending and not that the application for execution would be struck off. The matter was to be taken up and proceeded with after the expiry of the period of three months allowed to the judgment-debtors to pay up the amount. The Court therefore was quite wrong in striking off the case for the time being. At the same time it is quite clear that the use of the expression "for the time being" indicates that the Court was not disposing of the application finally but was merely shelving the matter, or striking off the application as a temporary measure. There was no default on the part of the decree-holder and there was no justification for the dismissal of his application for execution. The application must therefore be deemed to have remained pending and only provisionally shelved.

It is also clear that during the period of three months which the decree-holder had allowed to the judgment-debtors he could not proceed with the execution of the decree and attempt to get the mortgaged property sold. The execution was necessarily postponed or suspended for that period. His application for execution therefore remained in abeyance for that period. There was no subsequent order passed by the Court dismissing the application finally. This being so it followed that it was open to the decree-holder to apply to the Court to revive and carry through the pending execution suspended by no act or default of the decree-holder, and that it was not incumbent upon him to file a fresh application to initiate a new execution, *Qamaruddin Ahmad* v. *Jawahir Lal* (1). The view expressed by their Lordships of the Privy Council in the case quoted above has been applied by the Full Bench of this Court in two cases which arose under the new Civil Procedure Code: *Chhattar Singh* v. *Kamal Singh* (2) and *Baij Nath* v. *Ram Bharose* (3).

The present application is no doubt ostensibly a fresh application for execution, but the previous history is fully set forth. The majority of the learned Judges in the first Full Bench case interpreted a similar application as being in substance one for revival. There seems to be no reason why the present application cannot similarly be treated as one for revival. It was assumed by four out of the five Judges in that Full Bench case that an application for revival would be one governed by the residuary Art. 181, Lim. Act. There was previous authority for that view. But assuming that Art. 181 is applicable to this application the time would begin to run from the date when the right to apply accrued.

As pointed out above the decree-holder could not possibly proceed with the execution during the period of three months which had been allowed to the judgment-debtors. His right to get the proceedings revived and proceeded with accrued only after the expiry of that period of grace. Even assuming that the period of three years was to be counted from the date of the original compromise and not from the date of its verification, that period expired on 24th July 1926. The present application was made just within three years of that date. It therefore seems to me that the decree-holder did apply for revival of the application for execution which had merely been kept in abeyance within three years of the date when the right to apply accrued to him. In this view of the matter it is not beyond time.

Niamatullah, **J.**—I entirely agree. The first application for execution of the decree should be deemed to be pending throughout. The compromise dated 24th April 1926 clearly contemplated that the application for execution should remain pending. It was not open to the Court executing the decree to dismiss it contrary to the agreement of the parties. The Court did not in fact dismiss the application for execution, but ordered it to remain in abeyance as held by my learned brother. Nothing happened subsequently to make the first application for execution otherwise than as a pending application. It follows that on the date of the second application the execution proceedings initiated by the first application though in abeyance were pending. It may be convenient to call an application praying that action be taken in proceedings initiated by the first application for execution as an application "to revive" execution proceedings. Such application was so styled in *Qamaruddin Ahmad* v. *Jawahir* (1). In substance however it is not reviving proceedings which ex hypothesi are pending. It is only an application moving the Court to proceed with the execution proceedings before it. But whether the subsequent application be regarded as an application to revive execution proceedings previously taken or only as an application moving the Court to proceed with pending execution proceedings, there can be no doubt that it cannot in law be regarded as an application for execution the previous one being still undisposed of. The decree-holder never intended by what he agreed to in the compromise that the first application for execution should be dismissed, and as I read the order of the Court, it did not intend to dismiss it but allowed it to remain pending till the resumption of execution proceedings became necessary in the contingency provided for by the compromise. A second application for execution even though the decree-holder intended it to be such, is superfluous and may be disregarded, except in so far as it prays for action being taken on the first application to execute the decree.

It is not in my opinion necessary that a formal application for reviving the proceeding should be made. It is the duty of the Court to proceed to conclusion in a matter pending before it, even though it may be to dismiss the application in default of prosecution. Assuming that an application to 'revive' proceedings is essential I have no doubt that the second application fulfils, in substance, all the requirements of an application for 'reviving' execution proceedings in abeyance.

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(1) [1905] 27 All. 334=32 I.A. 102=8 Sar. 810 (P.C.).

(2) A. I. R. 1927 All. 16=100 I. C. 692=49 All. 276 (F.B.).

(3) A. I. R. 1927 All. 165=104 I. C. 116=49 All. 509 (F.B.).

Where it is the duty of the Court to do something or to take some action, Art. 181, Lim. Act, does not govern an application asking the Court to do such thing or to take such action. For instance an application for correction of decree so as to make it in conformity with the judgment has been held not to be within the purview of Art. 181—as already stated it is the duty of a Court and no application by an interested party reminding the Court of the necessity of taking further action can be barred by limitation.

Assuming Art. 181 is applicable to a case of this kind the starting point of limitation is the time "when the right to apply accrues." When proceedings are pending the right to apply is a recurring one and any application made during the pendency of the proceedings cannot be barred by Art. 181. This view finds support from *Kedar Nath Dutt* v. *Harra Chand Dutt* (4) and *Puran Chand* v. *Roy Radha Kishen* (5).

In cases decided by this Court, most of which are quoted in *Chhattar Singh* v. *Kamal Singh* (2) and *Baij Nath* v. *Ram Bharos* (3), it was assumed rather than decided that Art. 181 applies and that limitation begins to run from a certain point of time only. The questions which I have referred to were not considered probably because the application was within time in any view of the matter. For the reasons given by my learned brother and these additional reasons I agree in dismissing the appeal.

S.N./R.K. *Appeal dismissed.*

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(4) [1882] 8 Cal. 420.
(5) [1892] 19 Cal. 132 (F.B.).

A. I. R. 1931 Allahabad 461

SULAIMAN AND KING, JJ.

Makund Lal and *others* — Plaintiffs—Applicants.

v.

Mt. Sunita and *another* —Defendants—Opposite Parties.

Civil Revn. No. 86 of 1930, Decided on 23rd January 1931, against order of Small Cause Court Judge, Benares, D/- 18th December 1929.

Contract Act (1872), S. 23— Possessory mortgage of occupancy holdings with right to recover money on failure to deliver possession—Contract for possessory mortgage held void under S. 23 and the right to recover money on nondelivery unenforceable.

B obtained a possessory mortgage of certain occupancy holdings only under which he was given the right to enter into possession and appropriate the income. The mortgage deed further provided that in case the property went out of his possession he would be entitled to recover the money.

Held : that the contract for the possessory mortgage was void under S. 23 being against the tenancy law and that the right to recover money being contingent upon nondelivery of possession, a covenant illegal in itself and not capable of enforcement, *B* was not entitled to recover money. [P 461 C 2]

Gopi Nath Kunzru—for Applicants.
K. Verma—for Opposite Parties.

Sulaiman, J.— This is a plaintiffs' application in revision from a decree of the Court of Small Causes dismissing his suit for recovery of money. In 1923 the plaintiffs obtained a possessory mortgage of certain occupancy holdings only under which they were given the right to enter into possession and appropriate the income. It was further provided that in case the property went out of their possession they would be entitled to recover the money.

The plaintiffs brought the suit on the allegation that a fraud was committed inasmuch as it was not disclosed to the plaintiffs' father, the mortgagee that the property mortgaged consisted of occupancy holdings. It was conceded in the Court below that if the alleged fraud was not established then no decree could be passed. The learned Judge has come to the conclusion that no fraud has been proved.

It is quite obvious that the contract for the possessory mortgage of the occupancy holdings, if permitted, would defeat the provisions of the tenancy law and was therefore void under S. 23, Contract Act. The right to recover money was dependent on the contingency of there being no delivery of possession. As the covenant for delivery of possession was illegal and not capable of being enforced the plaintiffs are not entitled to recover the money. The suit was rightly dismissed. The revision is accordingly dismissed with costs.

V.B./R.K. *Revision dismissed.*

A. I. R. 1931 Allahabad 462

MUKERJI AND BENNET, JJ.

Ram Raikha Misir—Appellant.

v.

Lallu Misir and *others*—Respondents.

First Appeal No. 22 of 1930, Decided on 20th January 1931, against order of Addl. Sub-Judge, Gorakhpur, D/- 29th October 1929.

(a) Practice — Pleadings — Plaintiff pleading proper facts is entitled to argue in High Court that under rule of law he is entitled to certain finding.

It is not necessary for the plaintiff to do more in his plaint than set forth the facts on which he can rely for application of a rule of law. It is open to a plaintiff who has pleaded proper facts to argue in the High Court that under a rule of law he is entitled to a certain finding. [P 463 C 1,2]

(b) Partition—Presumption is in favour of regularity of proceedings unless irregularity is shown.

Where it is not shown that there was any irregularity in certain partition proceedings the presumption is in favour of regularity of proceedings. [P·463 C 2]

(c) Land Revenue Act (1901), S. 233 (k)—Scope—S. 233 (k) does not take place of rule of res judicata in partition suits—S. 233 (k) only bars suits asking for alteration of total amount of shares in mahal or suits asking for holdings to be changed from one mahal to another—Civil P. C., (1908), S. 11.

Section 233 (k) was not intended to take the place of the rule of res judicata in partition suits. S. 233 (k) only bars suits which would alter the partition in regard to the amount of shares in any mahal or subdivision of a mahal or suits which would transfer particular fields or holdings from any mahal or subdivision of a mahal. The rule of res judicata will apply only when the conditions laid down by S. 11, Civil P. C., exist: 38 *All.* 302; 39 *All.* 469 and 23 *All.* 291, *Rel. on.* [P 465 C 1]

(d) Civil P. C. (1908), S. 11, Expl, 4—Revenue Court in partition proceedings between parties is entitled to give decision as to title and possession—Its decision is one on which rule of res judicata can be based—Land Revenue Act, Ss. 111 and 233 (k).

Where the revenue Court in a partition proceedings between the parties was a Court which was entitled to give a decision both as regards the question of title and also was a Court which was entitled to award possession its decision is one on which the rule of res judicata can be based.

Where therefore it was open to a party in certain partition proceedings to raise a question of title to certain share in land and the possession thereof but the question was not raised, the question cannot be raised in view of Expl. 4, S. 11 in a subsequent suit between the parties to the partition. [P 466 C 1,2]

A. P. Pandey—for Appellant.

Shiva Prasad Sinha—for Respondents.

Bennet, J.—This is a first appeal from order brought by one of the plaintiffs against an order of remand of the lower appellate Court. The facts in the case are as follows:

One Faqir Misir owned a 4 pie share in Mauza Mahni Sangram. He had two daughters, Mt. Jagrani who died in 1912 and Mt. Laganmani. Now Mt. Jagrani had a daughter Mt. Ramkali who died in 1916 and Mt. Laganmani had a son Kamla Prasad, who died in 1912. Kamla Prasad's widow is Mt. Parbati, plaintiff 3. On 16th June 1905 Faqir Misir gave half his 4 pie share to his daughter Mt. Jagrani and half to his grandson Kamla Prasad. After the death of Mt. Jagrani Mt. Ramkali her daughter inherited her half share. After the death of Kamla Prasad, his wife Mt. Parbati plaintiff 3 inherited his 2 pies share. After the death of Mt. Ramkali her 2 pies share went to the collaterals of Faqira, namely plaintiffs 1 and 2 and one Chilar Misir. Chilar Misir sold his share to plaintiffs 1 and 2 under sale deed dated 11th December 1926. The result is that plaintiffs 1 and 2 now own one half of the share and Mt. Parbati plaintiff 3 owns the other half of the 4 pies share of Faqir. The plaintiffs brought a suit for a declaration that the plaintiffs are in exclusive possession and occupation as absolute owners without the participation of anyone else in the entire 4 pies share entered in khewat as No. 18 and that if the plaintiffs be found to have been dispossessed, they should be granted a decree for recovery of possession. The cause of action is stated in the plaint to be that the defendants have been making applications for mutation of their names for one pie out of the 4 pies share. But it is alleged that the defendants have not obtained possession. In the plaint in para. 4 it is set forth that there was a partition in the revenue Court of this village which began on 5th July 1912:

> "At that time every cosharer in the village made an application and got a separate lot prepared in respect of his property. Accordingly a joint lot comprising the 4 pie share of Faqira Misir was prepared for Mt. Ramkali and Mt. Parbati plaintiff 3 and it was numbered as lot 11. In the khewat of the recent settlement the property in the said lot was entered as No. 18. On 15th April 1916 the partition case was disposed of and the partition proceeding concluded."

In reply to this pleading para. 4 of the written statement stated:

> "As regards para. 4 of the plaint the allegation about the partition proceeding is admitted; the rest is not admitted."

The written statement further proceeded to state that on 11th June 1903 there was a hypothecation decree in suit No. 384 of 1903 passed in favour of the ancestor of the defendants against Faqir Misir and in execution the ancestor of the defendants and the defendants purchased a 1 pie share of Mauza Mahni Sangram at auction sale in 1909 and obtained formal delivery of possession of this 1 pie share on 1st June 1911.

In para. 7, additional pleas, it was stated :

> "During the partition proceedings the names of these defendants did not stand recorded in the khewat in respect of the 1 pie share sold. Hence nothing was done during those proceedings and by reason thereof the rights of these defendants cannot be prejudiced. The plaintiffs' claim is altogether wrong and fit to be struck off."

On these pleadings the Court of first instance framed issue 2 :

> "Whether the defendants are auction purchasers of any portion of the disputed property and is the same auction sale binding on the plaintiffs ?"

On that issue the Court of first instance came to the conclusion that

> S. 233 (k), Land Revenue Act, estops defendants from going back upon the partition record and opening a question of proprietary title which they failed to agitate at the proper time."

In the first appeal the lower appellate Court has set aside that decision and remanded the case to the Court of first instance for decision on the remaining issues.

The question which has been raised before this Court is that the defence is barred by S. 233 (k), Land Revenue Act, and that the Court below has erred in holding to the contrary. When the case was argued before this Court the question was raised as to whether the defence is or is not barred by the principle of res judicata. Objection was taken by the learned counsel for the respondents that the question of res judicata had not formed an issue in the Court of first instance and had not been argued before the lower appellate Court, and had not been mentioned in the grounds of appeal to this Court. But we consider that the question was sufficiently raised by the pleadings of the plaintiff and it is not necessary for the plaintiff to do more in his plaint than set forth the facts on which he can rely for the application of a rule of law. It is open to a plaintiff who has pleaded the proper facts to argue in this Court that under a rule of law he is entitled to a certain finding. Accordingly we consider that in the present case it is open to the plaintiff to argue in this Court that the defence was barred by the rule of res judicata and not merely that the defence was barred by S. 233 (k), Land Revenue Act.

We shall presently consider how far these two sections are related to one another. Now the facts which have emerged in the present case are that the defendants were parties to the partition case in the revenue Court and it is admitted that in that partition case a separate kura was formed in which the defendants and their predecessors had their 13 pie share separated. Neither of the parties were the applicants for partition. It is apparent therefore that under S. 110 (2), Land Revenue Act, applications must have been made by the predecessors of the plaintiff and by the defendant and their predecessors for the formation of these two separate kuras, in the one case a kura of 4 pies and in the other case a kura of 13 pies. Now S. 110 (2) lays down that such applications must be made at any time before the date fixed by the proclamation issued under that section. It was for the defence to show that the application of the predecessors of plaintiff was made at a time other than the time specified in S, 110 (2), Land Revenue Act, and the defence have not alleged that there was any such irregularity or that there is no evidence on the record to that effect. The question of the partition proceedings was raised by para. 4 of the plaint and it was open to the defence to plead in the written statement that there was any irregularity which would entitle the defence to prove that the partition proceedings would not be effective against the defence as a bar either under S. 233 (k) or under the rule of res judicata. We mention this point because reference has been made to various rulings in which as a matter of fact it was found that the particular applications for formation of a separate kura or mahal had been made subsequent to the date fixed. In the present case therefore these rulings have no application, because it is not shown that there was any such irregularity, and the presumption is in favour of regularity of proceedings.

We have been referred to a number of rulings and on a consideration of all these rulings we come to the following conclusions in regard to the meanings of S. 233 (k), Land Revenue Act. That section may be interpreted first on the narrow view that it only bars suits which ask for alteration of the total amount of shares in a mahal or in a subdivision of a mahal, or suits which ask for khasra numbers or holdings to be changed from one mahal or subdivision of a mahal to another. On this view S. 233 (k) would be no bar to the present suit. There is a wider view of S. 233 (k) in which it may be held to bar any question being raised in the civil Court which would have been raised in objection under S. 111, Land Revenue Act. But this view makes S. 233 (k) to be merely the application of the rule of res judicata to partition suits. We consider that on this view, S. 233 (k) is no wider and no narrower than the rule of res judicata which is found in S. 11, Civil P. C. Accordingly in the present case we consider that it is more useful and more correct to consider whether the rule of res judicata as laid down in S. 11, Civil P. C., does or does not bar the present defence.

We may at this stage examine briefly some of the various ruling of this Court on the question of S. 233 (k). In the Full Bench ruling of *Shambhu Singh* v. *Daljit Singh* (1) it was held that S. 233 (k), Land Revenue Act, did not bar a civil suit because that suit did not relate to partition or union of a mahal. The plaintiff had sued for a declaration of his title to a certain share which had been allotted to the defendants. What was meant by this ruling was that such a suit if granted would merely substitute the plaintiff for the defendant as the owner of the share in question and by this substitution the actual arrangement of the shares in the mahals and pattis would not be disturbed. This is what we call the narrow view of the interpretation of S. 233 (k), Land Revenue Act.

On the same day there was a decision given in another Full Bench case by the same Full Bench reported in *Kalka Prasad* v. *Man Mohan Lal* (2). It was similarly held that S. 233 (k), Land Revenue Act, did not bar the suit in which the plaintiff claimed recovery of possession of the mahal allotted to the defendant. This again would be merely substituting the plaintiff for the defendant as the owner of that mahal. It was held in *Bijai Misir* v. *Kali Prasad Misir* (3), that the suit of the plaintiff to recover possession of certain shares which had been awarded to the defendant in a partition of the revenue Court was barred by the provisions of S. 233 (k), Land Revenue Act. This suit was decided by a majority of the Court, the Chief Justice dissenting. It is obvious that there is a certain amount of conflict between these decisions. The circumstances of this last ruling were that the plaintiff had been a party to the partition proceedings and the plaintiff had not made any objection at that time to the share in question being allotted to the defendant. At p. 498 the late Banerji, J., stated :

> "No question of res judicata, in my opinion, arises in a case like this. Had the question of the title of the parties been decided by the revenue Court under Ss. 111 and 112 the matter would have been res judicata. In my opinion the present suit is barred by reason of the prohibition contained in S. 233 and not on the ground of res judicata."

In a later ruling of *Lal Behari* v. *Parkali Koer* (4), the same learned Judge interpreted the provisions of S. 233 (k) in a slightly different manner. In that case the parties were on the same side in partition proceedings and a separate mahal was formed in the name of the parties. Subsequently, the plaintiff brought a suit for a declaration that he alone was the owner of the entire mahal to the exclusion of the defendant and it was held that the suit was not a matter relating to the union or separation of mahals and clearly the provisions of S. 233 (k), Land Revenue Act, were no bar. That however is clearly distinguishable from the present case. In the present case the parties had separate kuras allotted to them. It is also held in this ruling that the suit is not barred by the rule of res judicata.

There have also been two recent rulings of Benches of this Court, the first of which is *Data Din* v. *Nohra* (5). In that case it was held that where plaintiff's suit for declaration of title did not affect the partition or union of mahals and left the integrity of the partition proceedings absolutely unaffected, S. 233 (k) was no bar to the suit. The question of res judicata was not considered in that case.

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(1) [1916] 38 All. 243=33 I.C. 19.

(2) [1916] 38 All. 302=33 I.C. 86 (F.B.).

(3) [1917] 39 All. 469=41 I.C. 912 (F.B.).

(4) [1920] 42 All. 309=55 I.C. 22.

(5) A.I.R. 1930 All. 419=121 I.C. 825.

The second recent ruling is reported in *Ram Sukh Pandey* v *Pirthi Singh* (6), and the rule laid down is similar. In that ruling also the question of res judicata was not considered.

These rulings restrict the principle of S. 233 (k) to what we have called the narrow view, that is, that that section only bars suits which would alter the partition in regard to the amount of shares in any mahal or subdivision of a mahal or suits which would transfer particular fields or holdings from any mahal or subdivision of a mahal. We consider that this view of S. 233 (k) is the correct view and that no advantage accrues from adding an additional interpretation of S. 233 (k) in the wider sense to make it co-extensive with the rule of res judicata. We consider that if the legislature had intended that S. 233 (k) was to take the place of the rule of res judicata in a partition suit, then the language in S. 233 (k) would have stated so plainly, and the language used in that section certainly does not indicate that there was any such intention. As the language stands there must certainly be an interpretation which is altogether outside the rule of res judicata for no extension of the rule of res judicata could be held to present suits to alter the position of field or holding numbers in mahals and subdivisions of mahals in all cases. The rule of res judicata will only apply where the conditions laid down by S. 11, Civil P. C., exist.

Now it has been argued that a revenue Court in a partition case is not a Court on whose decision res judicata for a subsequent civil suit of the present nature can be based. This argument has been put forward on the grounds that the revenue Court has not jurisdiction to try the subsequent civil suit. But the relief asked for the present civil suit is for a declaration of title and if necessary possession. Now the revenue Court under S. 111 could have given a valid decision on the question of title if that question had been raised before it by the defendants in the present case. It was open to the defendants in the partition case to claim that the one pie share which they had purchased at an auction sale in the year 1909 previous to the partition suit and by which they had obtained formal possession in 1911 should be allotted to the defendants in their kura which would have been enlarged from 13 pies to 14 pies, and that it should have been taken from the kura of the plaintiffs which would have been reduced from 4 pies to 3 pies. As regards possession, when the partition proceedings were confirmed, the parties would then have held possession in accordance with the partition decree. The revenue Court was therefore a Court which was entitled to give a decision both as regards the question of title and also was a Court which was entitled to award possession. We consider therefore that the decision of the revenue Court is a decision on which the rule of res judicata can be based. Now under S. 11, Civil P. C, Expln. 4 :

> "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It was open to the defendants to raise this question of the title to the one pie share and the possession thereof in the partition case. We consider therefore that the defendants are barred by the principle of res judicata under Expln. 4, S. 11, Civil P. C., and that this question not having been raised by the defendants in the partition proceeding, it cannot be raised in the present suit.

Accordingly we reverse the decision of the lower appellate Court and we set aside the order of remand. As there are a number of grounds raised in the appeal of the defendants which have not been considered by the lower appellate Court we remand the case to the lower appellate Court for decision on the grounds not already decided. Costs hitherto incurred in all Courts will abide the result.

Mukerji, J.—My learned brother has exhaustively dealt with the appeal and I shall add just a few words, having regard to the importance of the point raised and having regard to the fact that some cases, at any rate, decided by this Court may be said to be in conflict with one another.

All partition proceedings must be preceded by a decision of title when a party asks for partition of joint property. The first question that arises is a question of title. If no question of title is raised, that is to say, if there is no dispute, even then the Court has to declare the title of the respective parties before it and, after it has declared the title, it has to proceed to divide and distribute the property. The same is the case whether partition proceedings are taken in the civil or the revenue Court. Certain property belongs to several cosharers and one of these cosharers may take it into his head to apply for partition. The Land Revenue Act, 1901 provides that when such an application is made, notice would be given to the remaining cosharers and a date would be fixed for their appearance. If any of the remaining cosharers make an application that their shares also should be divided off, they have to come forward before the date fixed for the hearing of the application. In that case they also would be treated as being parties claiming partition and as if they had joined in the original application. Then on the date fixed (I take to be the meaning of S. 111, Land Revenue Act) if any question of title be raised, the revenue Court has three rules of procedure open to it, one of these being that it may decide the question of title itself. If no question of title be raised, the revenue Court would declare, under S. 114 the nature and extent of the interest of the several parties before it. This would amount to making of a preliminary decree for partition in a civil Court. After this preliminary decree has been passed, the property is to be divided and shares are to be allotted. If any party fails to raise any question of title, having had an opportunity to do so, surely he should not be allowed to contest, in a later proceedings, that he possessed a larger share than was declared for him in the proceedings under S. 114, Land Revenue Act.

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(6) A.I.R. 1931 All. 47.

In my opinion, where, as in this case, independent lots have been given to different parties without any contest, it must be assumed that it was because none of these parties wanted to raise a question of title. If that be the case, any party who now wants a larger share must be deemed to be barred from doing so by reason of the principle incorporated in S. 11, Expln. 4, Civil P. C. The true bar therefore that operates against the defence in this case is a bar of res judicata and not the bar of S. 233 (k), Land Revenue Act. As my learned brother has put it, there are two interpretations that have been put on S. 233 (k), Land Revenue Act. The narrower interpretation is really the right one and the larger interpretation is only a paraphrase of the rule of res judicata. It is much safer and much more desirable that the true aspect of S. 233 (k) should be understood and it should not be mixed up with the rule of res judicata.

In the Full Bench case of *Muhammad Sadiq* v. *Laute Ram* (7) this view was clearly pointed out. The head note runs as follows :

> "If a party to a partition which is being conducted by the revenue authorities .... desires to raise any question of title affecting the partition, he must do so according to the procedure laid down in Ss. 112 to 115 of the Act. If a question of title affecting the partition, which might have been raised under Ss. 112 and 113 of the Act during the partition proceedings, is not so raised, and the partition is completed, S. 241 (f) of the Act debars the parties to the partition from raising subsequently in a civil Court any such question of title."

This decision was given under the older Land Revenue Act, 1873. It contains the wider interpretation, though the reason behind the interpretation is one that would support an application of the principle of res judicata. S. 233 (k) of Act of 1901 corresponds to S. 241 (f) of the Act of 1873.

V.B./R.K. *Case remanded.*

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(7) [1901] 23 All. 291=(1901) A.W.N. 86 (F.B.).

⁂ A. I. R. 1931 Allahabad 466
Full Bench

SULAIMAN, AG. C. J., MUKERJI,
BANERJEE YOUNG AND PULLAN, JJ.

Ram Sanehi Lal and *another*—Defendants—Appellants.

v.

Janki Prasad and *others* — Plaintiffs and Defendants—Respondents.

Second Appeals Nos. 860 and 890 of 1928, Decided on 19th May 1931, from decision of Sub-Judge, Mainpuri.

⁂ (a) **Civil P. C. (1908), O. 34, R. 1—Auction-purchaser in execution of decree on prior mortgage to which subsequent mortgagee was not party obtains all rights of mortgagor and prior mortgagee—Mortgage prior and subsequent.**

The auction-purchaser in execution of a decree obtained on a prior mortgage without impleading the subsequent mortgagee acquires all the rights of the mortgagor who was a party including his rights to possession in cases where both the mortgages are simple, if either no suit by subsequent mortgagee is pending or purchase in execution of the prior mortgagee's decree was earlier in point of time. If the first mortgagee be the earlier purchaser the rights of the mortgagor to obtain possession will ultimately vest in him. If the mortgage is not time barred he can compel the subsequent mortgagee to redeem him but if it is time barred he must redeem the subsequent mortgagee (*Case law discussed*). [P 488 C 1]

✲ ✲ **(b) Transfer of Property Act (1882), S. 74—Sale in execution of decree or puisne mortgage during pendency of suit on prior mortgage is affected by rule of lis pendens.**

Per *Full Bench*.—Where a sale in execution of a decree obtained on foot of a puisne mortgage takes place during the pendency of the suit on the prior mortgage, it is affected by the rule of lis pendens so as to make the purchaser's right subject to the result of the prior mortgage suit. [P 473 C 2, P 489 C 1]

Per *Mukerji, J.*— Where a transfer takes place as the result of an auction sale held during the pendency of a prior mortgagee's suit, in execution of a subsequent mortgagee's decree, the principle of lis pendens will not apply. If however both the subsequent mortgagee and the mortgagor be parties to the prior mortgagee's suit, the auction-purchaser in the subsequent mortgagee's suit will be bound by the result of the prior mortgagee's suit, but not on the principle of lis pendens but because the subsequent mortgagee and all who are parties to his suit claim under titles inferior to that of the prior mortgagee. [P 487 C 2]

✲ ✲ **(c) Civil P. C. (1908), O. 34, R. 1—Sale in execution on decree on puisne mortgage during pendency of suit on prior mortgage—Rights of purchasers from decrees on rival mortgages considered.**

Where sale in execution of a decree obtained on the foot of a puisne mortgage takes place during the pendency of the suit on the prior mortgage, apart from the effect of the rule of lis pendens, if the second mortgagee is the earlier purchaser the purchaser in execution of decree on prior mortgagee will have the right to take possession as plaintiff if a suit on his mortgage is not time barred. If the purchaser from second mortgagee redeems him the purchaser from second mortgagee will retain the property. If the prior mortgage is time barred the purchaser from prior mortgagee cannot obtain possession. [P 473 C 2, P 489 C 1]

Per *Mukerji, J.*—Generally it is the first purchaser who gets the property and the question of purchase has nothing to do with the priority or posterity of the mortgage in enforcement of which the property is sold. [P 488 C 1]

✲ **(d) Civil P. C. (1908), O. 34, R. 1 — Not impleading subsequent mortgagee or other person interested in mortgaged property does not make whole proceeding null and void.**

Although O. 34, R. 1, lays down that all persons interested in the equity of redemption are necessary parties, that rule is a mere rule of procedure and not of substantive law and is subject to the provision of O. 1, R. 9, which lays down that as far as possible no suit is to fail on account of non-joinder of party. The omission therefore to implead a person interested in the mortgaged property does not make the whole suit defective and proceedings null and void and consequently a prior mortgagee can bring a suit against his mortgagor without impleading subsequent mortgagee and if there were no defect of lis pendens and no suit by subsequent mortgagee were pending, the prior mortgagee can sell up the rights and interests of the mortgagor in the mortgaged property even behind the back of the subsequent mortgagee only the right of the subsequent mortgagee under his mortgage is not extinguished: *A. I. R.* 1931 *All.* 277, *Foll.* [P 479 C 1]

(e) Transfer of Property Act (1882), S. 74 — Purchaser from mortgagor by private treaty or involuntary sale at auction whether third person or mortgagee, is entitled to subrogation.

A purchaser from mortgagor is entitled to subrogation and the principle is applicable to all subsequent transferees and it makes no difference whether the transferee from mortgagor was a transferee under a private treaty or a purchaser at an involuntary sale at auction or if instead of third person prior mortgagee himself acquires the equity of redemption: 10 *Cal.* 1035 (*P. C.*); 21 *Cal.* 70 (*P.C.*) and 10 *I. C.* 556, *Foll.* [P 479 C 2]

(f) Transfer of Property Act (1882), S. 52—S. 52 applies to Court sales and mortgage.

Language of S. 52 is applicable not only to private transfers but also to Court sales held in execution of decrees, and is not in applicable to Ch. 4, T. P. Act, which deals with mortgages: 15 *Cal.* 756; 25 *Cal.* 179 and 23 *All.* 60, *Foll.* [P 480 C 1]

✲ ✲ **(g) Civil P. C. (1908), O. 34, R. 1—Rights of purchaser in execution of mortgage decrees of rival mortgagees considered.**

If the purchaser in execution of the prior mortgagee's decree is not in possession and is suing as plaintiff the purchaser in execution of the subsequent mortgagee's decree, he can enforce his remedy, if limitation on the prior mortgage has not yet run out, but he cannot recover the mortgage money, if limitation has run out. If he was the earlier purchaser in point of time, he can redeem the second mortgage and recover possession, even though the prior mortgage is barred by time; but if he was the later purchaser in point of time then his suit even for redemption cannot be decreed. (*Case law discussed.*). [P 481 C 2]

✲ ✲ **(h) Civil P. C. (1908), O. 34, R. 1—Purchaser in execution of second mortgagee's decree—Rights and liabilities of purchasers considered.**

If the purchaser in execution of the second mortgagee's decree is suing the purchaser in execution of the prior mortgagee's decree, who is the defendant in possession, then if the purchaser under the second mortgage was the earlier purchaser in point of time, he must redeem the prior mortgage and the purchaser under the prior mortgage cannot compel the purchaser under the second mortgage to submit to redemption by him and if the purchaser under the second mortgage was later in point of time, then he must first redeem the prior mortgage, but the purchaser under the prior mortgage will have the right to redeem the purchaser under the second mortgage next, and retain possession of the mortgagor's property: (*Case law discussed.*). [P 482 C 1]

Saila Nath Mukerji and *Shiva Prasad Sinha*—for Appellants.

Baleshwari Prasad— for Respondents.

Order of Reference

Niamatullah and Pullan, JJ. — These two appeals arise out of a suit brought by the plaintiff Janki Prasad, the principal contesting respondent in S. A. No. 860 and the appellant in S. A. No. 890, for recovery of possession of a certain zamindari share. The circumstances which led to the present litigation are briefly as follows:

Sital Prasad and Sanehi Lal executed a deed of simple mortgage on 6th October 1911 in favour of certain persons (it is not necessary to mention their names) in lieu of Rs. 2,500 hypothecating a two biswa odd share in patti No. 1 and a one biswa odd share in patti No. 6 both of village Bhaineroli, for a term of ten years, subject to the condition that if interest was not paid in any year the whole of the mortgage money would become immediately payable. One Behari, who is now represented by his sons Ram Sanehi Lal and Sia Ram, first two defendants and appellants in this Court in S. A. No. 860 of 1928, obtained the mortgagee rights under the deed above mentioned, in the exercise of his right of pre-emption. Sital Prasad, one of the mortgagors already named, executed another deed of simple mortgage on 17th May 1912 in respect of his share of the property detailed above, i. e. half of it, to Baldeo Prasad. The second of the two aforesaid mortgages was first sued on, and a preliminary decree obtained on foot thereof on 13th March 1923, which was made final on 13th November 1923.

The appellants in S. A. No. 860 in whom the prior mortgagees' interest was then vested, were not made parties, and it is not disputed that they were not necessary parties and that the auction purchaser at a sale held in execution of the decree passed on the 2nd mortgage would take subject to the encumbrance created by the first mortgage. Before however such a sale could take place, the prior mortgage was put in suit and a preliminary decree obtained on foot thereof on 15th March 1924. A final decree followed in due course on 23rd March 1925. Between the dates of the preliminary and final decrees passed on foot of the prior mortgage, the property to which the subsequent mortgage related, i. e., half of that to which the prior mortgage related was sold in execution of the decree passed on foot of the second mortgage, to which reference has already been made and was purchased by Janki Prasad. He does not appear to have taken out delivery of possession, but succeeded in obtaining mutation of names. At the sale held in execution of decree passed on foot of the prior mortgage the mortgagees themselves were declared purchasers. On 20th November 1925, they took out delivery of possession and succeeded in obtaining mutation of names in their favour by an order which directed the removal of Janki Prasad's name. It is not disputed that the first two defendants, the prior mortgagees (as purchasers) were in actual possession up to the date of the suit which has given rise to this appeal. Janki Prasad sued for possession unconditionally and, in the alternative, for possession by redeeming the prior mortgage of 6th October 1911 to the extent of half,

> "provided that it has not become time barred as against the plaintiff and still has effect on the property purchased by him (the plaintiff.)"

The Court of first instance decreed the first relief with the condition superadded that if the defendants redeemed the second mortgage within three months the suit should stand dismissed. On appeal by the plaintiff, the lower appellate Court modified that decree by allowing the plaintiff-respondent to redeem the prior mortgage within six months. Accordingly, a preliminary decree for redemption under O. 34, R. 7, Civil P. C., was passed. Both parties have appealed to this Court. Second Appeal No. 860 of 1928 is by defendants 1 and 2 and S. A. No. 890 of 1928 is by the plaintiff.

Two main questions arise for consideration: first, which of the two auction-purchasers is entitled to possession of the property in dispute; and secondly, if the first two defendants, the mortgagee auction-purchasers in execution of decree of the prior mortgage, are rightfully in possession, whether the plaintiff, the auction-purchaser in execution of the decree passed on foot of the second mortgage, is still entitled to redeem the first mortgage so as to entitle him to possession on redeeming the prior mortgage.

The second question presents no difficulty. If the purchaser under the puisne mortgage has no right to possession, it can only be because the right of the mortgagor who was entitled to possession did not effectively pass under the auction sale to such purchaser, but, at any rate, the puisne mortgagee's right did pass to him. The puisne mortgagee not having been made a party in the prior mortgagee's suit, his right to redeem cannot be affected and can be exercised by his representative the auction-purchaser at the sale held in this suit.

The case law bearing on the first question is considerable, and it is not easy to reconcile some cases in which identical questions were considered. We desire to note only the cases of this Court which, in our opinion, have so unsettled the law that it is not a little embarrassing to the subordinate Courts when conflicting rulings of this Court are cited before them. It will be seen that in any cases the auction sale in the second mortgagee's suit took place during the pendency of the suit on the prior mortgage, as in the case before us. An important question emerges from that fact, viz. whether such sale is affected by the rule of lis pendens, a question which was considered with conflicting results in some and overlooked in others.

In *Hargu Lal Singh* v. *Govind Rai* (1) the mortgagor had sold his rights and the mortgagee (there was only one mortgage) brought his suit for sale subsequently, impleaded the mortgagor who had lost all rights to the mortgaged property before the iustitution of the suit, and failed to implead the vendee. The auction-purchaser in the mortgage suit sued the vendee for recovery of possession. It was held that he was not entitled to possession against such vendee. No doubt can arise as regards the correctness of the view therein taken. But that decision can be of no help in a case where there is competition between the auction-purchaser in the prior mortgagee's suit in which the puisne mortgagee was not a party and the auction-purchaser in the puisne mortgagee's suit. *Madan Lal* v. *Bhagwan Das* (2) was a case of two successive mortgages and both mortgages were apparently simple, so that the right to possession of the mortgaged property was in the mortgagor. The puisne mortgagee instituted his suit for sale first, but before the mortgaged property could be sold in execution of his decree the prior mortgagee also instituted a similar suit without impleading the puisne mortgagee. The sale in execution of the decree on foot of the second mortgage took place during the pendency of the prior mortgagee's suit, and the auction-purchaser obtained actual possession. Subsequently the purchaser in the prior mortgagee's suit made an unsuccessful attempt to obtain possession which was followed by a simple suit for possession described by the learned Judges as

> "an ordinary suit for ejectment, the plaintiff claiming to recover possession from the defendant absolutely and not subject to any condition."

The learned Judges dismissed the suit holding that the case of *Hargu Lal Singh* v. *Gobind Rai* (1) applied to the case before them. The judgment contains no discussion of the question whether the auction-purchaser in the prior mortgagee's suit to which the puisne mortgagee is no party acquires at least the right of a mortgagor which in case both mortgages are simple includes the right to possession. No question was raised or decided in reference to the sale in the puisne mortgagee's suit having taken place during the pendency of the prior mortgagee's suit and to the applicability or otherwise of the rule of lis pendens. It does not appear to have been noticed that *Hargu Lal Singh* v. *Gobind Rai* (1) was not a case in which there were prior and puisne mortgagees but was one in which the sole mortgagees sued the original mortgagor who had parted with all rights before the institution of his suit, so that he had ceased to be a mortgagor, and that his vendee to whom his rights had passed was the only person who could be sued. In *Madan Lal* v. *Bhagwan Das* (2), on the other hand, the mortgagor who was impleaded by the prior mortgagee, retained his rights till a date several months after the institution of the prior mortgagee's suit. In *Ram Prasad* v. *Bhikari Das* (3), which again was a case of one mortgage, the mortgaged property was sold in execution of a simple money decree during the pendency of the mortgagee's suit. The auction-purchaser obtained possession subsequently. The auction-purchaser in execution of the decree passed on foot of the mortgage unsuccessfully attempted to obtain possession. It should be noted that the auction-purchaser in the mortgagee's suit was a third person and not the mortgagee himself. He brought a suit for possession affording an opportunity to the auction purchaser in execution of the simple money decree to redeem. The suit was described by the learned Judges as one for foreclosure in substance. The claim was decreed. The two cases first referred to were distinguished on the ground that they were simple suits for possession in which no opportunity to redeem had been given to the defendant.

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(1) [1897] 19 All. 541=(1897) A. W. N. 154 (F.B.).

(2) [1899] 21 All. 235 (F. B.).

(3) [1904] 26 All. 464=(1904) A. W. N. 108.

The next case which should be referred to is that of *Babu Lal* v. *Jalakia* (4), in which though the prior mortgagee instituted his suit first, omitting to implead the subsequent mortgagee, the latter managed to obtain a decree and sale thereunder before the former could bring the mortgaged property to sale in execution of his decree. The purchaser in the prior mortgagee's suit failed to obtain possession and sued the purchaser in the second mortgagee's suit for possession of the property then in dispute, on the defendant, that is, the purchaser in the second mortgagee's suit, failing to pay the money due under the prior mortgage. It should be noticed that the substantial relief claimed in that suit was one for possession, giving an option to the defendant to redeem the prior mortgage. This feature is of importance, as in a subsequent case, in which a different view was taken, it was pointed out that redemption was a right and not an obligation. As a matter of fact, it was treated as a right in that case by the plaintiff, and Piggott and Lindsay, JJ., appear to us to have treated the matter on that footing. It was held that the purchaser in execution of a decree obtained by the prior mortgagee, the plaintiff in that suit, was entitled to possession unless the purchaser in the second mortgagee's suit chose to redeem the prior mortgage. Piggott, J., has expressed the opinion that the auction sale in execution of the decree obtained by the puisne mortgagee being pendente lite could not affect the right of the auction-purchaser in execution of the prior mortgagee's decree. At the same time he held that the puisne mortgagee whose right should be deemed to have been transferred to the auction-purchaser in his suit was a necessary party to the prior mortgagee's suit and a failure on the part of the prior mortgagee to implead him did not affect his right and, through him, that of the auction-purchaser in his suit to redeem the prior mortgage. Lindsay, J., has made no mention of the rule of lis pendens, but the ratio decidendi adopted by him is by strong implication based on that doctrine. He observed:

> " As for the title of the plaintiff, it cannot, I think, be argued that she acquired nothing under her purchase. It will not, I imagine, be denied that had she joined the subsequent mortgagee as a defendant in her suit, she would by her purchase have acquired an absolute title to the property, including the right to possession. To what extent then is her title defective by reason of her omission to implead the puisne mortgagee?
>
> Only to the extent that her title as owner is qualified by a right of redemption which was vested in the second mortgagee and which has now passed to the appellant as purchaser under the decree obtained on the second mortgage.
>
> " That is the only right which the second mortgagee could have enforced against her as prior encumbrancer for the right of the subsequent mortgagee to bring the equity of redemption to sale to satisfy his claim is a right which is exercised against the mortgagor only. The right of the first mortgagee to have the property sold is, in no way, affected by the second mortgagee's right of sale. As between the first and the second mortgagees (or their representatives), the only right of the latter is one of redemption."
>
> "As for the title of the auction-purchaser under the second mortgage, that too is circumscribed by the liability to redeem the earlier mortgage. The title could only become absolute by a discharge of the prior incumbrance."

It is clear that this view, which upholds the right of a purchaser in the prior mortgagee's suit who purchased after the sale in the second mortgagee's suit had already taken place, is justified only on the assumption that the sale in the second mortgagee's suit, though anterior in date, was subject to the result of the prior mortgagee's suit then pending.

In *Lachmi Narain Das* v. *Hirdey Narain* (5), Mukerji and Boys, JJ. have expressly dissented from the case last quoted on almost every material point. The frame of the suit was exactly the same as in the case last quoted, the plaintiff claiming possession on failure of the defendant to pay the money due under the prior mortgage. The plaintiff was purchaser in the prior mortgagee's suit, while the defendant was the purchaser in the second mortgagee's suit. The sale in execution of decree obtained by the puisne mortgagee took place during the pendency of the suit on the prior mortgage. Mukerji, J. held that

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(4) [1916] 37 I. C. 343.

(5) A.I.R. 1926 All. 480=97 I.C. 4.

> "the mortgage in favour of the plaintiffs does not give them a right to obtain possession. That right to possession can accrue to them only by working out the mortgage with proper parties before the Court. They have failed to work out the mortgage so far as the principal defendants are concerned and any fresh attempt to work out the mortgage today is barred by limitation."

In other words, according to that learned Judge, the auction-purchaser in the prior mortgagee's suit to which the puisne mortgagee was no party, does not acquire even the right of the mortgagor, the reason being that the mortgage was not "worked out" with proper parties before the Court. On the question of lis pendens and referring to the case of *Rabu Lal* v. *Jalakia* (4) he observed that

> "there was no transfer in favour of defendants in *Babu Lal* v. *Jalakia* (4) after the institution of the prior mortgagee's suit. The transfer took place in favour of the second mortgagee and at a date long prior to the institution of the suit by the first mortgagee. The sale under the subsequent mortgage was only an after effect and an inevitable effect of the second mortgage, and it would be wrong to describe the auction-sale as anything independent of the second mortgage."

Boys, J. arrived at the same conclusion, holding that the effect of the non-joinder of the puisne mortgagee was to leave him unaffected by the decree passed in the prior mortgagee's suit and that in reference to him it should be assumed that nothing had taken place on foot of the prior mortgage which should be deemed to be subsisting. On the doctrine of lis pendens he observed that

> "the sale to the auction-purchaser in the decree upon the puisne mortgage cannot be regarded as a new transfer; the title of the auction-purchaser must be taken, at any rate where, as in this case, the decree-holder was himself the purchaser, as dating back to the mortgage, and I find myself in agreement in this respect with Mitra, J., in *Har Prasad* v. *Dal Mardan* (6) at p. 906."

We may at once point out that Mitra, J., based his decision in that case on a different point, and his observation as to lis pendens is obiter dictum. He said:

> "I do not think it necessary to pursue the argument about lis pendens further, as I think the decree of the lower appellate Court is sustainable irrespective of it."

In a recent Full Bench case *Nannu Mal* v. *Ram Chander* (7), the position of the auction purchaser in execution of a decree passed on foot of the prior mortgage to which the puisne mortgagee was not a party was again considered. The view of the majority, which should be considered to be that of the Full Bench, is clearly in support of the contention that such auction-purchaser acquires the right of the mortgagor in the property subject to right of the puisne mortgagee to redeem and for that purpose the auction-purchaser is to be considered as standing in the shoes of the prior mortgagee. The facts of that case were different, though the position of the auction purchaser and his right to possession were the principal questions to be decided in it. The auction-purchaser had, in that case, made constructions on part of the mortgaged property after his purchase but before the suit brought by the puisne mortgagee, who sought to treat those constructions as accession to the mortgaged property. Sen, J., held that as against the puisne mortgagee, who was not a party to the prior mortgagee's suit, the auction sale in execution of the decree obtained by the prior mortgagee and, indeed, the proceedings in his suit should be considered as never having taken place and that consequently any additions made by the auction-purchaser were at par with those made by a total stranger. He observed on this question:

> "that if the puisne mortgagee who was not made a party to the suit of the prior mortgagee elects to treat the decree in that suit, and what followed it, as not binding on him, they have to be treated as nullity, not in the sense of being void ab initio but so far as his rights may be affected thereby. If he does so elect, the whole case shall have to be so dealt with as if the prior mortgage is subsisting in which case, as already stated, no question can arise as to whether anyone became a purchaser at an auction sale held in execution of a decree passed on foot of the prior mortgage which ex hypothesi is subsisting."

It should be noticed that this view is in conformity with that expressed by Mukerji and Boys, JJ., in *Lachmi Narain Das* v. *Hirdey Narain* (5), above referred to. The majority of the Full Bench however pronounced an opinion which is in conformity with that taken in *Babu Lal* v. *Jalakia* (4), first quoted. In describing the position of an auction-purchaser in execution of a decree passed on foot of the prior mortgage, in which the puisne mortgagee was not a party, Sulaiman, J., observed :

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(6) [1905] 32 Cal. 891=1 C.L.J. 371=9 C.W.N. 728.

(7) A.I.R. 1931 All. 277=132 I.C. 401 (F.B.).

> "They (auction-purchasers) have also undoubtedly acquired the interest of the mortgagor in the property. No doubt the decree in the previous mortgage suit is not binding on the subsequent mortgagees, who had not been impleaded, to this extent: that their rights under their mortgage have not been extinguished, as would have been the case if they had been impleaded and had not redeemed the prior mortgage. But it is not correct to say that the previous proceedings are totally a nullity. As between the prior mortgagee and the subsequent mortgagees the previous proceedings are ineffective, but that does not imply that the mortgagor's interest could not have been sold by the prior mortgagee behind the back of the subsequent mortgagees but subject to their subsequent mortgage. The mortgagor's interest in the property validly passed to the auction-purchasers, no matter whether the subsequent mortgagees were parties to the suit or not. The auction-purchaser cannot be in a worse position than a private transferee from the mortgagor. In this sense, the defendants are undoubtedly the representatives of the mortgagor *qua* the property which is now in suit. After payment of the amount of the previous mortgage decree the subsequent mortgagees can enforce their own mortgage against them, treating them as the representatives of their mortgagor."

King, J., who took the same view, held that

> "I think the auction-purchaser is in just the same position as the mortgagor's son or transferee in the cases which I have put, by way of example, above. The auction-purchaser is in fact the successor-in-interest of the mortgagor, having acquired all the mortgagor's right, title and interest in the property,"

In the Full Bench case to which reference has been made, the sale in execution of a decree obtained by the prior mortgagee without impleading the subsequent mortgagee had taken place long before the puisne mortgagee obtained a decree in his suit. In that respect it is different from *Babu Lal* v. *Jalakia* (4) and *Lachmi Narain Das* v. *Hirdey Narain* (5). We would have followed it in deciding the present case if the case before us had been free from the complication that the puisne mortgagee had the property sold first but during the pendency of the suit on the prior mortgage.

On the applicability or otherwise of the rule of lis pendens as contained in S. 52, T. P. Act, we find ourselves in agreement with Piggott, J. We would however give our own reasons in support of that view. In discussing the scope of that rule the language of S. 52, T. P. Act, which is exhaustive on that question in India, should be carefully borne in mind. The material portion may usefully be reproduced here:

> "During the active prosecution in any Court . . . . of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose."

It cannot be doubted that in a suit on a prior mortgage "right to immovable property is directly and specifically in question" and that the lis continues up to the date of sale: see *Parsotam Narain* v. *Chheda Lal* (8). It is now settled law, though some doubt existed at one time, that the rule applies not only to transfer of or dealing with the property pendente lite by a party himself but also at auction sales in decrees obtained against him, on the principle that what the owner could not do with the property the Court could not do on his behalf: see *Radha Madhan Madhub Holdar* v. *Manohar Mukerji* (9) and *Sukhdeo Prasad* v. *Jamna* (10). A sale in execution of a decree obtained by a puisne mortgagee during the pendency of a prior mortgage must, in our opinion, be held to be within the rule. Such a sale is undoubtedly a transfer of the property "directly and specifically in question" in the prior mortgagee's suit. The property is at least "dealt with" at the auction sale. It cannot be argued that the sale relates back to the mortgage or that it is the inevitable result of it, and therefore not affected by the rule of lis pendens, which has been purposely made so wide as to include not only transfers of properties pendente lite but also any manner of "dealing" with it during the pendency of a proceeding in which it is "directly and specifically in question." The whole object of the rule is to afford protection to the parties to a pending suit against every kind of dealing with the property in dispute and to maintain the status quo existing at the date of the suit.

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(8) [1907] 29 All. 76=3 A. L. J. 675=(1907 A. W. N. 283.

(9) [1888] 15 Cal. 756=15 I. A. 97=5 Sar. 211 (P.C.).

(10) [1901] 23 All. 60=(1900) A. W. N. 199.

On the authorities to which we have referred we are led to the following conclusions:

(1) Where the puisne mortgagee has had the mortgaged property sold before the prior mortgagee institutes a suit, or where the mortgagor parts with his right by a private alienation before such suit, and the prior mortgagee fails to implead the auction-purchaser or the transferee from the mortgagor, the auction-purchaser in his suit acquires no title to possession of the property purchased by him for the simple reason that the mortgagor had ceased to be the owner at the date of the suit and the equity of redemption had become vested in another person who was the only person that could have been made a party and was not impleaded.

(2) There are conflicting rulings of at least two Division Benches of his Court on the question whether the auction-purchaser in execution of a decree obtained on a prior mortgage without impleading the subsequent mortgagee acquires, at least, the rights of the mortgagor who was a party, including his right to possession in cases where both the mortgages were simple.

(3) Where sale in execution of a decree obtained on foot of a puisne mortgage takes place during the pendency of the suit on the prior mortgage, there are conflicting rulings of two Division Benches of this Court on the questions (a) whether the sale in the subsequent mortgagee's suit is affected by the rule of lis pendens so as to make the purchaser's right subject to the result of the prior mortgagee's suit; and (b) whether, apart from the effect of the rule of lis pendens, the purchaser in the prior mortgagee's suit is entitled to possession in preference to the purchaser in the puisne mortgagee's suit in case both mortgages were simple, even though the sale in the second mortgagee's suit took place before the sale in the prior mortgagee's suit.

On the second question our own view is that the purchaser in the prior mortgagee's suit acquires, at least, the mortgagor's right to possession subject to the right of the purchaser in the puisne mortgagee's suit to redeem the prior mortgage which, for that purpose, should be deemed to be subsisting. On the third question we hold that the sale in execution of decree obtained by a puisne mortgagee during the pendency of a suit on the prior mortgage is affected by the rule of lis pendens and that the purchaser in the puisne mortgagee's suit must yield to the paramount title in favour of the auction-purchaser in the prior mortgagee's suit. Our view is in conformity with that taken (by Piggott and Lindsay, JJ.,) in *Babu Lal* v. *Jalakia* (4), and contrary to that taken (by Mukerji and Boys, JJ.,) in the case of *Lachmi Narain* v. *Hirdey Narain* (5). In these circumstances, we are of opinion that questions 2 and 3 noted above should be referred to a larger Bench. Accordingly, we request the Hon'ble the Chief Justice to refer the aforesaid questions to a Full Bench. This appeal will be finally disposed of by us on receipt of the opinion of the Full Bench on questions 2 and 3.

Opinion

Sulaiman, Ag. C. J.—The questions referred to the Full Bench are as follows:

1. Whether the auction purchaser, in execution of a decree obtained on a prior mortgage without impleading the subsequent mortgagee acquires, at least, the rights of the mortgagor who was a party including his rights to possession in cases where both the mortgages were simple.

2. Where sale in execution of a decree obtained on foot of a puisne mortgage takes place during the pendency of the suit on the prior mortgage.

(a) whether the sale in the subsequent mortgagee's suit is affected by the rule of lis pendens so as to make the purchaser's right subject to the result of the prior mortgagee's suit; and (b) whether, apart from the effect of the rule of lis pendens, the purchaser in the prior mortgagee's suit is entitled to possession in preference to the purchaser in the puisne mortgagee's suit in case both mortgages were simple, even though the sale in the second mortgagee's suit took place before the sale in the prior mortgagee's suit.

The facts of this case may be briefly stated as follows:

On 6th October 1911 Sital Prasad and Sanehi Lal made a simple mortgage of their shares in a certain village in favour of certain mortgagees. A suit to pre-empt this mortgage was brought and decreed, with the result that the mortgagee's rights vested in Ram Sanehi and Sia Ram.

On 17th May 1912 Sital Prasad alone made a second simple mortgage in favour of Baldeo Prasad. The suit on the second mortgage was instituted on 21st March 1922, against the mortgagor without impleading the prior mortgagees. A preliminary decree for sale was passed on 13th March 1923 and a final decree on 13th November 1923.

In the meantime a suit by the prior mortgagees for sale on their mortgage was filed on 29th August 1923 without impleading the subsequent mortgagee. A preliminary decree was obtained against the mortgagors on 15th March 1924 and a final decree on 23rd March 1924.

It will thus appear that although the suit on the subsequent mortgage was instituted first, there was a parallel suit on the first mortgage as well, and decrees were obtained in both. Both the suits were pending before any auction sale took place.

The subsequent mortgagee was first to put the mortgagor's interest to sale at auction on 28th January 1925, the purchaser being Janki Prasad. The prior mortgagees put the mortgagor's interest to sale on 20th November 1925 and they themselves made the purchase.

As Janki Prasad was the lambardar of the village he did not apply for a formal delivery of possession from the civil Court but got mutation of names effected in the revenue Court. The prior mortgagees however applied for formal delivery of possession and having obtained it, succeeded in the revenue Court in getting the name of Janki Prasad expunged and their own names substituted. Admittedly Ram Sanehi and Sia Ram the mortgagee-purchasers entered into effective possession.

Janki Prasad accordingly brought the present suit for possession and in the alternative for redemption of the prior mortgage in case it was not time barred. The suit was resisted by the prior mortgagee purchasers on the ground that it did not lie, and in any case that the plaintiff must redeem them.

The lower appellate Court has given the plaintiff a decree for possession on payment of half the mortgage money due to the prior mortgagees. Both parties have accordingly appealed.

The appeals came up for hearing before Pullan and Niamatullah, JJ. who found that there was a conflict of opinion in this Court. They were inclined to agree with the opinion expressed by Piggott and Lindsay, JJ., in *Babu Lal* v. *Jalakia* (4) and were inclined to differ from the views expressed by Mukerji and Boys, JJ., in *Lachhmi Narain Das* v. *Hirdey Narain* (5) I am however not sure whether the learned Judges meant to hold that the former case was rightly decided and the latter case was not.

The case has been argued with ability on both sides and a large number of cases have been placed before us. As there is undoubtedly a conflict of opinion not only in this Court but also in the other High Courts I propose to discuss the relevant cases of this Court and only of course the cases decided by their Lordships of the Privy Council, and shall only give references to a few cases of the other High Courts.

There is considerable case law in support of the view that a prior mortgagee, who purchases the mortgagor's interest without impleading the subsequent mortgagee, is entitled to use his prior mortgage as a shield in a suit brought against him by the subsequent mortgagee or his purchaser, in case the prior mortgagee is actually in possession. The result of the view of this Court was summarised by my learned brother Mukerji, J., in his excellent Commentary on the Transfer of Property Act, Art. 238, in the following terms:

> " One difference between the rights of a subsequent mortgagee who has acquired or paid off a prior mortgage, and those of prior mortgagee who has acquired the mortgagor's right in the property by purchase is important to note. In the latter case, the person with the double rights cannot sue himself to enforce the prior mortgage and hence he is permitted to hold the prior mortgage as a shield even though at the time the question arises a suit on the prior mortgage would be time barred. But in the former case, no such consideration arises, and hence the right to hold the prior mortgage as a shield will last only so long as a suit on the prior mortgage will be within time."

The passage from S. 1395 of Jones' Mortgage quoted by my learned brother Mukerji, J., also shows that

> "when a party in interest other than the owner of equity of redemption is not made a party to the bill the foreclosure is not generally for 'this reason wholly void .... His only remedy however is to redeem. He cannot maintain ejectment against the purchaser."

A Full Bench of this High Court in *Hargu Lal Singh* v. *Gobind Rai* (1) laid down that if from a suit by a mortgagee a subsequent transferee of the mortgagor has been excluded, the decree does not affect his title. There can be no question as to the authority of this case.

Another Full Bench in *Madan Lal* v. *Bhagwan Das* (2) held that

> "where on a suit by a subsequent mortgagee without impleading the prior mortgagee a decree was obtained and the property was purchased by a third party and subsequently the prior mortgagee brought a suit without impleading the subsequent mortgagee and obtained a decree, and the property was sold and purchased by a further party, the latter's suit for ejectment against the third party was not competent."

It will be noticed that in this case it was the purchaser in execution of the prior mortgagee's decree, to which the subsequent mortgagee had not been impleaded, who was suing as plaintiff and claiming possession if the defendants did not redeem him. It is also clear that no other matter came up for consideration before the Full Bench, and no other point was decided.

Ram Prasad v. *Bhikari Das* (3) and *Hazra Bibi* v. *Shyam Narain* (11) were not cases of purchasers in execution of decrees of rival mortgagees.

In *Babu Lal* v. *Jalakia* (4) Piggott and Lindsay, JJ., had a case in which a prior mortgagee brought a suit on his mortgage without impleading the subsequent mortgagee and obtained a decree and purchased the property in execution. The subsequent mortgage also brought a suit on his mortgage without impleading the prior mortgagee and having obtained a decree, put up the property for sale which was purchased by a third party who went into possession. The prior mortgagee, although he got formal possession, failed to dispossess the third party. He then brought a suit against the subsequent mortgagee and the third party for recovery of the amount due under his mortgage and in default of payment by the defendants for recovery of possession. It would appear from the judgment that the sale in execution of the subsequent mortgagee's decree took place first. The learned Judges held that the suit was maintainable and as all the parties were before the Court the equities could be worked out between them and the third party was entitled to nothing more than an opportunity of paying off the prior mortgage.

With great respect it appears to me that ultimate decision was somewhat contrary to the opinion of the Full Bench expressed in *Madan Lal* v. *Bhagwan Das* (2).

In *Ghulam Safdar Khan* v. *Sukhi* (12). Tudball and Rafique, JJ., held that where in a suit for sale the plaintiff occupied the position of a puisne mortgagee and the defendants were persons who were in possession under a decree for foreclosure on foot of their prior mortgage, the defendants could hold up their prior mortgage as a shield, and the plaintiff was entitled to redeem by reason of not having been impleaded in the suit on the prior mortgage. I shall come back to this case again as it was ultimately disposed of by their Lordships of the Privy Council in *Sukhi* v. *Ghulam Safdar Khan* (13).

In *Hukum Singh* v. *Lallanji* (14) where a prior mortgagee, without impleading the puisne mortgage, sued for and obtained a decree for sale on his mortgage, but before the sale actually took place the puisne mortgagee sued for sale on his mortgage and contended that the prior mortgagee, by omitting to implead him, had forfeited his right to execute his decree, a Full Bench of this Court held that this was not better nor worse by his not having been impleaded in the prior mortgagee's suit, and that if the prior mortgage was valid the puisne mortgagee was not entitled to a decree for sale without giving the prior mortgagee an opportunity of redeeming him. It is to be noticed that by the time the second mortgagee brought his suit, limitation for the prior mortgage, if a fresh suit were to be instituted on it had expired. In *Bhudi Lal* v. *Administrator-General*

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(11) [1913] 20 I. C. 184.

(12) [1917] 38 I. C. 573.

(13) A. I. R. 1922 P. C. 11=65 I. C. 151=48 I. A. 465=43 All. 469 (P.C.).

(14) A. I. R. 1921 All. 339=61 I. C. 942=43 All. 204 (F.B.).

of Madras (15) Ryves and Gokul Prasad, JJ., held that where a puisne mortgagee wishes to sell property which has already been sold in execution of a decree passed under a prior mortgage, the decree must direct redemption by the second mortgagee of the first mortgage and then an order for sale if the purchaser of the property does not wish to redeem the second mortgage.

In *Ram Sarup* v. *Ram Lal* (16) Lindsay and Kanhaiya Lal, JJ., held that when a prior mortgagee purchases the rights of a mortgagor in execution of a simple money decree his rights under the prior mortgage merge in the purchase so long as no attempt is made by the puisne mortgagee to oust him by litigation or sale from the rights purchased, but it will be presumed that he intends to keep his mortgage subsisting in order that he might use it as a shield to protect himself against any subsequent encumbrance.

In the case of *Ram Narain* v. *Mt. Somi* (17) Stuart and Gokul Prasad, JJ., held that where two mortgagees, each without impleading the other, brought suits on their respective mortgages and obtained decrees for sale and purchased the property, the second mortgagee being earlier in date, a suit by the first mortgagee for possession, or compelling the defendant to redeem him, was not maintainable. But here the first mortgagee not being in possession was suing as plaintiff and could not set up his mortgage as a shield.

In *Phul Chand* v. *Mt. Surji, A.I.R.* 1923 *All.* 457 Ryves and Daniels, JJ., held that where a prior mortgagee of a property purchased it and satisfied a mortgage and the subsequent mortgagee of the same property brought it to sale on the basis of his mortgage after impleading the prior mortgagee as defendant, it was settled law that the prior mortgagee was entitled to hold up the earlier mortgages which were satisfied out of the sale consideration as a shield against any attempt to deprive him of the property.

In *Sukhi* v. *Ghulam Safdar Khan* (13) two simple mortgages had been executed in 1924 and 1925 by Nand Ram in favour of Kirpa, followed by a mortgage by conditional sale in 1883 in favour of Ghulam Safdar. In 1886 Kripa sued for sale without impleading Ghulam Safdar and got a decree and in execution purchased the property at auction. He bequeathed it to his wife Mt. Sukhi. She obtained probate after his death and then made a gift of it to her nephews Jagram and Net Ram. The latter, in whom the rights of Kripa and Nand Ram had become vested, executed a security bond in favour of Mt. Sukhi for her maintenance allowance, hypothecating the same property to her in 1902. In 1910 Ghulam Safdar sued Jagram and Net Ram for foreclosure of his mortgage of 1883, but omitted to implead Mt. Sukhi. The defendants successfuly set up the discharge of the mortgages of 1874 and 1875, as a shield and Ghulam Safdar had to deposit Rs. 2,954 in Court, which amount was taken away by Jagram and Net Ram. The latter did not redeem Ghulam Safdar's mortgage which was foreclosed in 1913.

In 1914 Mt. Sukhi brought a suit on the basis of her mortgage of 1902 claiming Rs. 10,000 as her arrears of maintenance. She impleaded Ghulam Safdar who was in possession of the property. The first Court gave the plaintiff a decree for sale conditional on her paying to the defendants the sum of Rs. 2,954, the amount which had been paid to satisfy the mortgage debts of 1874-1875. On appeal Tudball and Rafique, JJ., in *Ghulam Safdar Khan* v. *Sukhi* (12) modified the decree and directed the plaintiff to pay the additional sum of Rs. 8,649 odd which was due on the mortgage of 1883. In the course of the judgment the learned Judges held that the plaintiff, a puisne mortgagee, was seeking to enforce her mortgage against a prior mortgagee, who had failed to make her a party and that it was the duty of the Court to give the plaintiff an opportunity of occupying the position which she would have occupied if she had been made a party. They allowed Ghulam Safdar to set up his old mortgages as a shield and to compel the plaintiff to pay off the amount due on them. In the course of the judgment the learned Judges referred to an earlier case in which the question of limitation was discussed, but pointed out that the defendant was not seeking to enforce the old mortgages but merely held them up as a shield and that he was entitled to stand upon the former mortgages which he had satisfied and take up the position of a prior mortgagee and claim redemption. It is noteworthy that at the time when Mt. Sukhi was suing the mortgages of 1874 and 1875 as well as the mortgage of 1883 would have been barred by time if fresh suits to enforce them were instituted as even the extension of time allowed by the Limitation Act, 1908, had expired.

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(15) A. I. R. 1922 All. 104=65 I. C. 841=44 All. 418.

(16) A. I. R. 1922 All. 394=75 I. C. 472=44 All. 659.

(17) A. I. R. 1923 All. 449=74 I. C. 277=45 All. 189.

When the case went up before their Lordships of the Privy Council, *Sukhi* v. *Ghulam Safdar Khan* (13), they distinguished the cases of *Het Ram* v. *Sadi Ram* (18) and *Matru Mal* v. *Durga Kunwar* (19) on the ground that they were decided when S. 89, T. P. Act, was in force, but as that section had disappeared from O. 34, Civil P. C., their Lordships concluded that the law now was the same as had stood before the Transfer of Property Act was passed. Their Lordships observed at foot of p. 475 :

> "An owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield."

At p. 476 their Lordships remarked :

> "The general principle was stated rightly by the High Court, namely the plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgage in his suit having failed to make her a party. It is the duty of the Court to give the plaintiff the opportunity of occupying the position which she would have occupied if she had been a party to the former suit."

Their Lordships however considered that, owing to the laches of Ghulam Safdar, Jagram and Net Ram had been allowed to carry off in money the part of the estate represented by the value of the first mortgage which they had really impledged by their mortgage to the widow, and that therefore the widow should not be deprived of her rights. In the result their Lordships ordered the respondents to pay Rs. 2,925 with interest and in case of such payment directed the plaintiff to pay to the respondents Rs. 8,649 odd being the sum in the decree on the mortgage of 1883. The respondents were allowed a right to recover from Net Ram and Jagram by a separate suit the sum wrongly carried off by them in fraud of their own mortgage.

The question of allowing a prior mortgagee whose mortgage had long since become barred by time, but who was in possession of the property under a decree obtained without impleading the subsequent mortgagee, to set up his prior mortgage as a shield, even though the limitation for the mortgage had run out, was prominently before their Lordships ; and their Lordships allowed Ghulam Safder to recover the amount due on his mortgage of 1883. This, to my mind, is a clear authority for the proposition that a prior mortgagee, if he is in possession, can set up in defence a prior mortgage as a shield, although in his suit he had not impleaded the subsequent mortgagee and even though a fresh suit to enforce it would now be barred by time.

Bijai Saran Sahi v. *Deo Kishan Prasad* (20) was a case where after the execution of simple mortgages the equity of redemption was attached by the plaintiffs' predecessor in execution of a simple money decree and sold. While the attachment was pending the defendants purchased it. The plaintiffs ultimately purchased the interest at auction but failed to obtain actual possession. They sued for recovery of possession. The defendants set up the payment of previous simple mortgages as a shield. Kanhaiya Lal and Ashworth, JJ., held that as those mortgages were not usufructuary mortgages and the plaintiffs purchased the equity of redemption, it was not open to the defendants to resist the claim of the plaintiffs to possession, and the defendants had got possession by virtue of a sale which was unenforceable as against the claim arising out of the attachment. They remarked :

> "If the sale is invalid they must surrender possession of the same because their mortgages did not give them any right to possession."

In that case the ostensible purchase by the defendants was void against the plaintiffs and they could not under that colourable title set up payment of previous mortgages as a shield. Kanhaiya Lal, J., was one of the members of the Bench which had decided the case of *Ram Sarup* v. *Ram Lal* (16).

When the case went up to their Lordships of the Privy Council the judgment was affirmed and the following remark of the High Court was quoted with approval :

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(18) A. I. R. 1918 P. C. 34=45 I. C. 793=45 I. A. 130=40 All. 407 (P.C.).

(19) A. I. R. 1920 P. C. 79=55 I. C. 969=47 I. A. 71=42 All. 364 (P.C.).

(20) A. I. R. 1926 All. 734=97 I. C. 102=48 All. 698.

> " They (i. e. the defendants) get possession by virtue of the sale of 19th November 1908 . . . . . if the sale is invalid they must surrender possession of the same because their mortgages did not give them any right to possession."

Their Lordships further observed that whatever rights if any the defendants had under their mortgages, they could no doubt enforce them in proper proceedings taken for the purpose, but there was no opportunity afforded which enabled them to set up their mortgages as shields against the plaintiffs' claim for possession. That was a case in which the defendants' purchase of the equity of redemption was void and a nullity and is therefore unlike the case of *Mt. Sukhi* v. *Ghulam Safdar* where the purchase had been made without impleading the subsequent mortgagee. I am therefore of opinion that *Bijai Saran Sahi's* case does not in any way shake the authority of *Shukhi's* case.

I now come to the case of *Lachmi Narain* v. *Hirdey Narain* (5). No doubt my learned brethren Mukerji and Boys, JJ., expresly dissented from certain expressions of opinion made in *Babu Lal* v. *Jalakia* (4). On some points, their opinions are contrary to those held by Piggott and Lindsay, JJ. But in *Lachmi Narain's* case the plaintiff was the prior mortgagee and the defendant was the puisne mortgagee. Both had sued the mortgagor upon their mortgages without impleading each other and both had obtained decrees for sale and purchased the mortgagor's interest at auction. The sale in execution of the decree of the puisne mortgagee was earlier in point of time, and he also succeeded in obtaining actual possession of the property. The prior mortgagee purchaser sued for possession offering the defendant an opportunity to redeem the plaintiff. The learned Judges held that the plaintiff was not entitled to possession and the suit was not maintainable. It would be noticed that apart from certain expressions of opinion contained in the judgment, it was quite clear that the prior mortgagee was not in a position to set up his prior mortgage as a shield. His suit in substance was one for the enforcement of his mortgage, and had been brought after the mortgage had become barred by limitation.

On the other hand *Muhammad Abbas Ali Khan* v. *Chhotey Lal* (21), was a case where an owner of a property possessed the equities of the first mortgagee and the rights of the original mortgagor as acquired by an auction sale in a decree on the first mortgage to which a subsequent mortgagee had not been impleaded. Both my learned brother Mukerji, J., and myself held that he was entitled in a suit of the subsequent mortgagee, who was not bound by the sale or the decree to which he had not been made a party, to set up the first mortgage as a shield. We both relied on *Sukhi* v. *Ghulam Safdar Khan* (13), which was held to be directly applicable. Abbas Ali Khan having paid off a previous mortgage was given priority in respect of the amount paid by him as against Chhotey Lal who came under a subsequent mortgage. The equities were adjusted accordingly, although if Abbas Ali Khan were suing to enforce the previous mortgage which he had discharged he would have been hopelessly beyond time.

The Full Bench case of *Nannu Mal* v. *Ram Chander* (7) is distinguishable in this respect that there the prior mortgagee had obtained his decree, without impleading the subsequent mortgagee and had put up the property to sale long before the subsequent mortgagee brought his suit. But in the course of my judgment I had occasion to remark at p. 281 :

> "A purchase at auction in execution of a prior mortgage decree, to which a subsequent mortgagee is not a party, does not confer on the purchaser any right to enforce the mortgage by a suit against the subsequent mortgagee not impleaded, (the limitation for the prior mortgagee had expired). It may give the former the right to redeem the latter. But where the purchaser has succeeded in obtaining actual possession, Courts in India have allowed to him the equitable right of holding up the discharge of the prior mortgage as a shield for purposes of defence . . . . . . but a shield is purely a weapon of defence and not attack."

It is analogous to a lien and can be exercised only so long as it is accompanied with possession. King, J., also remarked :

> " Although the auction-purchaser is in one sense standing in the shoes of the prior mortgagee, and can set up the prior mortgage as a shield, nevertheless it is clear in this case that the auction-purchaser did not enter into possession of the property as a representative of the prior mortgagee."

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(21) A. I. R. 1927 All. 28=97 I. C. 594.

As regards the cases in the other High Courts, there too the opinion is somewhat conflicting. I am not called upon to discuss them, but I would only refer to a few out of the numerous cases: *Debendra Narain Roy* v. *Ramtaran Banerji* (particularly p. 608) (22); *Ram Narain Sahoo* v. *Bandi Persad* (23); *Hassanbhai* v. *Umaji* (24), and *Mohomed Karim Rowthan* v. *Abdulla* (25).

It may also be noted that in *Umesh Chunder Sircar* v. *Zahur Fatima* (26) a puisne mortgagee had been excluded from the previous suit and he was given by their Lordships of the Privy Council a decree for sale with application of the purchase money to pay encumbrances in their due order.

It thus appears that there is considerable authority for the support of the proposition stated above. I now come to a consideration of the principles on which these authorities seem to proceed.

There are three principles which are now well established and from which the right of the prior mortgagee as a defendant in possession to set up his prior mortgage as a shield follows logically.

The first principle is that the omission to implead a person interested in the mortgaged property in the suit does not make the whole suit defective and the proceedings null and void, but only frees the person excluded from all liability under the decree. No doubt O. 34, R. 1, Civil P. C., lays down that all persons interested in the equity of redemption are necessary parties. But that rule is a mere rule of procedure and not of substantive law and is subject to the provisions of O. 1, R. 9, Civil P. C., which lays down that as far as possible no suit is to fail on account of nonjoinder of party. A prior mortgagee therefore can bring a suit against his mortgagor without impleading a subsequent mortgagee; and if there were no defect of lis pendens and no suit by a subsequent mortgagee were pending, the prior mortgagee can sell up the rights and interest of the mortgagor in the mortgaged property, even behind the back of the subsequent mortgagee. It would be incorrect to say that the decree is null and void and the effect is the same as if the proceedings had never taken place. I adhere to the opinion expressed by me in *Nunnu Mal* v. *Ram Chunder* (7):

> "No doubt the decree on the previous mortgage is not binding on the subsequent mortgagees, who had not been impleaded, to this extent that their rights under their mortgage have not been extinguished, as would have been the case if they had been impleaded and had not redeemed the prior mortgage. But it is not correct to say that the previous proceedings are totally a nullity. As between the prior mortgagee and the subsequent mortgagees the previous proceedings are ineffective, but that does not imply that the mortgagor's interest could not have been sold by the prior mortgagee behind the back of the subsequent mortgagees but subject to their subsequent mortgage. The mortgagor's interest in the property validly passed to the auction-purchasers no matter whether the subsequent mortgagees were parties to the suit or not. The auction-purchasers cannot be in a worse position than a private transferee from the mortgagor."

The second principle is that a purchaser from the mortgagor is entitled to subrogation. S. 74, T. P. Act, expressly conferred a right of subrogation on subsequent mortgagees, but the equitable principle underlying that section was applied to all subsequent transferees on the strength of the rule of equity laid down by their Lordships of the Privy Council in *Gokul Das Gopal Das* v. *Puran Mal Premsukh Das* (27) re-affirmed in *Gobind Lal Roy* v. *Ram Janam Misser* (28) and followed by this Court in several cases out of which mention may be made of *Kesrimal* v. *Mubarak Husain* (29). It is obvious that there is to be no difference in principle where the transferee from a mortgagor was a transferee under a private treaty or a purchaser at an involuntary sale at auction. It would further follow that the principle would equally apply if instead of a third party, the prior mortgagee himself were to acquire the equity of redemption. The old theory of a necessary merger was exploded and the doctrine in *Toulmein* v. *Steere* (30) was held to be inapplicable in India by their Lordships of the Privy Council in *Gokul Das's* case referred to above. It would then seem to follow that if the prior mortgagee can acquire the mortgagor's interest in the suit on his mortgage, even without impleading a subsequent mortgagee, he can claim the benefit of his prior mortgage which would not now be necessarily extinguished.

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(22) [1903] 30 Cal. 599=7 C. W. N. 766 (F.B.)

(23) [1904] 31 Cal. 737.

(24) [1904] 28 Bom. 153=5 Bom. L. R. 892.

(25) [1900] 24 Mad. 171=10 M. L. J. 347.

(26) [1891] 18 Cal. 164=17 I. A. 201=5 Sar. 507 (P. C.).

(27) [1884] 10 Cal. 1035=11 I. A. 126 (P. C.)

(28) [1894] 21 Cal. 70=20 I. A. 165 (P. C.).

(29) [1911] 10 I. C. 556.

(30) 3 Mer. 210=17 R. R. 67,

Apart from all question of lis pendens or limitation, a prior mortgagee or for the matter of that any other purchaser under his decree, would be entitled to keep alive his mortgage as against a subsequent mortgagee, who had not been impleaded.

The third principle is that the language of S. 52 has been held to be applicable not only to private transfers but also to Court sales held in execution of decrees. S. 2 (d) does not make S. 52 inapplicable to Ch. 4, which deals with mortgages. This is now well settled: vide *Radhamadhub Holdar* v. *Monohar Mukerji* (9) and *Moti Lal* v. *Kharrabuldin* (31), followed in numerous cases out of which mention may be made of *Sukhdeo Prasad* v. *Jamna* (10).

When a suit under the prior mortgage is pending and the subsequent mortgagee has not been impleaded, the plaintiff is trying to sell the rights and interests of the mortgagor, namely, the equity of redemption. He is not selling his own rights as the mortgagee, but by the principle of subrogation the auction purchaser would step into the shoes of the mortgagee also in addition to his acquiring the proprietary interest of the mortgagor, subject to the subsequent mortgage.

Thus the equity of redemption of the mortgagor is in dispute in such a suit and the doctrine of lis pendens would undoubtedly attach to it. If in another proceeding, whether it be in execution of a simple money decree or in enforcement of a subsequent mortgage, the same proprietary interest of the mortgagor is simultaneously sought to be sold, S. 52 would apply. Similarly if while a suit of a subsequent mortgagee for the enforcement of his mortgage against the mortgagor, without impleading the prior mortgagee, is pending, any attempt on the part of the prior mortgagee to get that interest sold in his own decree would be equally governed by S. 52.

In *Parsotam Narain* v. *Chheda Lal* (8) at p. 80, Banerji, J., quoted with approval a passage from Bennet, J., on lis pendens:

> "Where something remains to be done by the Court in the execution of its judgments and decrees other than can be done without order of Court by the merely ministerial officers of the Court, lis pendens continues until this decree is executed. So in the case of the foreclosure of a mortgage it continues until the purchaser has been put into possession of the property."

The learned Judge held that a sale of the mortgagor's interest between the decree nisi for foreclosure and the order absolute for foreclosure was affected by lis pendens.

It has been suggested that lis pendens cannot apply to the sale in a subsequent mortgage decree for the reason that the transfer in reality took place at the date of the mortgage and the subsequent auction sale is merely a necessary result of it. If these arguments were sound it could be said that the transfer under the first mortgage took place at the date of that mortgage and the auction-purchaser in the prior mortgage suit would always have priority even though his auction sale may be later in point of time. It seems to me that the transfer by the mortgagee at the time of its execution was of the mortgagee's rights and was made to the mortgages. The equity of redemption of the mortgagor was not all transferred at that time. In the mortgage suit the plaintiff is trying to put up for sale the mortgagor's equity of redemption and not the mortgagee's interest. The auction-purchaser would purchase the rights and interest of the defendant mortgagor, although by virtue of the principle of subrogation he would also step into the shoes of the mortgagees and acquire his rights as well. But it cannot be suggested that the mortgagee's rights are put up for sale or are transferred by the defendant. It is not a case of a sale of the mortgagee's interest, but of the mortgagor's interest free from the mortgage. Indeed, the defendant had no right whatsoever to transfer the mortgagee's rights. The property purchased at auction may not be co-extensive with that mortgaged, and in most cases is much less. Can this be the result of only one transfer effected by the mortgage? In the case before us Janki Prasad became the auction-purchaser in execution of the decree on the subsequent mortgage. Can it be said that the transfer made to him really took place when the mortgage was executed in favour of the mortgagee: Surely the transfer with which we are dealing and which is in favour of Janki Prasad could only have taken place on the date of the auction sale and not a day earlier. To take another illustration. Suppose there were a third mortgagee who is impleaded and a fourth mortgagee not impleaded. The sale in pursuance of the second mortgage would extinguish the third mortgage and would not involve a transfer of the third mortgagee's interest to the purchaser entitling him to enforce it against the fourth mortgagee. Or suppose that the whole mortgage decree is not satisfied, can it be said that the auction-purchaser has acquired any part of the mortgagee's right? I therefore do not see how this argument can avoid the applicability of lis pendens to the transfer of the mortgagor's interest, even though that transfer takes place in the case of a mortgage suit.

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(31) [1898] 25 Cal. 179=24 I. A. 170 = 7 Sar. 223 (P. C.).

I fully agree with the opinion expressed by my learned brothers Pullan and Niamatullah, JJ., in their order of reference that it is not possible to get over the doctrine of lis pendens in such cases. As pointed out above the doctrine would apply equally to both the suits and the sale in each suit would be subject not only to the other mortgage but to the decree or final order passed in the other suit. The result in my opinion would be that the sales in execution of the decree on the two mortgages in the parallel suits would both be imperfect and not absolute, each being subject to being avoided by the other mortgagee. This may be a very unsatisfactory state of affairs, but it is the inevitable result of the applicability of S. 52 to both the suits.

The subsequent mortgagee cannot avoid the effect of the doctrine of lis pendens by urging that it was open to him under O. 34, R. 1, Civil P. C., to enforce his own mortgage subject to the prior mortgage, without impleading the prior mortgagee. Though he was not bound to implead the latter, he could very well have joined him in the suit. As the legal title acquired by the purchaser, even though he may be the first in point of time, is defective and imperfect, equity will prevail. The doctrine of allowing a prior mortgagee who has entered into possession of the mortgaged property to set up his prior mortgage as a shield is a doctrine of equity. As noted above it is a means of defence and not a weapon of attack. To allow him to maintain a suit as plaintiff, when limitation on his mortgage has expired would be tantamount to permitting an enforcement of his time barred mortgage against a person left out from the first suit and now entitled to plead limitation.

While the prior mortgagee has obtained possession of the mortgaged property, though strictly speaking not under his simple mortgage, but because he has acquired the mortgagor's interest in execution of his mortgage decree, he is in enjoyment of the profits in lieu of his interest. It may well be suggested that the continuous payment of interest in this form helps to keep alive the limitation in his favour. Strictly speaking the limitation would not apply to the defence. If however the prior mortgagee does not succeed in obtaining possession, he cannot enforce his rights under the prior mortgage in a suit as plaintiff, if the remedy on that prior mortgage has become barred by time.

After the equities have been adjusted by the payment of the amounts due on the encumbrances, which can be validly ordered to be paid up, the equity of redemption of the mortgagor will ultimately remain vested in the person who purchased it at auction first in point of time. The same property cannot pass to two persons under different sales, and therefore after the legal defects have been removed and the equities have been adjusted preference must be determined by the priority of purchase in point of time.

In my judgment the following results follow from these conclusions:

1. (A) If the purchaser in execution of the prior mortgagee's decree is not in possession and is suing as plaintiff the purchaser in execution of the subsequent mortgagee's decree.

(a) he can enforce his remedy, if limitation on the prior mortgage has not yet run out, but

(b) he cannot recover the mortgage money, if limitation has run out.

(B) (a) If he was the earlier purchaser in point of time, he can redeem the second mortgage and recover possession, even though the prior mortgage is barred by time.

(b) But if he was the later purchaser in point of time, then his suit even for redemption cannot be decreed.

2. If the purchaser in execution of the second mortgagee's decree is suing the purchaser in execution of the prior mortgagee's decree, who is the defendant in possession, then

(a) if the purchaser under the second mortgage was the earlier purchaser in point of time, he must redeem the prior mortgage, and the purchaser under the prior mortgage cannot compel the purchaser under the second mortgage to submit to redemption by him;

(b) if the purchaser under the second mortgage was later in point of time, then he must first redeem the prior mortgage, but the purchaser under the prior mortgage will have the right to redeem the purchaser under the second mortgage next, and retain possession of the mortgagor's property.

Mukerji, J.—This is a reference to a Full Bench. The questions that have been referred to a Full Bench have not been separately formulated, but I gather from the order of reference that the following are the questions on which answers are needed.

1. Whether the auction-purchaser in execution of a decree obtained on a prior mortgage without impleading the subsequent mortgagee acquires, at least, the rights of the mortgagor who was a party, including his right to possession in cases where both the mortgages were simple?

2 (a). Whether the sale in the subsequent mortgagee's suit is affected by the rule of lis pendens so as to make the purchaser's right subject to the result of the prior mortgagee's suit?

(b) Whether apart from the effect of the rule of lis pendens, the purchaser in the prior mortgagee's suit is entitled to possession in preference to the purchaser in puisne mortgagee's suit in case both the mortgages were (*sic*) simple, even though the sale in the second mortgagee's suit took place before the sale in the prior mortgagee's suit?

The facts of the case must be carefully noted, because the questions put to the Full Bench cannot be answered irrespective of facts. The questions are rather wide in their nature and are capable of different answers under different circumstances. I take it however that the reference relates to the admitted and established facts of the case and I therefore lay emphasis on the facts of this case. My answer should not be taken as relating to any facts which are not identical with the facts of this case.

Sital Prasad and Sohan Lal were two brothers and owned certain properties in equal shares. They made a simple mortgage for Rs. 2,500 in favour of Mt. Dulari wife of Baldeo Prasad and to one Punna Lal on 6th October 1911. The mortgage money was payable in ten years with a certain rate of interest. It was agreed that the interest would be paid yearly and in default of payment of the yearly rent the mortgagees would be entitled to sue for their mortgage money. The result was that the Court below has held that the mortgage became payable in 1912 and the limitation for the suit would expire in 1924.

Defendants 1 and 2 in the suit out of which this appeal has arisen, namely, Ram Sanehi and Sia Ram, hereinafter to be called the prior mortgagees, sued the simple mortgagees Mt. Dulari and Punna Lal for pre-emption and were successful with the result that they became substituted as the mortgagees.

One of the brothers who had mortgaged the property in 1911, namely Sital Prasad, mortgaged his half share in the property already mortgaged, to Baldeo for Rs. 300 on 17th May 1912.

The prior mortgagees brought a suit for sale, being Suit No. 166 of 1923, on 29th August 1923. To this suit the subsequent mortgagee Baldeo was not made a party. The important dates are as follows:

Date of suit ... 29th August 1923.
Preliminary decree ... 15th March 1924.
Final decree ... 23rd March 1925.
Sale in execution of
prior decree ... 20th Nov. 1925.
(Prior mortgagees themselves purchased),
Delivery of possession through Court... 7th Feb. 1926.

Baldeo instituted his suit being No. 105 of 1922. To this suit the prior mortgagees were not parties. The important dates are as follows:

Institution of the
suit ... 21st March 1922.
Preliminary decree ... 13th March 1923.
Final decree for sale... 13th Nov. 1923.
Sale at auction (purchaser being Janki
Prasad plaintiff) ... 20th **Jan.** 1925.

(No delivery of possession through the Court).

Order of mutation of names in favour of auction-purchaser, 21st April 1925.

It has been held that although Janki Prasad succeeded in obtaining on order of mutation in his name he was not actually in possession and the prior mortgagees by virtue of their purchase were actually put in possession on 7th February 1926.

Janki Prasad raised the suit out of which this appeal and reference have arisen against the prior mortgagees who have purchased in execution of their own decree for possession of the property (half share belonging to Sital Prasad) purchased by himself and has made the mortgagors or their representatives also parties. His contention is that he is entitled to possession without payment of anything to defendants 1 and 2, but he had offered to redeem them in case it is found that the plaintiff is not entitled to possession without redemption of the prior mortgage of 1911.

The suit was resisted on various grounds. The first Court held that the plaintiff was entitled to possession unconditionally, but defendants 1 and 2 were entitled to redeem the plaintiff. It accordingly directed that the plaintiff's suit should be decreed subject to this condition: that if defendants 1 and 2 redeemed the plaintiff (in reference to the second mortgage) the suit would stand dismissed, except for costs.

The plaintiff filed an appeal and defendants 1 and 2 filed a cross-objection. The cross-objection related to the question of costs and to the finding of the first Court, as to possession in favour of the plaintiff.

The lower appellate Court held that the plaintiff was not in possession when defendants 1 and 2 were put in possession, that the mortgage of 1911 was time barred at the date of Janki Prasad's suit which was instituted in December 1926, that defendants 1 and 2 had a right to hold up as a shield their prior mortgage of 1911, although it was time barred, because as a matter of fact, defendants 1 and 2 were in possession, and that the plaintiff was entitled to redeem half of the property mortgaged in 1911. The lower appellate Court accordingly modified the decree of the Court of first instance and gave a decree for possession to the plaintiff on condition that he redeemed the mortgage of 1911 on payment of half the mortgage money within a period of six months.

Point No. 1: As already stated, the question is rather wide and, ordinarily speaking, the answer should be in the affirmative if we disregard the peculiar facts of this particular case. When a mortgagee, whether he be a prior mortgagee or a subsequent mortgagee, brings the mortgaged property to sale the auction-purchaser acquires the two interests possessed by the mortgagee and the mortgagor respectively. A mortgage is according to S. 58, T. P. Act, a transfer of an interest in immovable property in favour of the mortgagee. A property has been described as a bundle of rights and when a person makes a mortgage, he parts with some of his rights in the property in favour of the mortgagee. To clearly understand the principle, let us take this illustration. Suppose P represents the property. If it is mortgaged to say three persons *A*, *B* and *C*, we may say that the interest P-1, out of the entire property P, has been parted with in favour of *A*, the interest P-2 has been parted with in favour of *B*, interest P-3 has been parted with in favour of *C*, and what remains with the mortgagor *D* is the interest P-4. In the case supposed P is = P-1 + P-2 + P-3 + P-4. If *A* the first mortgagee, brings a suit for sale (I am speaking of simple mortgages only) and makes, as he ought to do, the mortgagor and all the subsequent mortgagees parties, the auction-purchaser acquires the interest of *A*, the interest of *B*, the interest of *C*, and the interest of the mortgagor; that is to say he acquires P-1, P-2, P-3, P-4, and therefore the entire property *P*. But if *A* brings a suit for sale against the mortgagor alone without impleading *B* and *C*, the auction-purchaser acquires the interest of the mortgagee *A*, which is P-1, and the interest of the mortgagor which is P-4 only. Thus the auction-purchaser is the owner of P-1 and P-4 alone. The interest P-2 and P-3 have not vested in the auction-purchaser.

It follows from what has been stated above that the auction-purchaser will be entitled to take possession of the property as he has acquired the interest of the mortgagor which is P-4.

It will thus be seen that the question is purely elementary in its character and the answer is equally simple and affirmative.

If however we seek to apply the principle enunciated above to the facts of this case, we shall find that the question involved in this case is more complicated. What we have to consider in deciding the reference is what rights are left out if *B* and *C* the subsequent mortgagees, are not impleaded in the suit of *A*, as has been done in this case, by the omission of Baldeo Prasad from the suit. *B* and *C* have not only a right to redeem *A* or, in the case of a sale, the auction-purchaser (it matters little whether the auction-purchaser is the prior mortgagee himself or a third party), but also they have an absolute right to bring the interests mortgaged to them to sale, without payment of the prior mortgage of *A* *B* can raise a suit of his own by making *C* a party as a subsequent mortgagee. *D*, a party as the mortgagor, and the auction-purchaser in *A's* suit and decree, as the person who has acquired the interests of the mortgagor, in execution of the decree obtained by *A*. *B* can say that he would sell the property subject to the mortgage in favour of *A* and now held by (I am not considering the question of limitation for the present) the auction-purchaser, and nobody can possibly object to this attitude of his. *A* by omitting *B* and *C* from his suit could not in any way interfere with *B's* right to sell the mortgage property subject to the prior mortgage. This aspect of the rights of the subsequent mortgagee, who has been omitted from the prior mortgagee's suit is very often overlooked. *A* by his act or omission cannot take away the rights of *B*. Now if *B's* suit is decreed, as it is bound to be, unless the auction-purchaser under the prior mortgage, in his capacity of the representative of the mortgagor, redeems *B*, the property will be sold subject to the prior mortgage of *A* and the auction-purchaser, whoever he may be, will be entitled to obtain possession, even as against the auction-purchaser under the prior mortgage decree. The only right which the auction-purchaser under the prior motgage of *A* will then have is to bring a suit for sale after making the subsequent auction-purchaser a party. In this suit the prior auction-purchaser will be entitled to nothing but the amount of the price which he has paid for the property, not exceeding the mortgage money due to *A*. If the auction-purchaser be *A* himself and if he has purchased the property in full satisfaction of his mortgage decree, he will be entitled to realize the whole of the mortgage money by a fresh sale.

No authority is needed in support of the elementary proposition that in execution of a mortgage decree the auction-purchaser acquires not only the interest of the mortgagor but also that of the mortgagee, who brings the property to sale. I may however quote some authorities on the point. Jones, in his well-known book "Law of mortgages of Real Property" Ed. 7 in Art. 1305, states as follows, in considering what is the effect of omitting a party, interested in the mortgaged premises, other than the original mortgagor himself. He says:

> "When a party in interest other than the owner of the equity of redemption is not made a party to the bill, the foreclosure is not generally for this reason wholly void. It is effectual as against those persons' interest in the equity, who are made parties. The sale vests the estate in the purchaser, subject to redemption by the person interested in it, who was not made party to the proceedings. His only remedy however is to redeem. He cannot maintain ejectment against the purchaser. He cannot have the sale set aside by intervening, by petition in the foreclosure suit. His only right is the right of redemption. The sale though it fails to be effectual in other respects operates as an assignment of the mortgage and all the mortgagee's rights to the purchaser who may proceed de novo to foreclose, as against the parties whose interests have been omitted."

As a commentary on this text quoted from Jones, I may point out that the word "foreclosure" is a common designation for suits both for sale and for "foreclosure" strictly so called. Further, I would point out that where the author is talking of the right of the party, omitted from the previous suit, to redeem, he is not considering the right of a subsequent transferee who was omitted, to raise a suit of his own and to bring the property to sale subject to the prior mortgage relating to the suit to which he was not a party. The author is contracting a suit for redemption with a suit in ejectment.

Similarly, Coote (Edn. 9 of 1927, Vol. 2, p. 940) in considering what passes to the purchaser when a sale is held under an English mortgage states:

> "The effect of a conveyance by the mortgagee under an express or statutory power to sell is to vest the property in the purchaser discharged from the mortgage and all claims arising thereunder and free from equity of redemption."

This means that in the purchaser, vest all the rights of the mortgagee and all the rights of the mortgagor and not only the rights of the mortgagor alone. The rights of the mortgagor alone would mean the equity of redemption, burdened with the mortgage. The purchaser gets the property free from mortgage and therefore if there be no intermediate mortgagee he gets the entire property. If there be an intermediate mortgagee, the purchaser gets the first mortgagee's rights, also the rights of the mortgagor.

Answer to Question No. 1. My answer therefore to question No. 1 is in the affirmative, subject to the rider that the sale in favour of the auction-purchaser does not prevent the subsequent mortgagee from bringing a suit of his own and sell the property again by making the auction-purchaser under the prior mortgage a party to it, the property being sold in the second suit, subject to the prior mortgage.

Point No. 2 (*a*). I must consider this question with reference to the facts of this case and not independently of them. The question would otherwise be very wide and would be capable of different answers in different circumstances. The question is:

> "Whether the sale in a subsequent mortgagee's suit is affected by the rule of lis pendens so as to make the purchaser's right subject to the result of the prior mortgagee's suit."

There can be no doubt that the rule of lis pendens, generally speaking, applies to cases of transfer pending suit on a mortgage. Thus, if where a mortgagee's suit is pending the mortgagor transfers his property voluntarily or, if his interest is attached in execution of a simple money decree and it is sold, the purchaser by private treaty or the auction-purchaser would take the property subject to the result of the mortgage suit. Again, if pending a mortgage suit, the mortgagee plaintiff should sell his interest by private treaty, or if his interest be attached in execution of a simple money decree and be sold the purchaser by private treaty or the auction-purchaser, as the case may be, would purchase subject to the result of the mortgage suit. This would be in accordance with S. 52, T. P. Act, read with general principles of law. Literally, S. 52 applies to a transfer by a party to the suit, which would be a private act, but there can be no doubt on principle and on authorities, that where the interest of a party is transferred at the instance of a simple money creditor, who attaches the same in execution, the principles of the section would apply. The reason is perfectly clear. Although a party is not himself transferring the property, he is made to do so involuntarily at the instance of the Court and the result would be the same.

Where however a transfer takes place, not in execution of a simple money decree or by private treaty, but at the instance of a prior or subsequent mortgagee, who is no party to the litigation, S. 52 or the principles on which S. 52 is based, has no application whatsoever. The reasons are these. There is no difference in principle between a private sale and a sale held in execution of a simple money decree after attachment. A judgment-debtor has failed to pay while he could pay by selling his property. The Court seizes the property and sells it for the judgment-debtor for the benefit of the judgment-creditor. There, the only right that passes to the auction-purchaser is the right, title and interest of the judgment-debtor alone and none of the decree-holder, who has no interest whatsoever in the property attached and sold.

In the case of a sale under a mortgage, the transfer has already taken place at the date of the mortgage and what follows, namely the subsequent sale in execution of the mortgage decree, is nothing but the logical effect of a transfer which took place some time ago and not during the pendency of the suit by the prior mortgagee. Let us consider this illustration. *B* has made a simple mortgage of property P to *C*. *A* sues *B* for recovery of P on the allegation that *A* is the owner of the same. To this suit, *A* does not make *C* a party. It is clear that if *A's* suit be decreed, *C* will not be bound by the result of the suit. There is no transfer pendente lite. Now let us suppose that while the suit of *A* against *B* was pending, *C* brings a suit against *B* for sale of the property under the simple mortgage executed in his favour, and during the pendency of *A's* suit, brings the property P to sale and himself purchases it. The question is: "Will *C* be bound by the result of the suit in favour of *A*?" We have seen that *C* as a mortgagee would not be bound by the decree passed in favour of *A*, not being a party to *A's* suit, and because there was no transfer in favour of *C*, pending the suit of *A*. "Will *C* be bound because he has brought a suit of his own on the mortgage and purchased the property himself?" If it be said that *C* would be bound in the capacity of the auction-purchaser, how will you divide up *C's* liability between his capacity as the mortgagee and his capacity as the auction purchaser? How far will *C* be bound, if he be bound at all? If we should hold, as we ought to, that *C* is not at all liable, how, and on what principle, shall we hold the acution-purchaser, in execution of the decree obtained by *C*, liable, if the purchaser should happen to be somebody other than *C* himself?

On principle therefore the sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of lis pendens.

Further, the sale in execution of a mortgage decree transfers not only the interest of the mortgagor, but also the interest of the mortgagee himself: see observations on question 1.

Let us recollect the illustration of three mortgages and the mortgagor in an earlier portion of this judgment. If a sale takes place at the instance of the second mortgagee, the third mortgagee being a party to the suit, the auction purchaser would acquire the rights of the two mortgagees and of the mortgagor. The mortgagor alone is a party to the prior mortgagee's suit, while the second mortgagee is not. How will you split up the liabilities of the auction-purchaser in his various capacites as thé representative of the mortgagor he will be bound by the decree obtained by the prior mortgagee and will not be permitted to question the decree, while as the representative of the second mortgagee he will be entitled to treat the decree as not binding on him, and will be entitled to ask for redemption and also to sell the property again, subject to the prior mortgage.

To apply the principle to this case, when Janki purchased on 20th January 1925, he acquired the interest, which is the sum total of the interest of Sital and Baldeo. Sital alone was a party to the suit of Ram Sanehi and Sia Ram, but Baldeo was no party to it. The transfer in favour of Janki Prasad was therefore a transfer not by "any party to the suit or proceeding" within the meaning of S. 52, T. P. Act.

It has been suggested that even in the case of a mortgage sale only the right, title and interest of the judgment-debtor (the mortgagor) passes to the auction-purchaser, and that the auction purchaser gets the interests of the plaintiff mortgagee on the principle of subrogation alone. But what would happen in the case, which I have considered by way of illustration. In the case of a suit by the second mortgagee, against the third mortgagee and the mortgagor, the auction-purchaser acquires not only the interest of the second mortgagee, *B*, but also the interest of *C* and *D*, the second mortgagee and the mortgagor respectively. The auction-purchaser has paid the mortgage money due to the second mortgagee and thus we may say (let us assume) that the auction-purchaser has acquired, by subrogation, an interest of the second mortgagee *B*. But how does he acquire the interest of *C*, the subsequent mortgagee also? There is no question of payment of the money due to *C* the third mortgagee. The failure of the third mortgagee *C* to redeem the mortgage in favour of the second mortgagee *B* extinguishes the rights of the third mortgagee and vests the auction-purchaser with the rights belonging to the second mortgagee, the third mortgagee and the mortgagor.

The text-books when they talk of application of the principles of lis pendens, where the mortgage suit is pending, they speak of the transfer of equity of redemption or the mortgagor's interest. I have not come across a case where an auction-purchase in execution of a mortgage decree held by a person not a party to the lis has been held to come within the purview of the rule of lis pendens.

Again, let us take note of the facts of the present case. The suit by Baldeo was a perfectly good suit. He was not bound to make Ram Sanehi and Sia Ram defendants 1 and 2 parties to the suit, they being prior mortgagees. It follows that the result of the suit should not be allowed to be vitiated by anything done irregularly by Ram Sanehi and Sia Ram. Ram Sanehi and Sia Ram instituted their suit in the absence of Baldeo and got a decree and brought the property to sale. By obtaining the decree to which Baldeo was not a party, they could not prejudice the right of Baldeo which was twofold, namely: (1) the right to redeem Ram Sanehi and Sia Ram and; (2) to sell the mortgage property subject to the prior mortgage in favour of Ram Sanehi and Sia Ram. If the sale in favour of Janki Prasad be vitiated by the principle of lis pendens, the proceedings in the suit of Ram Sanehi and Siya Ram and the purchase by them are equally vitiated on the principle of lis pendens, owing to the pendency of Baldeo's suit, 105 of 1922. Each of the two purchases made, respectively, by Janki Prasad and Ram Sanehi and Sia Ram, would be affected by the principle of lis pendens. Then who is the true owner of the property? *The mortgagor's interest must vest in somebody.* It cannot reside in no person or, inchoately, in both Janki Prasad and Ram Sanehi and Sia Ram. When Ram Sanehi and Sia Ram made the purchase the property, being the interest of Sital Prasad, had already passed to Janki Prasad and this happened, not by virtue of anything done by Baldeo or Sital Prasad during the pendency of Ram Sanehi and Sia Ram's suit No. 166 of 1923, but by virtue of what had been done so early as on 17th May 1912, the date of the mortgage. The mortgage suit of Baldeo was nothing but a corollary of the transfer effected in 1912. Besides, as I have already said, the result of the suit was a transfer to Janki Prasad of an interest, which was not the sole interest of Sital Prasad, but an interest which is the sum total of the interests of Sital Prasad and Baldeo. We cannot split up this interest acquired by Janki Prasad and say that so far as Sital Prasad's interest is concerned, it is affected by the principle of lis pendens, although the interest of Baldeo is not affected by that principle.

It has been argued that Janki Prasad got his interest by a sale held in 1925 and not by the mortgage of 1912. I do not regard this argument as serious, because the mortgage of 1912 gave Baldeo a right to bring the interest of Sital Prasad to sale and it is that right of 1912 that has been exercised by Baldeo and, as the result of the exercise of that right, Janki Prasad had made the purchase. If instead of Janki Prasad, the second mortgagee himself had purchased, could it then be said that Baldeo Prasad's right, as the auction-purchaser, were something different from, and had no basis on, the mortgage of 1912?

I may point out, and this is very important to note, that if the subsequent mortgagee Baldeo had been a party to the suit of Ram Sanehi and Sia Ram, there would have been no difficulty, in holding that Janki Prasad would have been bound by the result of Ram Sanehi and Sia Ram's suit. For, in that case, both the subsequent mortgagee Baldeo and Sital Prasad, being parties to the suit of 1923, and because of holding interests inferior to those of the first mortgagee, their interests would have passed subject to the result of the prior mortgagee's suit. As I have said this is an important distinction to remember, and the simple question formed in the order of reference does not take note of the different answers that may be given in different cases.

My answers therefore to question 2 (a) is as follows:

Answer to question 2 (*a*):

Where a transfer takes place as the result of an auction sale held during the pendency of a prior mortgagee's suit, in execution of a subsequent mortgagee's decree, the principle of lis pendens will not apply. If however both the subsequent mortgagee and the mortgagor be parties to the prior mortgagee's suit, the auction-purchaser in the subsequent mortgagee's suit will be bound by the result of the prior mortgagee's suit, but not on the principle of lis pendens but because the subsequent mortgagee and all who are parties to his suit claim under titles inferior to that of the prior mortgagee.

Question 2 (*b*).—It runs as follows:

> "Whether apart from the effect of the rule of lis pendens, the purchaser in the prior mortgagee's suit is entitled to possession in preference to the purchaser in the puisne mortgagee's suit, in case both the mortgages are simple, even though the sale in the second mortgagee's suit took place before the sale in the prior mortgagee's suit?"

The question, here again, is too wide and is capable of different answers in different circumstances. I take it that the question was framed with reference to the facts of this case and this case alone.

It is firmly established that the purchaser in execution of a mortgage decree obtains the rights of the mortgagor and the mortgagee alone; if therefore the subsequent mortgagee has not been made a party to the prior mortgagee's suit, the auction-purchaser acquires no right as against the subsequent mortgagee, and it would follow, as against those who claim under the subsequent mortgagee. It is equally a firmly established proposition that a property can be sold only once and the mortgagor can lose his property once only. Thus the purchaser at the first auction sale, whether it be held under the prior mortgage, or whether it be held under the subsequent mortgage, acquires the interest of the mortgagor. After the mortgagor's interest has once passed away to a purchaser, that interest cannot be sold again effectively : see, e. g. *Moti Lal* v. *Karrabuldin* (31).

In this case before us, Janki Prasad, having purchased first, became the owner of the interest of Sital Prasad and the interest of Sital Prasad could not again be sold by virtue of the sale held on 7th February 1926. No doubt, it would be open to the prior mortgagees Ram Sanehi and Sia Ram, who have purchased at auction, to bring a second suit against Janki Prasad (if there be no bar of limitation) and sell up the interest of Janki Prasad, if he fails to redeem Ram Sanehi and Sia Ram.

The Full Bench cases of *Madan Lal* v. *Bhagwan Das* (2) and *Hargu Lal Singh* v. *Govind Rai* (1) both being decisions of five learned Judges of this Court, are authorities for the proposition that a simple mortgagee can give, to the purchaser, his own right as simple mortgagee alone, and those rights of a simple mortgagee do not carry with them a right to obtain possession.

Answer to question 2 (*b*).—My answer therefore to the question is that, generally, it is the first purchaser who gets the property and the question of purchase has nothing to do with the priority or posterity of the mortgage, in enforcement of which the property is sold.

Doctrine of shield.—In the course of the arguments before the Full Bench, some question as to the right of the prior mortgagee, who has obtained possession, rightly or wrongly, to hold up his prior mortgage as a shield, against a suit by the person, to whom property has passed rightfully, was raised and discussed. I do not find that there is anything in the reference which requires a discussion of the principles of the doctrine of shield and I therefore refrain from expressing any opinion. I will content myself with referring to the latest pronouncement of their Lordships of the Privy Council in *Bijai Saran Sahi* v. *Rudra Bageshwari* (32). The paper book and the judgment of the High Court were put before us and I find that Kanhaiya Lal and Ashworth, JJ., do refer to the fact that the defendant's counsel relied on the doctrine of shield. But the plea was disregarded not only by the High Court, but also by their Lordships of the Privy Council, on the ground that the simple mortgages held by the defendant did not give him a right to hold possession as against the rightful owner. This is in accordance with the Full Bench cases of *Madan Lal* v. *Bhagwan Das* (2) and *Hargu Lal* v. *Gobind Rai* (1).

I have not referred to decided cases, as, in my opinion, an attempt to follow them in disregard of principles, has been responsible for all the troubles, so clearly pointed out by the learned Judges making the reference. If the decision of the present Bench or of the majority of them be based on sound principles, it would not matter if the reconciliation of authorities has not been attempted.

Banerji, J.—I agree with Sulaiman, Ag. C. J., and for the reasons given by him.

Young, J.—I agree with the judgment of Sulaiman, Ag. C. J., and have nothing to add.

Pullan, J.—After reading the judgment of Sulaiman, Ag. C. J., I am confirmed in the view expressed in the order of reference and have nothing to add.

By the Court.—The answer to the first question is in the affirmative, if either no suit by the subsequent mortgagee is pending or the purchase in execution of the prior mortgagee's decree was earlier in point of time. If the first mortgagee be the earlier purchaser, the rights of the mortgagor to obtain possession will ultimately vest in him. If his mortgage is not time barred, he can compel the subsequent mortgagee to redeem him, but if it is time barred he must redeem the subsequent mortgage.

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(32) A. I. R. 1929 P. C. 288=120 I. C. 650.

The answer to (a) of the second question is in the affirmative.

The answer to (b) of the second question is that if lis pendens does not apply and the second mortgagee is the earlier purchaser, the prior mortgagee will have the right to take possession as plaintiff if a suit on his mortgage be not time barred. If the second mortgagee redeems him, the second mortgagee will retain the property. If the prior mortgage has become barred by time, the prior mortgagee cannot obtain possession.

V.B./R.K. *Reference answered.*

* * A. I. R. 1931 Allahabad 489

Full Bench

SULAIMAN, MUKERJI AND YOUNG, JJ.

Pitam Lal and *others*—Appellants.

v.

Kalla Ram and *others*—Respondents.

First Appeal No. 134 of 1927, Decided on 2nd March 1931, from decision of Dist. Judge, Agra, D/- 16th December 1926.

* * **(a) Probate and Administration Act (1881), S. 62—Oral will — Probate can be granted—Succession Act (1925), S. 276.**

An application for the grant of the probate of an oral will can be entertained under the Probate and Administration Act and Succession Act : 25 *All.* 313, *Foll.* ; 24 *Bom.* 8, *Ref.*

The fact that the substance of the oral will was taken down by a witness at the time the will was made makes no difference in the eye of the law. As regards application of the Act, that fact would only be a strong piece of evidence to prove the contents of the oral will.

[P 490 C 1, 2]

* **(b) Succession Act (1925)—Application for probate shortly before Succession Act—Act can apply.**

Where a will is made before coming into force of the Succession Act and the application for probate is made shortly before coming into force of the new Act since the new Act lays down a rule of procedure and not a substantive law, the new Act can govern the proceedings.

[P 490 C 1, 2]

N. P. Asthana and *Nanak Chand*—for Appellants.

U. S. Bajpai, S. N. Chaube and *Hari Ram Guha*—for Respondents.

Sulaiman, J. — Two questions have been referred to this Full Bench for consideration. They are:

(1) Whether an application for the grant of probate of an oral will can be entertained under the Probate and Administration Act (Act 5 of 1881);

and

(2) whether the Act would apply to a case where the substance of the oral will was taken down by a witness at the time.

If the questions were res integra and we had to consider nothing but the provisions of the Probate and Administration Act (Act 5 of 1881) there would be considerable difficulty in holding that a probate of an oral will would be granted.

No doubt the definition of "will" though not that of "codicil" in S. 3 was wide enough to include an oral will. But "probate" was defined as meaning the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator. We then had Ss. 24, 25, 26 and 27 relating to the grants limited in operation. The language of these sections presupposed that the will had been lost or mislaid or was in the possession of a person residing outside the province or that it was in existence but was not forthcoming. The language of these sections was therefore appropriately related to a written will and not to an oral will. Lastly we had S. 62 which referred to the application to be made for probate which must have the will annexed or in the cases mentioned in Ss. 24, 25 and 26 a copy, draft or a statement of the contents thereof annexed and must also state that it was duly executed. It did not expressly say that was to be done in the case of an oral will. S. 63 referred to the case where the will was in a language other than English, of which a translation had to be annexed.

Reading these sections together, it would have followed that the procedure laid down for the grant of a probate related to the probate of a written will and not an oral one.

No doubt under the Succession Act (Act 10 of 1865) privileged wills made by soldiers or mariners need not be wholly in writing. Then there was S. 187 which laid down that no right as executor or legatee could be established in a Court of justice unless a Court of competent jurisdiction had granted probate of the will under which the right was claimed. But the language of S. 244, Succession Act, though similar in some respects to that of S. 62, Probate and Administration Act, was not absolutely identical, as the latter section had the words allowing the annexing of "a copy, draft or statement of the contents of the original will" limited to the cases covered by Ss. 24, 25 and 26. It might also have been difficult to interpret S. 62, Probate and Administration Act, not according to its plain language but in the light of the difficulties which might arise under the Succession Act. However the fact remains that the Bombay High Court *In re Haji Mohamed Abba* (1) held that a probate of a nuncupative will could be granted. This case was followed by the Allahabad High Court in *Gokul Chand* v. *Mangal Sen* (2), where the difficulties were fully appreciated but it was considered more convenient and in accordance with the practice in England to admit probate of an oral will.

The legislature has now consolidated these two Acts and passed the Succession Act (Act 39 of 1925). It permits of oral wills being made by Mahomedans as well as by soldiers, mariners and airmen, whose wills are not required to be in writing. The language of S. 276 is almost identical with that of the old S. 62, Probate and Administration Act. It does not expressly refer to oral wills. It must be presumed that the legislature was aware of the trend of rulings in this country. And when in re-enacting the statute, it had adhered to the former phraseology, we are justified in inferring that the interpretation laid down in the rulings has been approved of by the legislature.

If oral wills are not to be admitted to probate there would certainly be one serious difficulty in the way of soldiers, mariners and airmen. S. 213 of the new Act does not exempt them and lays down that their executor or legatee cannot establish the will without having obtained probate or letters of administration. If S. 276 does not permit of a probate being granted of an oral will, their wills would be nullified in their effect.

We may further note that although the will in this case was made before the new Act came into force and would accordingly not be invalid, the application was made shortly before the coming into force of the new Act. The Act lays down a rule of procedure and not a substantive law and therefore there is no reason why the new Act should not govern these proceedings. It is also obvious that there was nothing to prevent the applicant from withdrawing this application and filing a fresh application as soon as the new Act came into force. Having given the case our best consideration we think that the rule laid down in *Gokul Chand* v. *Mangal Sen* (2) should be followed.

Our answer to the first question is therefore in the affirmative.

In our opinion the fact that the substance of the oral will was taken down at the time the will was made would not make any difference in the eye of the law. That fact would only be a strong piece of evidence to prove the contents of the oral will.

V.B./R.K. *Order accordingly.*

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(1) [1900] 24 Bom. 8=1 Bom. L. R. 715.

(2) [1903] 25 All. 313=(1903) A. W. N. 63.

** A. I. R. 1931 Allahabad 490
Full Bench

SULAIMAN, AG. C. J. BOYS AND BANERJI, JJ.

Mahabir Singh—Defendant — Appellant.

v.

Narain Tewari and *others*—Plaintiffs and Defendant—Respondents.

Letters Patent Appeal No. 167 of 1929 Decided on 9th June 1931 from judgment of Mukerji, J. of this High Court, D/- 9th April 1929.

(a) Precedents—Case is binding authority for what it actually decides—Per *Boys, J.*—It is sometimes useful to set out other propositions than those actually decided.

A case is a binding authority for what it actually decides. [P 499 C 1]

Per *Sulaiman, Ag. C. J.*—A Full Bench case is a binding authority on the question directly arising in the case. But it is doubtful whether any general expression of opinion not expressly considered and specified, would not be an obiter dictum and therefore not possessing the same binding authority. [P 493 C 1, 2]

Per *Boys, J.*—It is on occasions a useful course to adopt to set out other propositions than the one which the Court may have immediately to decide in order to bring the answer to the actual question calling for decision into its proper relation, as the Judges considering that question view the matter, with other cognate matters. To this extent and no more the practice of setting out the scheme into which the particular answer fits may be of advantage and it is one not uncommonly followed by the High Courts in England. [P 497 C 2, P 498 C 1]

Per *Banerji, J.*—A case is only an authority for what it actually decides and cannot be treated as the exposition of the whole law on the subject: *A.I.R.* 1931 *All.* 35, *Disc.*; *Quinn* v. *Leathem* (1901) *A.C.* 495, *Rel. on.* [P 499 C 1]

(b) Civil P. C. (1908), S. 100—Although party cannot raise new point of law in appeal Court is not precluded from deciding case on such point, when it is important and no fresh evidence is necessary.

Although a party cannot claim to raise a new point of law in a second appeal or Letters Patent Appeal which was not pressed in the lower Courts, and although as a matter of practice new points are not allowed to be so raised, yet practice does not mean absolute prohibition of law and the Court itself is not precluded from deciding the case on such a new point. There being no prohibition of law the power exists though as a matter of practice it may not be exercised. Of course where the new point involves an inquiry into fresh facts or the necessity of fresh evidence the Court would ordinarily decline to go into it. Estoppel against a party cannot confer jurisdiction on a Court when it has none and the appellate Court is bound to intervene when absence of jurisdiction is patent on the record or a new glaring fact, e.g., the death of a party which nullifies all proceedings against him, may for the first time be brought to the notice of the appellate Court which it cannot ignore. [P 494 C 1]

* **(c) Evidence Act (1872), S. 115—There is no estoppel against statute.**

Personal estoppel is not necessarily a question of policy. But there can be no estoppel against a statute. If a question of estoppel were dependent on the determination of some facts, a party may certainly be estopped from pleading it. But if it is patent and apparent on the record, then even if there were estoppel against a party, a Court would not be estopped from considering the point. Indeed, if it involves a question of jurisdiction, it would be the duty of the Court to take it into account. The principle of estoppel cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a Court, as a party cannot by its admission or previous conduct confer jurisdiction on a Court where none exists. [P 494 C 2]

Per *Banerji, J.*—No estoppel can be pleaded against any provision of an enactment. If the law lays down that the Court executing the decree must decide questions relating to execution and no regular suit can be instituted, it cannot be said that by a wrong order of a Court, which was subject to appeal or revision a jurisdiction could be claimed to vest in a Court which really has no jurisdiction: *A. I. R.* 1929 *All.* 549, *Ref.* [P 498 C 2]

* **(d) Civil P. C. (1908), S. 11—Execution —Civil P. C. (1908), S. 47.**

The order of an executing Court not passed under S. 47 has not the effect of res judicata. [P 494 C 2]

* * **(e) Civil P. C. (1908), S. 47—Person raising question relating to decree must be party to suit or representative of party when question is raised—Civil P. C. (1908), O. 22, R. 9.**

A person raising questions relating to execution discharge or satisfaction of a decree should be either party to the suit or the representative of the party at the time when the question is raised. [P 499 C 1]

If a suit is withdrawn against one defendant who accordingly disappears from the suit altogether, or when he has been exempted by the plaintiff and his name has been struck off the record before the passing of the decree, he is on the same footing as a stranger to the litigation. Similarly, where the defendant dies during the pendency of a suit and his heirs are not brought on record and the decree is passed behind his back, his heirs are not bound to interfere in the execution proceedings, and the mere fact that he was a party at one time would not matter. Although a second suit on the same cause of action would be barred under O. 22, R. 9, the position as regards the suit which has abated would be almost the same as if the deceased had not been impleaded: *A.I.R.* 1928 *Mad.* 276, *Ref.* (*Case law discussed.*) [P 495 C 1]

* * **(f) Civil P. C. (1908), S. 47—Question whether decree is nullity or not being passed against dead person, does not relate to execution of decree and does not come under S. 47 so as to bar a separate suit.**

When the heirs of a deceased defendant, who dies before the suit terminates, and who are not brought on record within the prescribed period, challenge the decree on the ground that it was never passed against their ancestor and is null and void as against them, they are not to be deemed to be representative of a party to the suit and to be raising question relating to the execution, discharge and satisfaction of the decree within the meaning of S. 47 so as to bar a separate suit. The questions as to whether the decree is a nullity or not is not a question relating to execution or satisfaction of the decree. It goes to the very root of the decree and is a matter which the executing Court cannot decide, the dispute involved not being within the scope of S. 47: 21 *All.* 316; 13 *All.* 53; 32 *Cal.* 296 and 44 *Cal.* 627, *Ref.*; 17 *All.* 478, *not Foll.* (*Case law discussed*). [P 499 C 1,2]

* **(g) Civil P. C. (1908), O. 22, R. 12—Suit can abate after preliminary decree.**

A suit continues till the final decree is passed and it can abate till that contingency happens. It can abate after the passing of a preliminary decree: *A. I. R.* 1930 *All.* 779 and 130 *I.C.* 289, *Rel. on.* [P 497 C 1]

A. P. Pandey and *Kedar Nath Sinha*—for Appellant.

Shiva Prasad Sinha—for Respondents.

Order of Reference.—A simple mortgage had been executed in 1907 by one Sheo Nath in favour of Mahabir Singh. Sheo Nath died and was succeeded by his son Chandi. Before his death Sheo Nath had sold a part of the mortgaged property to Shri Bhagwat.

In 1915 Mahabir Singh sued on his mortgage against Chandi and Shri Bhagwat and obtained a preliminary decree for sale on 22nd December 1920 against both.

Shri Bhagwat died after the passing of the preliminary decree. Then Mahabir Singh applied for the preparation of the final decree but omitted to implead the legal representatives of Shri Bhagwat. The Court actually declared that the application had abated as far as the property held by Sri Bhagwat deceased was concerned. A final decree was passed against Chandi alone. The name of Shri Bhagwat was of course not shown as a judgment-debtor in the decree but the whole mortgaged property was included in it.

When Mahabir Singh put his decree into execution the sons of Shri Bhagwat filed an objection in the execution department to the sale on the ground that the decree did not bind them. Mahabir Singh took an objection that they had no locus standi to file an objection in the execution department and their remedy lay by a separate suit. This contention was allowed and the objection of the sons of Sri Bhagwat was disallowed. The sons of Shri Bhagwat then brought the present suit for a declaration that their property was not liable to be sold under the decree. Mahabir Singh now changed his position and took the plea that there was no remedy by way of a separate suit and that the claim was barred by S. 47, Civil P. C.

Both the Courts below allowed the plea of Mahabir Singh and dismissed the suit as being barred by S. 47, Civil P. C.

On appeal to this High Court a learned Judge of this Court came to a contrary conclusion and held that the separate suit did lie.

In appeal it is contended that the sons of Shri Bhagwat who at one time was a party to the suit are the legal representatives of the deceased party within the meaning of S. 47, Civil P. C. Reliance is placed on the case of *Imdad Ali* v. *Jagan Lal* (1) which to a certain extent supports this view. On the other hand there is the case of *Beni Prasad Kunwar* v. *Mukhtesar Rai* (2), which appears to lay down the contrary principle.

Three important questions arise in this case. The first is whether it is open to Mahabir Singh, who got the previous application under S. 47, Civil P. C., dismissed, now to turn round and plead the bar of S. 47, Civil P. C.? The second is whether the legal representatives of a defendant who dies during the pendency of the suit are the representatives of a party to the suit within the meaning of S. 47, Civil P. C. so as to bar a separate suit brought by them?

The third question, which in view of the recent amendment of O. 22, R. 12, has lost all its importance so far as this Court is concerned is whether there can ever be an abatement of a suit after the passing of a preliminary decree.

This question has been answered in the affirmative in the cases of *Anmol Singh* v. *Hari Shankar Lal* (3) and *Bahadur Singh* v. *Nanak and another* (4).

If the Full Bench thinks it necessary to reconsider this point it may do so. We accordingly direct that this case may be laid before the Chief Justice for the constitution of a higher Bench.

Opinion

Sulaiman, Ag. C. J.—This case has been referred to a Full Bench because of the important questions of law involved in it.

In 1907 Sheonath executed a simple mortgage in favour of Mahabir Singh and then later in 1915 sold a part of the mortgaged property to Shri Bhagwat. The mortgagee brought a suit in 1920 after the death of Sheo Nath and impleaded the mortgagor's son Chandi and also Shri Bhagwat. On 22nd December 1920 a preliminary decree for sale was passed against Sri Bhagwat and Chandi. It should be mentioned in this connexion that Shri Bhagwat attempted to get it declared by a separate suit that the property sold to him was not covered by the mortgage; but his suit failed.

Shri Bhagwat died. No application to bring his three sons on the record as his legal representatives was made within the time allowed by law. The Court declared that the suit abated against the deceased. The mortgagee then applied for the preparation of a final decree against Chandi alone. This was done, but the entire mortgaged property was included in the decree which was passed in 1924.

When an application for execution of the final decree by sale of the entire mortgaged property was made, it was resisted by the three sons of Shri Bhagwat on the ground that no decree had been passed against their father and their property was not liable to be sold. Mahabir replied that they had no locus standi to intervene in the execution department under S. 47, Civil P. C. An application made by them for converting their application into a plaint was dismissed by the Court. It also dismissed their objection dated 28th June 1926, holding that S. 47 did not apply and their remedy was by a separate suit. The three sons of Sri Bhagwat accordingly instituted the present suit on 16th July 1926. Mahabir now resiled from his former position and pleaded that a separate suit did not lie and S. 47, Civil P.C. was a bar to the claim. Both the Courts below accepted this plea and dismissed the suit. A learned Judge of this Court has come to a contrary conclusion. In his view the suit is maintainable

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(1) [1895] 17 All. 478=(1895) A.W N. 109.

(2) [1899] 21 All. 316=(1899) A. W. N. 101.

(3) A.I.R. 1930 All. 779=126 I. C. 20=52 All. 910.

(4) [1930] 130 I.C. 289.

> "as the result of declaring that a certain suit has abated against a particular party is putting that party as against whom the suit abates in the same position as if he had never been made a party to the suit."

He accordingly allowed the appeal and remanded the suit for disposal according to law; he granted permission to file an appeal under the Letters Patent. The Bench hearing the appeal has referred it to a larger Bench.

The first question suggested in the order of reference is whether the defendant Mahabir is estopped from pleading that a separate suit does not lie. The learned advocate for the defendant-appellant urges that this is a new point of law which was not raised in the Courts below and cannot therefore be raised in this appeal. He relies strongly on the Full Bench case of *Ram Kinkar Rai* v. *Tufani Ahir* (5). He further contends that the question of estoppel was not urged before the learned Judge of this Court and is therefore not to be allowed to be raised in the Letters Patent appeal. He refers to the established practice of this Court as pointed out in *Balkaran Singh* v. *Dulari Bai* (6). Speaking personally for myself, I doubt very much if the Full Bench in *Ram Kinkar Rai* v. *Tufani Ahir* (5) intended to lay down, or could have laid down, an exhaustive list of all possible cases in which alone a new point can be allowed to be raised in first or second appeal. The Full Bench case is certainly a binding authority on the question which directly arose in that case, but it would be doubtful whether any general expression of opinion that in no other case, not expressly considered and specified a new point could be raised, would not be an obiter dictum and therefore not possessing the same binding authority. To quote the words of the Lord Chancellor the Earl of Halsbury in *Quinn* v. *Leathem* (7) at p. 506:

> "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since a generality of the expression which may be found there are not intended to be an exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found, and that the case is only an authority . . . . . for what it actually decides."

It is however clear from the judgment itself that the Full Bench did not intend to prepare any complete list, for the cases under the first head are stated to be by way of illustration ("e.g."). It is also clear that the possibility of other cases outside the two categories indicated was recognized and the question whether a plea of limitation could be raised for the first time was left open. One can conceive of other categories of cases in which a new point may in the discretion of the appellate Court be possibly allowed to be raised. A course of rulings of the High Court laying down the law one way might well have prevented a party from re-agitating the question of law decided by them, and a Privy Council decision upsetting those rulings may justify permission to raise the new point of law suggested by the recent pronouncement. There have been cases where a section of a local Act has been wrongly applied to a scheduled District or a suit decided in ignorance of an amending Act or a village not treated as a town area in ignorance of a Government notification. I have known a case where a claim on an unregistered mortgage for less than Rs. 100 subsequent to 1904 was decreed by the Court below in ignorance of the Act of that year. Again, in numerous cases it has been found that the Courts below entertained a wrong conception of the legal position of the parties and omitted to frame a crucial issue which ought to be decided in order to do complete justice between them. The appellate Court has felt that it is essential to have a finding on such an indispensable issue before disposing of the case. I am far from expressing any final opinion that in any of the above cases the appellate Court would allow the new point to be raised. It would be obiter dictum if I did so. I am only suggesting that there are precedents for any such cases and the point will have to be reconsidered when any such cases arise. O. 41, R.25, Civil P. C., contemplates the remitting of a new issue which the Court below has omitted to frame or to determine. Of course the power to send down new issues is to be exercised very cautiously and only in exceptional and appropriate cases. But in first appeals in which an appellate Court has to form its own opinion on the facts, very often a new point arises which is not considered by the trial Court but which is absolutely necessary for the decision of the case.

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(5) A. I. R. 1931 All. 35=53 All. 65 (F.B.).

(6) A. I. R. 1927 All. 231=97 I. C. 292=49 All. 55.

(7) [1901] A. C. 495=70 L. J. P. C. 76=85 L. T. 289=50 W. R. 139=65 J. P. 708=17 T. L. R. 749.

I am therefore not sure whether the Full Bench meant to confine their remarks to second appeals or to extend them to first appeals also. There is however nothing in that judgment to suggest that although a party cannot claim permission to raise a new point of law, the Court itself is precluded from deciding the case on such a new point. There being no prohibition in law the power of course exists, though as a matter of practice it may not be exercised. Of course, where the new question involves an enquiry into fresh facts or the necessity of fresh evidence, the Court would ordinarily decline to go into it.

The same remarks apply more or less to the raising of new points in a Letters Patent appeal. As a matter of practice new points are not allowed to be raised. Such as undoubtedly been the practice of the Court. But practice does not mean any absolute prohibition of law. One can conceive of cases of a gross abuse of the process of Court or of an utter absence of jurisdiction, which may even for the first time be permitted to be raised. Estoppel against a party cannot confer jurisdiction on a Court when it had none and an appellate Court may feel it to be its duty to intervene if the absence of jurisdiction is patent on the record or a new glaring fact, e. g., the death of a party which nullifies all proceedings against him, may for the first time be brought to the notice of the appellate Court which it cannot ignore.

If there were a real estoppel against the defendant Mahabir, which would prevent him from now pleading that the plaintiff should have gone to the execution department, when he himself got him sent to the regular side, I would allow the point to be raised because it would not only be an abuse of the process of the Court but scandalous to permit the plaintiff being sent from pillar to post. I would not however say that personal estoppel is necessarily a question of policy. But I am of opinion that there can be no estoppel against the statute. If a question of estoppel were dependent on the determination of some facts, a party may certainly be estopped from pleading it. But if it is patent and apparent on the record, then, even if there were estoppel against a party, a Court would not be estopped from considering the point. Indeed, if it involves a question of jurisdiction, it would be the duty of the Court to take it into account. The principle of estoppel cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a Court, as a party cannot by its admission or previous conduct confer jurisdiction on a Court where none exists. I may refer to the case of *Bhagwan Singh* v. *Tasadduq Husain* (8).

The position would of course be different if the previous order were to operate as res judicata. But in the case before us the execution Court had held that S. 47, Civil P. C., did not apply. Its order was not under S. 47 and it cannot have the effect of res judicata.

The main question for consideration is whether when the heirs of a deceased defendant, who died before the suit terminated and whose heirs were never brought on the record within the prescribed period, challenge the decree on the ground that it was never passed against their ancestor and is null and void as against them, they are to be deemed to be the representatives of a party to the suit and to be raising questions relating to the execution, discharge, or satisfaction of the decree within the meaning of S. 47, Civil P. C., so as to bar a separate suit.

So far as I am concerned I would be inclined to hold that the use of the present participle "arising" indicates that the person should be either a party to the suit or a representative of the party to the suit at the time when the question is raised. I would then have no hesitation in holding that if a suit had been withdrawn as against one defendant, who accordingly disappeared from the suit altogether, or where he had been exempted by the plaintiff and his name had been struck off from the record, before the decree came to be passed, he is on the same footing as a stranger to the litigation. I would similarly have no hesitation in holding that if a defendant dies during the pendency of a suit and his heirs are not brought on the record and the decree is passed behind his back, his heirs are not bound to intervene in the execution department because their ancestor ceased to be a party to the suit. The mere fact that he was a party at one time would not affect the matter, when he admittedly ceased to be a party before the decree came to be passed. Although under O. 22, R. 9, a second suit on the same cause of action will be barred, the position as regards the suit which has abated is almost the same as if the deceased had not been impleaded. I can find some support for this view in the observation of Ayyangar, J., in *Nallaperumal Pillai* v. *Sakul Hamed Maracayar* (9) at p. 408 (of 108 *I. C.*), where the learned Judge, though he did not decide the point, observed :

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(8) A. I. R. 1929 All. 549=115 I. C. 642.

> "The expression "arising between the parties to the suit" undoubtedly contemplates their having continued to be parties to the suit, at any rate, up to the stage at which the question arises. The present participle arising is the word used and the expression arising between the parties to the suit would be inappropriate if it should be referable to the question arising between one who is a party to the suit and another who has ceased to be a party to it by an order of the Court."

It was undoubtedly the view of this High Court before the new Civil Procedure Code came into force that for S. 47 to be applicable the decree must be one capable of execution against the person concerned. This Court went to the length of holding that the defendant against whom a suit is dismissed ceases to be a party. The legislature has added an explanation to the new S. 47, Civil P. C., which brings a defendant, against whom a suit has been dismissed, within the purview of the section. But that explanation does not take us further so as to include the case of a defendant who was exempted from the suit and whose name was struck off from the record or who died and whose heirs were never substituted. The cases of *Data Din* v. *Nanku* (10) and *Sachitanand Tewari* v. *Radhapat Pathak* (11) where the defendant had been exempted by the decree, stand on a different footing, because the exemption by the decree is tantamount to a dismissal of the suit as against him. They were not cases where before the decree was passed the suit had either been withdrawn as against the defendant or the defendant had been exempted and his name struck off from the record.

The case of *Imdad Ali* v. *Jagan Lal* (1) is undoubtedly in favour of the view that the heirs of a deceased defendant although they had not been brought on the record of the suit ought to object to the execution under the old S. 244, Civil P. C. In that case Hamid Unnissa had died before the decree was passed and her heir Imdad Ali was not made a party. When in execution his property was sold he applied under S. 332, Civil P. C., (corresponding to O. 21, R. 100) for restoration of possession. The Bench held that his application could be treated as one under S. 244 and that he could object under that section. The learned Judges further held that the proceedings were null and void because the decree having been passed against the dead person was incapable of execution. They in fact entertained an execution appeal on behalf of Imdad Ali and decreed it. The position has been clarified since then and in view of the observations of their Lordships of the Privy Council in several cases. It cannot now be held that this case lays down the correct law.

I may point out that in a later case of this Court in *Beni Prasad* v. *Mukhtasar Rai* (2), another Bench held that the heirs of a deceased defendant who had died and whose heirs had not been substituted were entitled to bring a separate suit, and their suit was not barred by the provisions of S. 244. They relied in particular on the case of *Radha Prasad Singh* v. *Lal Saheb Rai* (12). In this case a decree for possession and for the ascertainment of mesne profits was passed; but the defendant died before mesne profits could be ascertained and a final decree passed. His heirs were not brought on the record. These proceedings took place before 1882, when S. 244, Act 10 of 1877, was in force but its phraseology was similar. A separate suit was brought by the heirs in March 1882. Their Lordships of the Privy Council remarked at p. 65:

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(9) A. I. R. 1928 Mad. 276=108 I. C. 406.

(10) [1918] 47 I. C. 864.

(11) A. I. R. 1928 All. 234=116 I. C. 86.

(12) [1891] 13 All. 53=17 I. A. 150=5 Sar. 600 (P.C.).

> "An operative decree, obtained after the death of a defendant by which the extent and quality of his liability already declared in general terms are for the first time ascertained cannot bind a representative of the deceased, unless they were made parties to the suit in which it was pronounced."

Their Lordships held that a separate suit was maintainable. In *Khiarajmal* v. *Daim* (13), where a minor had not been properly represented on the record their Lordships of the Privy Council remarked at p. 312:

> "The Court had no jurisdiction to sell the property of persons who were no parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and may be disregarded without any proceeding to set them aside."

Again at p. 313, it was remarked:

> "In fact his interest in the property seems to have been ignored altogether. He is not mentioned as a debtor in the award and there is no decree against him. The Court therefore had no jurisdiction to sell his share."

Similarly in *Rashiunnissa* v. *Muhammad Ismail Khan* (14), which also was a case where a minor had not been properly represented, their Lordships of the Privy Council disapproved of the High Court's view that if she had any objection to make to the execution of the decree she ought to have raised objections under S. 244, Civil P. C., and not by a separate suit. Their Lordships held that the appellant was never a party to the previous suit in the proper sense of the term, and a separate suit by her was maintainable. In the case of *Gopi Narain Khanna* v. *Bansidhar* (15) their Lordships of the Privy Council pointed out that S. 244 would not apply where the questions between the parties were not such as could have been determined by the Court in execution of the decree, but a new decree would be required for the purpose.

It has been held in numerous cases that where the decree is sought to be challenged on the ground of its invalidity, the proper remedy is by a separate suit. A large number of these cases are quoted in the judgment of Mukerji and Cuming JJ., in *Kalipado Sirkar* v. *Harimohan Dalal* (16), and many more are to be found in the commentaries on the Civil Procedure Code. I may only mention the recent case of this Court, *Rajaram* v. *Chhaddammi Lal* (17), where it was held:

> "The question now raised is however not a question relating to the execution, satisfaction or discharge of a decree. It is a question which goes to the root of the decree itself and challenges its validity, and that question cannot be determined except by a separate suit."

I am therefore clearly of opinion that where the question is either that a decree was passed against a dead person or was not passed against him at all, and therefore it is a nullity pure and simple, the dispute does not relate to the execution of the decree but aims at its utter destruction. The dispute as to the execution of a decree contemplates the existence of a valid decree. Where a decree is without jurisdiction or is otherwise utterly null and void, and can therefore be ignored by a person his protest is not merely as to its execution but he impeaches the decree itself. Such a dispute in my opinion is not within the purview of S. 47 at all.

Of course it does not follow that when a person, against whom no decree exists, finds that his property has been seized he cannot go to the Court and put his complaint before it. Nor does it follow that if the attention of the Court is drawn to the fact that the decree is a nullity it must blindly proceed to execute it regardless of the utter absence of its jurisdiction. The Court would certainly have power to refuse to execute a decree of this kind when it is a nullity or has been passed without jurisdiction. But the complaint of the aggrieved party would not be an objection within the meaning of S. 47, Civil P. C., so as to bar a separate suit by him, but would rather be in the nature of a petition to the Court by an aggrieved party or at the worst an objection under O. 21, R. 58, Civil P. C., which can be filed by a stranger to the litigation. In such cases no further appeal would lie because the order passed in favour of or against the aggrieved person would not be a decree within the meaning of S. 2, Civil P. C.

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(13) [1905] 32 Cal. 296=32 I. A. 23=8 Sar. 734 (P. C.).

(14) [1909] 31 All. 572=36 I. A. 68=3 I. C. 864 (P. C.).

(15) [1905] 27 All. 325=32 I. A. 123=8 Sar. 799 (P. C.).

(16) [1917] 44 Cal. 627=35 I. C. 856.

(17) A. I. R. 1926 All. 475=95 I. C. 147=48 All. 574.

The last point suggested in the order of reference is as to the question whether there could be an abatement of a suit between the passing of a preliminary decree and the preparation of the final decree. The rulings in India were all one way and laid down that under the new Civil Procedure Code the suit continues till the final decree is passed and it can abate before that contingency happens. A dissentient note was struck by a Full Bench of the Madras High Court in *Perumal Pillay* v. *Perumal Chetty* (18) after the pronouncement of their Lordships of the Privy Council in *Lachmi Narain Marwari* v. *Balmukund Marwari* (19). The same view appears to have been followed in Calcutta and Oudh. In *Anmol Singh* v. *Hari Shankar Lal* (3) in concurrence with King, J., I held that the decision of their Lordships of the Privy Council did not upset the previous rulings of the Indian High Courts, and explaining the ratio decidendi of the case pointed out how that case was distinguishable. Another Bench of this Court in *Bahadur Singh* v. *Nanak* (4) agreed with that view and came to the same conclusion.

I may further point out that in the case of *Radha Prashad Singh* v. *Lal Saheb Rai* (12) their Lordships of the Privy Council held that the death of a defendant after the decree for possession and ascertainment of mesne profits but before the final decree for mesne profits was passed made the decree ineffective as against him and his estate was not at all liable. As the reasons have been fully set forth in the above cases it is not necessary to repeat them again. I adhere to the view expressed therein.

I would accordingly uphold the order passed by the learned Judge of this Court and dismiss this appeal.

Boys, J.—The facts are as follows:

(1) Mahabir Singh, the present appellant, who was the defendant in the suit, obtained a preliminary decree for sale on a mortgage against Chandi, son of the deceased mortgagor and Shri Bhagwat transferee of a part of the property.

(2) Shri Bhagwat died and his heirs were not brought on the record, the suit therefore abating against Sri Bhagwat.

(3) Mahabir Singh then applied for a final decree against Chandi alone, and a final decree was prepared which included the whole of the property mortgaged, that is to say, included the property transferred to Shri Bhagwat.

(4) This was followed by an application for execution by sale of the property. The sons of Sri Bhagwat objected but Mahabir Singh successfully contended that under S. 47, Civil P. C., they had no locus standi.

(5) Shri Bhagwat's sons thereupon brought the present suit. Mahabir now raised a diametrically opposite contention, and before both the lower Courts successfully contended that S. 47, Civil P. C., barred the suit. The plaintiffs came up in appeal to this Court when a single Judge held that S. 47, Civil P. C., was no impediment to the suit and remanded the case for disposal according to law. Mahabir Singh thereupon filed a Letters Patent appeal, and it is that Letters Patent appeal that has been referred to the present Full Bench.

Before this Court the plaintiffs-respondents seek to raise a new point, contending that Mahabir Singh was estopped from relying upon S. 47 to defeat the plaintiffs' claim because he had previously relied upon it to defeat their objections in execution. The appellant has urged that a new point of this description cannot be raised in appeal. and has relied upon the decision in *Ram Kinkar* v. *Tufani* (5) and the appellant further relied on the practice of this Court as evidenced by the decision in *Balkaran* v. *Dulari* (6) that a new point is not allowed to be taken in a Letters Patent appeal. To the decision in *Ram Kinkar* v. *Tufani* (5) I was a party. I have had the advantage of seeing the judgment of the Hon'ble the Acting Chief Justice. He has pointed out that that judgment cannot be binding authority on any other question than that which called for immediate decision. That is manifestly so, but I apprehend that it is on occasions a useful course to adopt to set out other propositions than the one which the Court may have immediately to decide, in order to bring the answer to the actual question calling for decision into its proper relation, as the Judges considering that question view the matter, with other cognate questions. To this extent and no more I think the practice of setting out the scheme into which the particular answer fits may be of advantage and it is one not uncommonly followed by the higher Courts in England. In *Ram Kinkar* v. *Tufani* (5) it is suggested that a new point may be taken where it is a matter of public policy. The present I consider to be such a case and to come within that suggested rule. I would therefore have allowed the point to be taken, but the plaintiffs-respondents are met by another difficulty, that stated by the Hon'ble the Ag. Chief Justice, that there can be no estoppel against the statute.

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(18) A. I. R. 1928 Mad. 914=112 I. C. 116=51 Mad. 701 (F.B.).

(19) A. I. R. 1924 P. C. 198=81 I. C. 747=51 I. A. 321=4 Pat. 61 (P.C.).

On the main question I agree with the learned Judge of this Court from whose decision this appeal has been filed, and with the Hon'ble the Ag. Chief Justice, that S. 47 is not an impediment in the way of the plaintiffs' suit.

I would therefore dismiss the appeal.

Banerji, J.—Three questions have referred in this case to this Bench. They are as follows: (1) Whether it is open to Mahabir Singh, who got the previous application under S. 47, Civil P. C., dismissed, now to turn round and plead the bar of S. 47, Civil P. C. (2) Whether the legal representatives of a defendant who dies during the pendency of the suit are the representatives of a party to the suit within the meaning of S. 47, Civil P. C., so as to bar a separate suit brought by them. (3) Whether there can ever be an abatement of a suit after the passing of a preliminary decree.

The facts necessary for the determination of the questions raised in the case may be shortly stated as follows:

The appellants are the heirs or legal representatives of one Mahabir Singh, who held a simple mortgage executed by Sheo Nath in 1907. A suit for sale was instituted on the mortgage impleading the heirs and transferee from Sheo Nath. On 22nd December 1920 a preliminary decree for sale was passed against the defendants. Before the mortgagee applied for the preparation of a final decree the transferee from the original mortgagor died. An application for bringing on the record the heirs of the deceased was dismissed and it was declared that the suit had abated as against the deceased. The mortgagee applied for and obtained a final decree against the heir of the mortgagor but included the whole of the property mortgaged in his application. The mortgagee applied for execution of the final decree when objections to the sale of the property in the hands of the heirs of the transferee were made by them. The decree-holder then contested the application on the ground that under S. 47, Civil P. C., the applicants could not object to the sale of the property. The Court executing the decree held that the applicants had no locus standi to object under S. 47, Civil P. C., and directed them to institute a regular suit.

The applicants, the heirs of the transferee then instituted the suit out of which the present appeal has arisen. They are respondents before us. The suit was contested by the decree-holders, who are the appellants before us, on the ground that by reason of S. 47, Civil P. C., the plaintiffs, the respondents here, were precluded from instituting a regular suit. The trial Court and the lower appellate Court accepted this contention and dismissed the suit. An appeal was preferred to this Court and Mukerji, J., holding that the suit was maintainable, remanded the case for trial. He has held that the result of declaring that a certain suit has abated against a particular party is putting that party as against whom the suit abates in the same position as if he had never been made a party to the suit and that an order declaring abatement is neither an order decreeing a suit nor dismissing it.

The first question referred to in the order of reference, namely, whether the defendant is estopped from pleading that a separate suit does not lie must be answered in the negative. My reason is that no estoppel can be pleaded against any provision of an enactment. If the law lays down, as it is claimed it does, that the Court executing a decree must decide questions relating to execution and no regular suit can be instituted it cannot be said that by a wrong order of a Court which was subject to appeal or revision a jurisdiction could be claimed to vest in a Court which really has no jurisdiction. Mr. Pandey on behalf of the appellants, has relied on the case of *Ram Kinkar Rai* v. *Tufani Ahir* (5) and contends that as the question of estoppel was not raised before Mukerji, J., Mr.

Sinha should not be permitted to raise it here. It is unnecessary for the purpose of this case to refer to that ruling. I however wish to say that the ruling is a binding authority on the question which directly arose in the case. A case is only an authority for what it actually decides and cannot be treated as an exposition of the whole law on the subject. Moreover a party may be precluded from raising a new point of law but I am of opinion that the Court hearing an appeal cannot be prevented from deciding the case on a new point raised before it which ordinarily does not require fresh evidence to be taken.

The next question is whether the present suit is barred by reason of the provisions of S. 47, Civil P. C.

The language of S. 47 seems to me to make it clear that the legislature intended that all questions relating to execution should be decided between the parties or their representatives by the Court executing the decree. The use of the word "arising" seems to me to indicate that the legislature intended that the person raising any question must be a party to the suit on the date when the question arises. The learned advocate has referred to the case of *Imdad Ali* v. *Jagan Lal* (1) in support of his contention that no suit is maintainable. That case decided two points. One was that proceedings in execution taken against the heirs of a deceased who had died before the decree was passed were null and void, and the second was that an application under S. 332, Civil P. C., corresponding to O. 21, R. 100 could be treated as one under S. 244.

The position in my opinion, by reason of the observations of their Lordships of the Privy Council, is that the first point is now accepted, but as regards the second point it must be held that questions between persons who are representatives of a dead party who died before the passing of the decree cannot be raised under S. 47, Civil P. C. In *Khiarajmal* v. *Daim* (13) their Lordships of the Privy Council have held that the Court has no jurisdiction to sell the property of persons who were no parties to the proceedings or property represented on the record. In *Gopi Narain Khanna* v. *Bansidhar* (15) it was held that S. 244 (now S. 47) Civil P. C., would not apply where the questions beteenw the parties were not such as could have been determined by the Court in execution of the decree. In the present case the question is as to whether the decree declaring that the property of the respondent was liable to sale was a nullity or not. This is not a question in my opinion relating to the execution or satisfaction of the decree. The question relates to the very root of the decree and this is a matter which an executing Court cannot decide. My answer therefore to the second question is in the negative, that is that the dispute involved in the present suit is not within the scope of S. 47, Civil P. C.

The third question is really of no material importance now that this Court has amended O. 21, R. 12, Civil P. C. I have read the two jndgments referred to in the order of reference and agree in answering the question in the affirmative.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 499

Special Bench

BANERJI, KING AND YOUNG, JJ.

Municipal Board, Benares—Appellant.

v.

Kandhaiya Lal and *others* — Respondents.

Second Appeal No. 1812 of 1926, Decided on 5th June 1931, from decision of Dist. Judge, Benares, D/- 8th May 1926.

(a) Civil P. C. (1908), S. 100 — "Fact" — Meaning explained.

The word "fact" in "finding of fact" should be understood to have the meaning assigned to it in S. 3, Evidence Act. [P 501 C·1]

(b) Civil P. C. (1908), S. 100 — Finding whether certain practice does or does not prevail is finding of fact—Whether practice has attributes of binding custom is question of law.

A finding as to the existence or non-existence of a custom in so far as it is a finding that a certain practice does or does not prevail is a finding of fact. The question whether a prevailing practice has the essential attributes of a legally binding custom is a question of law: *A. I. R.* 1917 *P. C.* 33, *Expl.* and *Foll.*; (*Case law discussed.*) [P 502 C 1]

(c) Civil P, C. (1908), S. 100 (1) (c) — Misreading or ignoring of important documentary evidence amounts to substantial error.

The misreading or ignoring of important documentary evidence amounts to a substantial error or defect in procedure within the meaning of S. 100 (1) (c) and the High Court is justified in reversing the finding if it holds such reversal justified on merits. [P 503 C 2]

(d) Civil P. C. (1908), S. 100 (1) (c)—Relying on inadmissible evidence amounts to substantial error.

When the opinion of a law committee of a Municipality as regards a custom, which is inadmissible in evidence, the members not having been called as witnesses, is relied upon in coming to the conclusion as to the existence or non-existence of a custom, it amounts to substantial error in procedure. [P 504 C 1]

(e) Custom—Prevailing practice has force of custom.

A prevailing practice is as valid as a custom having the force of law and is legally binding. [P 504 C 2]

K. N. Katju and *M. L. Chaturvedi* — for Appellant.

Iqbal Ahmad and *Mukhtar Ahmad* — for Respondents.

Order of Reference.—The question raised by Dr. Katju in this second appeal is that there was evidence in the case to prove that in respect of the sale of a house in Benares the Municipal Board could claim haq-i-chaharum as it was alleged that there was a custom in shahr khass where the house is situated that the landlord is entitled to claim one-fourth of the sale price, and that in second appeal this Court is entitled to examine the evidence to see whether he has proved the alleged custom. Mr. Iqbal Ahmad appearing on behalf of the respondents contends that where a Court has found on the evidence before it that the alleged custom is not proved, that finding is a finding of fact which is binding on us in second appeal.

In support of his contention Mr. Iqbal Ahmad has referred us to the case of *Shakira Bibi* v. *Nandan Roy, A. I. R.* 1922 *All.* 241, and the decision of this Court in *Munshi* v. *Sahu Kedar Nath* (1).

Dr. Katju has, in support of his contention that the finding of the learned Judge of the Court below is not a finding of fact, referred us to the case of *Tajammul Husain* v. *Banwari Lal* (2) and the case of *Rafiq* v. *Shankar Lal, A. I. R.* 1925 *All.* 718.

There appears to be a clear conflict of decisions of this Court on the point as to whether when the lower appellate Court holds that a custom is not proved this Court can or cannot examine the evidence to see whether there was sufficient evidence from which the Court below should have come to the conclusion that the alleged custom had been proved.

We therefore direct that this case be laid before the Hon'ble the Chief Justice to constitute a larger Bench for the decision of the appeal.

Opinion.

King, J.—The chief point for determination is whether the finding of the lower appellate Court, that the existence of an alleged local custom has not been proved, is a finding of fact binding upon this Court in second appeal.

On 5th December 1918 one Nepal sold his house, situated in the city of Benares, to Kanhiya Lal (defendant 1). The Municipal Board of Benares, as owner of the site of the house, brought the suit, out of which this appeal arises, against the buyer (defendant 1) and the representatives of the seller (defendants 2 and 3) claiming one-fourth of the sale price (zar-i-chaharum) on the basis of a local custom alleged to prevail throughout the city of Benares.

The principal defence was that the house is situated in the shahr khass (city proper) and the alleged custom of zar-i-chaharum does not prevail in the shahr khass, although it may prevail in certain mauzas which were formerly rural areas but have now been absorbed and included in the Municipal area. The trial Court found upon the evidence that no custom of realizing zar-i-chaharum exists in shahr khass, and dismissed the suit.

The plaintiff appealed to the District Judge who, after remanding the case for findings upon certain issues, agreed with the trial Court in finding that the plaintiff had failed to prove the existence of the alleged custom in the mohalla in dispute, namely, Mohalla Kucha Champa Shahid which is in the shahr khass.

The plaintiff now comes to this Court in second appeal and contends that the Court below was wrong in finding that the alleged custom did not prevail in the locality in dispute.

For the respondent it is argued that the finding of the Court below, as to the non-existence of the alleged custom, is a finding of fact which is binding upon this Court in second appeal. The appellant maintains that the question of the existence of a custom is a mixed question of law and of fact. So far as the facts are concerned the findings of the Court below, if properly arrived at, must be accepted; but the question whether upon the facts so found the existence of the custom is, or is not, proved is a question of law. The High Court therefore can and should examine the evidence and decide whether the evidence is not sufficient to prove the alleged custom. Each party cites numerous authorities in support of his contention.

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(1) L. P. A. No. 2 of 1928.

(2) A. I. R. 1926 All. 43=38 I. C. 752=48 All. 77.

The difficulty in deciding which of the two conflicting contentions is correct seems to us to arise partly from an ambiguity in the meaning of the word "custom." In one sense it means simply a usual practice. In another sense it means an established practice or usage having the force of law. That the inhabitants of a certain locality have, in certain circumstances, usually acted in a certain manner is, we think, a "fact." It is a state of things, or a relation of things, capable of being perceived by the senses. It is impossible to determine whether a given finding is or is not a finding of fact unless we assign to the word "fact" a definite and uniform meaning, and we think that the word "fact" should be understood to have the meaning assigned to it in S. 3, Evidence Act. So a finding that it is not proved that owners of houses in Mohalla Kucha Champa Shahid have usually, upon occasions of the sale of their houses, paid zar-i-chaharum to the owner of the site, is in our opinion a finding of fact. If it is found that zar-i-chaharum has usually been paid on demand then a further question arises whether the usual practice is sufficiently ancient, uniform, certain, uninterrupted and so forth to constitute a binding custom, i. e. a custom having the force of law. This latter question must be a question of law. That a practice prevails is perceptible by the senses and therefore a "fact"; that the usual practice is legally binding is not a "fact." So the question whether it is legally binding is a question of law.

These propositions are abundantly supported by the rulings of their Lordships of the Privy Council. In *Mohesh Chunder Dhal* v. *Satrughun Dhal* (3) the question was whether the custom of lineal primogeniture had been proved as the rule of succession to an impartible raj. The Privy Council observed that the High Court were right in "considering that the question was merely a question of fact."

In *Muhammad Kamil* v. *Imtiaz Fatima* (4) the question was whether inheritance was governed by a family custom excluding female heirs. Their Lordships remarked: "The existence of such a custom is a question of fact . . . ."

In *Rup Chand* v. *Jambu Prasad* (5) the question was whether a custom, applicable to the parties, authorizing the adoption of a married boy, had been established. Their Lordships laid down that

> "this is strictly speaking a pure question of fact determinable upon the evidence given in the case."

Similarly in *Anant Singh* v. *Durga Singh* (6), where the question was whether a family custom had been established according to which a stepbrother was entitled to succeed equally with a full brother, their Lordships observed: "The question involved was one of fact only."

Lastly in *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (7), where the question was whether a local custom had been proved, authorizing a shebait to alienate debuttar lands at a fixed rent, irrespectively of legal necessity or benefit to the estate, and two successive Courts had found the custom to be proved, the Judicial Committee remark:

> "No doubt two findings upon questions of pure fact must be accepted by this Board, but questions of the existence of ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law not 'fact'."

This exposition of the law by the highest authority is strongly relied upon by the appellant, but we cannot read it as supporting the contention that whenever the question is whether an ancient custom has been proved to exist then the High Court in second appeal can treat the whole question as a question of law and satisfy itself, by examination of the entire evidence, whether the finding of the Court below as to the existence or non-existence of the alleged custom, is in accordance with the weight of evidence.

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(3) [1902] 29 Cal. 343=29 I. A. 62=8 Sar. 233 (P. C.).

(4) [1909] 31 All. 557=36 I. A. 210=4 I. C. 457=13 O. C. 183 (P. C.).

(5) [1910] 32 All. 247=37 I. A. 93=6 I. C. 272 (P. C.).

(6) [1910] 32 All. 363=37 I. A 191=13 O. C. 163=6 I. C. 787 (P. C.).

(7) A. I. R. 1917 P. C. 33=39 I. C. 722=44 I. A. 147=40 Mad. 709 (P. C.).

We take the pronouncement to mean that a finding that an ancient custom exists involves the determination of two questions. The first question is whether the alleged practice prevails or is usually followed. This is a question of fact. If the finding is in the affirmative then a second question arises, whether the prevailing practice has the essential attributes of a custom having the force of law. This second question is a question of law, not of fact. If the finding upon the first question is in the negative then no question of law arises for determination. A finding that a "custom" does not exist may however involve the determination of both questions. The Court of first appeal may hold that the practice does prevail but it is not sufficiently ancient, or uniform, or uninterrupted etc. to constitute a custom modifying the ordinary law. In such a case there would be a question of law for determination in second appeal.

The Privy Council decisions seem to us so clear and consistent on the point in dispute that it might seem unnecessary to discuss the rulings of the High Courts in India, but as many such rulings have been cited before us we will refer to those which are most directly applicable.

The appellant relies strongly upon *Kumarappa Reddi* v. *Manavala Goundan* (8) decided by a Full Bench of the Madras High Court. The existence of a local custom was in dispute and two successive Courts answered the question in the negative. The Full Bench held that they were precluded in second appeal from interfering with the findings of actual facts from which the existence of the custom might be inferred ; but the inference as to the existence, and the decision as to the validity of the custom are matters of law revisable by the High Court in second appeal. They expressly overruled *Kakarla Abbaya* v. *Venkata Papayya Rao* (9), which laid down that where a question of custom is concerned the High Court in second appeal should examine the evidence bearing upon it and should consider the credibility of the evidence relied on and the weight due to it. Wallis, C. J., expressly held that the High Court has no larger powers of interference with findings as to custom, in so far as they are findings of fact, than with any other findings of fact. The learned Judges held that, on the facts found by the District Judge, the existence of the custom in the estate was proved. It seems that they were of opinion that the District Judge's findings of fact were, to some extent, vitiated by errors of law and therefore liable to interference in second appeal. It must be observed that the District Judge held that the custom used to prevail but it had been discontinued in all but a small portion of the lands in suit. We think this ruling is no clear authority for the view that a finding, that an alleged practice does not prevail and never has prevailed in a given area, is a finding of law and not a finding of fact.

The appellant also cites the Full Bench ruling of this High Court, *Ram Bilas* v. *Lal Bahadur* (10) but we do not think that it supports his contention. It was held that where a question arises as to the existence or non-existence of a custom and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish the custom, then the question is one of law and the High Court is entitled in second appeal to consider whether the finding is based upon sufficient evidence. In that case the Court below found the custom proved. In such cases the question of law necessarily arises whether the prevailing practice has the essential attributes of a legally binding custom. When their Lordships speak of evidence legally insufficient to establish a custom, we think they mean insufficient to establish a custom having the force of law i. e. insufficient to establish the legal requirements of such a custom.

In *Hazari Dulaya* v. *Janki* (11) and *Rafiq* v. *Shankar Lal, A. I. R.* 1925 *All.* 718, it was held that the question of the existence or non-existence of a custom was a question of law or a mixed question of law and fact and the High Court in second appeal can consider whether the finding is based upon sufficient evidence. In these cases however the point was not argued.

In *Ali Husain* v. *Mazahir Husain, A. I. R.* 1924 *All.* 477, the point was argued and it was held by a single Judge that it is always open to the High Court in second appeal to consider whether a finding on custom was based on 'sufficient evidence. This ruling purports to follow *Ram Bilas* v. *Lal Bahadur* (10) but seems to go further and we cannot reconcile it with the Privy Council decisions.

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(8) [1918] 41 Mad 374=44 I.C. 699 (F.B.).

(9) [1906] 29 Mad. 24=16 M.L.J. 8.

(10) [1908] 30 All. 311=5 A.L.J. 456=(1908) A.W.N. 112 (F.B.).

(11) [1909] 3 I.C. 6.

On the other hand we have numerous High Court decisions to the effect that a finding as to the existence or non-existence of a custom is essentially a finding of fact.

The question is very fully discussed in *Kailash Chandra Datt* v. *Padma Kishore Roy* (12) in which it was held that the question whether the facts found in any given instance prove the existence of the essential attributes of a custom is a question of law; the question whether such a state of facts has been proved by the evidence is merely a question of fact. This appears to us to lay down the law correctly, in the light of Privy Council rulings.

Similar opinions are expressed by learned Judges of this Court in *Hashim Ali* v. *Abdul Rahman* (13), *Baru Mal* v. *Tansukh Rai* (14), *Shakira Bibi* v. *Nandan Roy, A. I. R.* 1922 *All.* 241, *Munshi* v. *Sahu Kedar Nath* (15) and confirmed in *Munshi* v. *Sahu Kedarnath* (1) and *Ram Saran Das* v. *Pearey Lal* (16).

We think the preponderance of judicial opinion establishes the propositions that a finding as to the existence or non-existence of a custom, in so far as it is a finding that a certain practice does or does not prevail, is a finding of fact. The question whether a prevailing practice has the essential attributes of a legally binding custom is a question of law.

In accordance with these propositions we have to consider how far we are entitled in second appeal to interfere with the findings of the Court below. The District Judge finds that it is not proved that the practice of zarichaharum ever prevailed in mohalla Kucha Champa Shahid. Not a single instance of the realization of zarichaharum in that mohalla was proved. We think this must be held to be a finding of fact binding upon this Court in second appeal unless it can be shown that the finding is vitiated by some error of law.

Dr. Katju has forcibly argued for the appellant that the finding of the Court below should be reversed as being vitiated by errors of law. One important branch of evidence consisted of a number of kabuliyats executed in favour of the Collector or the Municipal Board. The appellant relied on these as containing admissions of liability to pay zarichaharum. The Court below remarked that they are contracts and "do not refer to a custom whereby the dues are realized." We find that the learned Judge must have completely misread or ignored certain kabuliyats which contain clear references to the custom. Ordinarily we should have sent certain issues to the Court below for recording its findings, but as the whole of the evidence has been laid before us by the advocates for the parties, we proceed to examine it.

Serial No. 21 (of the appellant's list of documents) is a kabuliyat of the year 1873 relating to the lease of a plot in Mohalla Gyan Bapi (shahr khass) for building purposes. The lessee states:

> "When I or my successors sell the materials of the house then out of the sale price we shall deposit to the Municipality one-fourth share on account of the right (haqq) of the Municipality."

This is a clear recognition of the customary right of the Municipality to zarichaharum. The same language is to be found in serials 22 and 23 and other kabuliyats also.

Serials 103 to 110 (of the respondent's list of documents). Exs. 79 to 86 are kabuliyats of the years 1859 to 1864 in favour of the Collector. In these the lessee recites:

> "if we sell the materials of the house we shall deposit in the treasury one-fourth as haqq zamindari in pursuance of the custom prevailing in the city."

The custom could not have been recognized in clearer terms. Two of these leases relate to Bengali Tola which is a mohalla of shahr khass. The learned Judge was therefore clearly under a misapprehension when he said that the kabuliyats do not refer to the custom. We think the misreading or ignoring of important documentary evidence amounts to a substantial error or defect in the procedure within the meaning of S. 100 (1) (c), Civil P.C., and justifies this Court in reversing the finding if we hold such reversal justified on the merits.

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(12) [1918] 45 Cal. 285=41 I. C. 959.

(13) [1906] 28 All. 698=3 A.L.J. 467=(1906) A.W.N. 187.

(14) [1915] 37 All. 524=29 I.C. 1001.

(15) Second Appeal No. 1856 of 1927 decided on 28th October 1927.

(16) A.I.R. 1931 All. 104.

Another substantial error in procedure was to place reliance upon an opinion expressed by the law committee of the Municipality in their resolution of 4th July 1908. We do not know the names of the members of the committee. None of them were called as witnesses. We think their opinion is inadmissible in evidence for the purpose of proving that the custom does not prevail.

As to the absence of proof of realizations we think the Judge was wrong in supposing that the Collector would exercise supervision over the collection of dues in respect of nazul land made over to the Municipality for administration and control. The suggestion that realizations were made but were embezled by servants of the Municipality seems probable enough.

The plaintiff produced eight decrees for zarichaharum relating to mohallas of shahr khass but not to Mohalla Kuch Champa Shahid. These show that the prevalence and validity of the custom have been judicially recognized in certain mohallas of shahr khass. This goes far to disprove the defendant's contention that the custom does not prevail in any part of shahr khass. He himself produced sale-deeds relating to other mohallas in shahr khas for proving that no zarichaharum had been paid, so it was common ground that the custom prevailing in other mohallas of shahr khass had an important bearing on the prevalence of the custom in the mohalla in dispute.

One of the strongest pieces of evidence in the plaintiff's favour is to be found in the admissions in the sale-deed of the house in suit. The sale-deed of 1918 by which the house was transferred by Nepal to defendant 1 contains the words:

> "and be it known that the buyer is responsible for payment of the zarichaharum due to the zamindar. I the seller shall have no concern with it."

The earlier sale-deed of 1903 whereby the house was sold to Nepal also contains a clause stating that the buyer would be responsible for the haqq chaharum zamindar. The language of the deeds contain no suggestion that the zamindar's right to haqq chaharum was in any way doubtful. We think that they amount to admissions of the zamindar's right, and the language does not support the theory that the covenants "were inserted by way of precaution" in case the zamindar really had such a customary right.

Upon consideration of the whole of the evidence we think the plaintiff has proved the prevalence of the practice in the locality in question. The validity of the practice as a custom having the force of law has received judicial recognition in so many cases that we must regard it as a legally binding custom.

In the result we allow the appeal and decree the plaintiff's suit with costs throughout.

R.M./R.K. *Appeal allowed.*

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* A. I. R. 1931 Allahabad 504
Special Bench

SULAIMAN, AG. C. J., YOUNG AND KING, JJ.

K. N. Joglekar—Applicant.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 299 of 1931, Decided on 26th June 1931.

* **(a) Penal Code (1860), S. 121-A—Severity of sentence varies with seriousness of acts of each accused.**

In practice the severity of the sentence would vary with the degree of the seriousness of the acts done by each accused who is convicted. [P 505 C 1]

* **(b) Criminal P. C. (as amended in 1923), S. 498—S. 498 is not controlled by S. 497—Cumulative effect of all circumstances is to be considered in granting bail.**

Section 498 is not controlled by the limitations of S.497, except when there are not reasonable grounds for believing that the accused committed the offence, or there are reasonable grounds for believing that he is not guilty, in which cases it becomes a duty to release him. Magistrates can proceed under S. 497 only and their discretion is regulated by the provisions of that section; but S. 498 confers upon a Sessions Judge or the High Court wide powers to grant bail which are not handicapped by the restrictions in the preceding section. That discretion is unfettered but of course it cannot be exercised arbitrarily, but must be exercised judicially. It is not any one single circumstance which necessarily concludes the decision, but it is the cumulative effect of all the combined circumstances that must weigh with the Court. [P 506 C 1, 2]

* **(c) Criminal P. C. (as amended in 1923), S. 498—Offence serious and nonbailable and punishable with death or transportation—Grant of bail is not rule but exception particularly when prosecution evidence is closed and Sessions Judge has refused bail.**

It cannot be said that the grant of bail should be the rule and the refusal of bail should be the exception, as regards serious nonbailable offences which are punishable with death or transportation for life. On the other hand, in cases where there is a reasonable ground for believing that the accused has been guilty of an offence punishable with death or transportation for life, as regards which the legislature has thought fit to prohibit Magistrates from granting bail at all, the grant of bail by a Sessions Judge or the High Court, who have undoubtedly power under S. 498, Criminal P. C., is to be made not as a general rule but only in exceptional cases, particularly when the accused is on his trial, the prosecution evidence is closed and the Sessions Judge has refused to exercise his discretion in his favour. [P 507 C 1]

(d) Criminal P. C. (as amended in 1923), S. 498—Accused several—Witnesses numerous—Exhibits numerous—Offence under S. 121-A—Reasons should be stated not separately but only conclusions should be stated.

The best course in cases where several accused are tried for an offence like S. 121-A, P. C., and several witnesses are examined and several documents to be filed, is to refrain from giving separate reasons in the case of each accused, and simply to state final conclusions in applications for bail. [P 507 C 2]

K. N. Katju, R. S. Pandit, Sheo Prasad and *D. P. Sinha*—for Applicant.

Government Advocate—for the Crown.

Sulaiman, Ag. C. J.—These are applications for bail on behalf of accused persons involved in the Meerut conspiracy trial. In the words of the Magistrate :

> " the charge brought against the accused is one under Part 2 of S. 121-A, I. P. C., namely that they conspired to deprive the King of his sovereignty of British India.

The maximum punishment that can be imposed under this section, when the offence as well as its gravity are established, is one of transportation for life. In practice the severity of the sentence would vary with the degree of the seriousness of the acts done by each accused who is convicted.

The complaint was filed by a police officer against 33 accused persons on 15th March 1929 and all the accused except one were arrested within a week of that date. The inquiry began in June 1929 and 32 accused persons were committed to the Court of Session in January 1930. One accused person was discharged. The Sessions trial started in that very month and has not yet been completed. The prosecution evidence has however been concluded and the statements of the accused are being recorded. It is expected that the termination of the trial will take several months more.

An enormous volume of evidence has been produced by the prosecution, and consists of over 300 witnesses and over 3,000 exhibits. It is not practicable even briefly to consider the bulk of the evidence. Facts which are important for purposes of this miscellaneous proceeding have been put before us in the form of affidavits on behalf of the prosecution. The grounds for release on bail are set forth in the written applications of the accused. To give us a rough idea of the prosecution case and the general nature of the evidence against the accused, the counsel for both parties have also drawn our attention to some passages in the commitment order, and we have also read it.

On 23rd April 1931 Mukerji and Boys, JJ., granted bail to two accused, Hutchinson and Nimbkar. Later on the Additional Sessions Judge released four more persons on bail, but refused the applications of the others who had applied for bail.

We have before us written applications of 21 accused persons. The cases of the remaining four accused also were for the sake of convenience ordered to be put up before us for consideration. Ordinarily an accused person is expected to move the Sessions Court in the first instance. But in this case it was considered desirable that the cases of all the accused who are in custody should be considered together and not in instalments. Three of these have since intimated that they do not wish to apply for bail. A counsel has been engaged on their behalf as amicus curiae. The fourth had been released on bail on account of his ill-health.

As some question has been raised regarding certain legal principles applicable to bail applications it may be convenient to examine the relevant sections of the Code of Criminal Procedure at the very outset.

In all bailable cases S. 496, Criminal P. C., makes it imperative that bail should be granted subject to certain conditions.

Section 497 (as amended) first gives a discretion to the Court (particularly Magistrates) to order release on bail even in cases of nonbailable offences. This prima facie gives a Court both power to grant bail and power to refuse bail. But such a wide discretion is to some extent controlled by two restrictions. Sub-S. (1) provides that if :

> "there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life,"

then he shall not be released. On the other hand, sub-S. (2) provides that if :

> "there are not reasonable grounds for believing that the accused has committed a nonbailable offence,"

the accused shall be released on bail. Sub-S. (4) provides that if, after the conclusion of the trial, there are reasonable grounds for believing that the accused is not guilty, he shall be released. It is obvious that where the prosecution can satisfy the Court that there appear reasonable grounds for believing that he has been guilty of such a serious offence as is punishable with death or transportation for life, the Magistrate has no discretion to grant bail. On the other hand, if the defence can satisfy the Court that there are no reasonable grounds for believing that the accused has committed any nonbailable offence at all (not necessarily one punishable with death or transportation for life), or that there are reasonable grounds for believing that he is not guilty, then the Court has no option but to grant bail. In every other case, where it cannot be shown affirmatively that there are reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life, or where it cannot be shown clearly that there are no reasonable grounds for believing that he has committed any nonbailable offence, or it cannot be shown that there are reasonable grounds for believing that he is not guilty, the Court is free to exercise its discretion having regard to all the circumstances brought to its notice.

Section 498, Criminal P. C., gives an unfettered discretion to the High Court or the Court of Session to admit an accused person to bail. It is a mistake to imagine that S. 498 is controlled by the limitations of S. 497, except when there are not reasonable grounds for believing that the accused committed the offence, or there are reasonable grounds for believing that he is not guilty, in which cases it becomes a duty to release him. Magistrates can proceed under S. 497 only and their discretion is regulated by the provisions of that section; but S. 498 confers upon a Sessions Judge or the High Court wide powers to grant bail which are not handicapped by the restrictions in the preceding section. That discretion is unfettered but of course it cannot be exercised arbitrarily, but must be exercised judicially. There is no hard and fast rule and no inflexible principle governing such discretion. The only principle that is established is that there should be a judicial exercise of that discretion. It is not any one single circumstance which necessarily concludes the decision, but it is the cumulative effect of all the combined circumstances that must weigh with the Court. The considerations are too numerous to be classified or catalogued exhaustively.

The learned Judges in the case of *Emperor* v. *Hutchinson* (1) considered nine circumstances in detail. These were whether there was or was not reasonable ground for believing that the applicants were guilty of the offence, the nature and gravity of the charge, severity and degree of the punishment that might follow, the danger of the accused absconding if released on bail, their characters, means and standing, the danger of the offence being continued or repeated, the danger of witnesses being tampered with, opportunity to the accused to prepare their defence, and the long period of the detention of the accused and the probability of a delay of a further period of seven months. These do not appear to have been laid down as exhaustive or inflexible tests. There is no doubt that all or most of these points may in particular cases be of importance and weight may have to be attached to them, and to other points also. It cannot be suggested that any one of those tests would, by itself, even in the face of other considerations to the contrary, be conclusive. It is the net result of all the considerations for and against the accused which must ultimately decide the matter. Many more considerations can be added, without any attempt to make the list exhaustive. Even the extreme youth or old age or sex of the accused may be a matter for consideration, and so also the state of his health. Such considerations are covered even by the new proviso to S. 497 (1). His previous conduct and behaviour in Court, or want of confidence in obtaining reliable sureties or the character of the sureties, if indemnified by the accused, may equally be taken into account. Even his social status or the position which an accused person occupies in relation to the other members of his family, particularly when he is the only adult male member, the rest being women and children, has also not been lost sight of. Sometimes even the fact that he was arrested during the harvesting time has also been considered, though of course not made the sole ground of release. Again, the fact that the Sessions Judge has refused to exercise his discretion in favour of the accused must also be given due weight. It would be hopeless to attempt to draw up an exhaustive list.

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(1) A. I. R. 1931 All. 356=1931 Cr. C. 612.

It has been observed by Mukerji, J., that

> "on general principles, and on principles on which Ss. 496 and 497 (as amended in 1923) are framed the grant of bail should be the rule and the refusal of bail should be the exception."

With great respect, we do not think that any such rule exists as regards serious nonbailable offences which are punishable with death or transportation for life. On the other hand, in cases where there is a reasonable ground for believing that the accused has been guilty of an offence punishable with death or transportation for life, as regards which the legislature has thought fit to prohibit Magistrates from granting bail at all, the grant of bail by a Sessions Judge or the High Court, who have undoubtedly power under S. 498, Criminal P. C., is to be made not as a general rule but only in exceptional cases. This is particularly so when the accused is on his trial, the prosecution evidence is closed and the Sessions Judge has refused to exercise his discretion in his favour. This is a rule of practice and caution only.

But we feel that we must point out that the learned Additional Sessions Judge has very improperly gone out of his way to criticize the soundness of some of the observations made by a learned Judge of this Court in the case of Hutchinson and Nimbkar which he was bound to respect, and to question the method adopted by the High Court for calling for affidavits, the language chosen and the tone adopted by him at some places are objectionable, and it is regrettable that he did not express himself less unhappily.

We think that we must take into consideration all the circumstances disclosed by the affidavits filed before us as well as by the extracts from the committal order to which our attention has been drawn. It would embarrass the Additional Sessions Judge if we were to deal with the case of each accused separately and give reasons for the existence or otherwise of reasonable grounds for his complicity, or reasons for or against the gravity of the charge, or the degree of punishment likely to be imposed. Such opinion, based on the meagre materials before us, would seriously handicap the Additional Sessions Judge in arriving at his own conclusions. In our opinion, the best course in the special circumstances of these cases is to refrain from giving separate reasons in the case of each accused, and simply to state our final conclusions.

We are of opinion that Desai, Thengdi, Alve, Jhabwala, Kadam and Saigal shall be released on bail on condition of their executing each (excepting Thengdi) a personal bond in Rs. 2,000 with two sureties, each surety to be in Rs. 2,000 and to be to the satisfaction of the District Magistrate of Meerut. While on bail these accused shall not take part in any public demonstration or agitation of any kind and shall not make any public speeches or contribute anything to the public press.

In the case of Thengdi the personal bond shall be for Rs. 4,000. The amount of the sureties and the other conditions to be the same as in the case of the others.

The applications of the rest are dismissed.

R M./R.K. *Application dismissed.*

** A. I. R. 1931 Allahabad 507

Special Bench

SULAIMAN, AG. C. J., YOUNG AND SEN, JJ.

Wali Mohammad Khan—Plaintiff—Appellant.

v.

Ishak Ali Khan and *others*—Defendants—Respondents.

Second Appeal No. 1009 of 1928, Decided on 19th June 1931, from decision of Sub-Judge, Mainpuri, D/- 5th March 1928.

**(a) Civil P. C. (1908), O. 4, R. 1—Omission to comply with provisions regarding presentation of plaint is irregularity which

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

can be cured if plaintiff has acted in good faith ; 20 *All.* 90 ; 45 *All.* 701=*A. I. R.* 1924 *All.* 54=77 *I. C.* 30, *Overruled.*

Omission to comply with the provisions regarding presentation of plaint is a mere irregularity and not an absence of jurisdiction; and if a person presenting it is not properly authorized the presentation would be irregular and the Court would then have the discretion to allow the irregularity to be cured or not. If the plaintiff has acted in good faith and without gross negligence and it is fair and just to allow the defect to be cured the Court would undoubtedly do so : 18 *All.* 396 (*F. B.*) ; 22 *All.* 55; 40 *All.* 147; *A. I. R.* 1927 *All.* 514; 21 *Cal.* 866, *Appr.*; **20 All. 90 ; 45 All. 701=A. I. R. 1924 All. 54=77 I. C. 30, Overruled.** [P 511 C 2]

****(b) Civil P. C. (1908), O. 6, Rr. 14 and 15 and O. 4, R. 1—Absence of signature, verification or presentation on part of some of plaintiffs does not affect jurisdiction of Court.**

The absence of signature or verification or for the matter of that the absence of presentation on the part of some of the plaintiffs out of several does not affect the jurisdiction of the Court, and the suit must be deemed to have been duly instituted on their behalf if it was filed with their knowledge and authority: 17 *Cal.* 580 (*P.C.*), *Foll.* [P 512 C 1]

***(c) Civil P. C. (1908), O. 4, R. 1—Suit by mother as guardian for son—Son found major on date of institution—Suit authorized and prosecuted by son—Mistake if bona fide can be cured—Minor—Civil P. C., O. 32, R. 3.**

Where a suit has been filed in the name of a plaintiff by his mother acting as guardian and next friend and describing him a minor, while in fact he was of age and the suit has been authorized by him, and is prosecuted by him in person, the suit cannot be thrown out on the technical ground that the plaint as originally filed described him as a minor under the guardianship of his mother. Defect in its form should be cured if it is due to a bona fide mistake. [P 512 C 1]

S. C. Goyel and *S. B. L. Gaur*—for Appellants.

Iqbal Ahmad and *M. A. Aziz*—for Respondents.

Order of Reference

Sulaiman and Young, JJ.—The present suit for pre-emption was instituted by Wali Mahammad Khan alleged to be 17 years and 11 months old, under the guardianship of his mother (presumably stepmother). The defendants did not challenge the fact of the minority of the plaintiff ; but a rival pre-emptor did so. The plaintiff when questioned stated that his father and mother had died when he was still a child and he did not know his correct age. The trial Court while discussing which course was preferable for Wali Mohammad, either to file the suit as major or through his next friend remarked:

> "In my opinion the course adopted by him was the proper one. It has not done any harm if in such a doubtful case it was (he has) chosen to file the suit through his next friend. He has himself been prosecuting his suit and has also made his statement as a witness. If he (be) major, he himself understands his interest and if (not) he is represented by his next friend."

It accordingly disallowed the objection.

The appellate Court without giving any specific reasons beyond remarking that the appeals could not be properly disposed of without a finding on the question of minority sent that issue for a finding. The opinions of the medical witnesses were divided and the other oral evidence was not very satisfactory, but an entry in a register of a village school in the handwriting of a deceased teacher turned the scale. The Munsif found that the plaintiff was more than 18 years old at the time of the institution of the suit. The appellate Court has thought that that was the sole point for determination and held that he was major. It has relied mainly on the entry in the register and was not impressed by the suggestion that the entry was forged. If it were necessary to find the exact date of the birth of the plaintiff and to determine whether he was within three years of his attainment of majority when the trial Court decided the suit, it may be a question whether the entry made by the teacher, without proof of his special means of knowledge was at all admissible.

But the only point urged in appeal is that the fact that the plaintiff was a major at the time of the institution of the suit was not sufficient for the dismissal of the claim. The view of the Court below is supported by the case of *Sheorania* v. *Bharat Singh* (1) decided (1) when the old Code of Civil Procedure was in force and *Ruhul Amin* v. *Shanker Lal* (2). The last mentioned case fully supports the view of the lower appellate Court.

It may be mentioned that the High Courts of Calcutta, Madras and Lahore, have dissented from the view expressed in *Sheorania* v. *Bharat Singh* (1). These cases are collected in Mr. Mullah's commentary, who prefers the other view (810).

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(1) [1897] 20 All. 90=(1897) A. W. N. 203.

(2) A. I. R. 1924 All. 54=77 I. C. 30=45 All. 701.

Without going to the other High Courts there are observations in cases of this Court also which are not easily reconcilable with the previously mentioned cases.

In the Full Bench case of *Rajit Ram* v. *Katesar Nath* (3) it was laid down that if the verification of plaint was discovered to be defective the plaint may be amended, for such a defect would not of necessity result in the dismissal of the suit.

In the case of *Basdeo* v. *John Smidt* (4) it was held that the mere fact that the plaint in a suit had not been signed by the plaintiff named therein or by any person duly authorized by him in that behalf would not necessarily make the plaint absolutely void; and that a defect in the signature of the plaint or the absence of signature, could be cured by amendment at any stage of the suit, if the suit was in fact filed with the knowledge and by the authority of the plaintiff.

In the case of *B. B. and C. I. Ry. Co. Ltd.* v. *Siyaji Mills Co. Ld., A. I. R.* 1927 *All.* 514, it was held that when a suit is instituted by a proper agent with the knowledge and by the authority of the plaintiff named therein it is unimportant how the plaint was actually filed or signed, and that such irregularity would not be fatal as it did not affect the merits of the jurisdiction of the Court.

One view is that a valid presentation of the plaint is absolutely essential and that a defective presentation is not a mere irregularity but affects the jurisdiction of the Court.

The other view is that the provisions in O. 3 and 4 are mere rules of procedure which can be annulled, altered or added to by each High Court separately, and that a failure to comply strictly with those provisions would only amount to an irregularity which can be cured either under S. 99 or O. 6, R. 17, Civil P. C. An otherwise valid plaint is not void merely because it is handed over to the munsarim by a pairokar or clerk who does not hold a proper power of attorney.

We consider that the conflict of opinion should be set at rest by an authoritative pronouncement, at least so far as this Court is concerned.

We therefore direct that this case be laid before the Honourable Chief Justice for constituting a Full Bench.

Opinion

Sulaiman, Ag. C. J.—This case has been referred to a larger Bench because of some apparent conflict in the observations made by this Court in a number of cases.

The suit was for pre-emption and was filed in the name of Wali Mohammad Khan stated to be 17 years and 11 months old under the guardianship of his mother. It was instituted on the 28th August 1925. The plaint was signed by the mother and by a pleader appointed under a vakalatnama bearing her signature. It was not disputed in the Courts below that the plaintiff was aware of the institution of the suit and that in fact he was prosecuting it. Before the hearing of the case when the plaintiff was questioned he stated that his father and mother had died when he was still a child and he did not know his correct age but had learnt from his colleagues that he was about 18 years of age. The vendees did not challenge the fact of the minority of the plaintiff, but a rival pre-emptor did so. The learned Munsif while discussing the course adopted by the plaintiff considered that he chose the method of filing the suit through a next friend because it was a doubtful case and for him it was the proper course. He thought that because the plaintiff himself had been prosecuting the suit, there was no serious defect ln the frame of the suit. If he was a major he fully understood his interest, and if he was a minor he was represented by his next friend. The lower appellate Court took a contrary view of the legal position of the plaintiff and remitted an issue for a finding on the question of minority. The finding was against the plaintiff, it being held that he had just attained majority before the institution of the suit.

The position according to law was that a suit was filed in the name of the plaintiff by his mother acting as his guardian and next friend and describing him as a minor, while in fact he was of age; but the suit had been authorized by him and it was prosecuted by him in person.

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(3) [1896] 18 All. 396=1896 A.W.N. 102 (FB).
(4) [1899] 22 All. 55=(1899) A. W. N. 172.

The lower appellate Court came to the conclusion that the defect was so serious that it could not in any way be remedied. It has accordingly dismissed the suit.

There is some authority for the support of the view taken by the lower appellate Court. It was observed in the case of *Sheorania* v. *Bharat Singh* (1) that a suit instituted on behalf of a person alleged to be a minor through his next friend, when the plaint was neither signed nor verified by the real plaintiff, but only by the next friend, was defective inasmuch as there was no plaint by the real plaintiff before the Court which could be amended. So far as the learned Judges laid emphasis on the absence of any verification of the plaint by the real plaintiff, their observation was contrary to what had been previously held by a Full Bench of this Court in *Rajit Ram* v. *Katesar Nath* (3), viz., that the defect in the verification of the plaint, even if discovered subsequently, was in no way fatal to the suit and could be remedied. The view expressed in *Sheorania's* case (1) has been followed recently by a Division Bench of this Court in *Ruhul Amin* v. *Shankar Lal* (2) But in that case emphasis was not laid on the want of signature and verification, as had been done in *Sheorania's* case, but rather on the absence of proper presentation of the plaint. The learned Judges came to the conclusion that a plaint presented by a next friend of a person who was stated to be minor, while in fact he was not a minor, was not validly presented to the Court, and that, in view of the provisions of O. 4, R. 1, and O. 3, R. 1 and 2, Civil P. C., a defect of that sort could scarcely be regarded as a defect or irregularity in any proceeding in a suit within the meaning of S. 99 of the Code, but was a plea which affected the jurisdiction of the Court. It was accordingly held that the trial Court had no jurisdiction to entertain the suit at all, except upon a plaint properly presented. It may be remarked that the absence of proper presentation had not been put forward as a ground in *Sheorania's* case.

On the other hand, there are observations in numerous other cases of this Court which point to the contrary conclusion. We have already referred to the Full Bench case in *Rajit Ram* v. *Katesar Nath* (3). In *Basdeo* v. *John Smidt* (4) it was held that the plaint in a suit which had not been signed by the plaintiff named therein or by any person duly authorized by him in that behalf was not necessarily absolutely void, and that a defect in the signature of the plaint, or the absence of signature where it appeared that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein, might be waived by the defendant, or if necessary cured by amendment at any stage of the suit. The learned Judges considered that the striking off of the name of the guardian and the description of the plaintiff as being of age was an amendment of the plaint which the Court had authority to permit. That was certainly a case where the plaint had been filed by an advocate but the learned Judges referred with approval to several unreported cases where the plaint had been filed by a person who was not an advocate.

In the case of *in the matter of the petition of Bisheshar Nath* (5) a single Judge of this Court observed that R. 14, O. 6, Civil P. C., which required a pleading to be signed by a party, was merely a matter of procedure, it being the business of the Court to see that that provison was carried out. He further held that where a suit was duly authorized, the proper signing of the plaint was a matter of practice only and if a mistake or omission had been made, it might be amended at any time. In that case the plaint had been signed by another person on behalf of the plaintiff who was actually in jail at the time and there was obviously no proper presentation of it in Court by him or by any person duly authorized in this behalf. The learned Judge held that there was no fatal defect in the suit. A similar view was expressed by another Bench of this Court in the case of *Bombay Baroda and Central India Ry. Co., Ld.* v. *Siyaji Mills Co. Ltd., A. I. R.* 1927 *All.* 514, where it was held that any irregularity in the signature or verification of the plaint was a mere defect of procedure and could not be fatal when the merits of the case had not been affected. In that case a suit had been instituted by a person not duly authorized but with the knowledge and by the authority of the plaintiff named therein. It was accordingly considered that it was unimportant how the plaint was actually filed or signed.

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(5) [1918] 40 All. 147=44 I.C. 28=19 Cr. L.J. 865.

The other High Courts in India appear to have taken the view contrary to that expressed in *Sheorania's* case. We may refer to the case of *Taqui Jan* v. *Obaidulla* (6) in which Trevelyan and Ameer Ali, JJ., held that a suit instituted by a person, alleging himself to be a minor, the suit being brought through a next friend, while in fact the plaintiff was not a minor at the time, need not be dismissed and the plaint could be amended. This was followed by the Calcutta High Court in the case of *Narayan Chandra Das* v. *Dulal Chandra Dutta, A. I. R.* 1927 *Cal.* 477, and by the Lahore High Court in the case of *Amritsaria* v. *Gamun* (7). The Bombay High Court in the case of *Ganapati Nana Powar* v. *Jivanabai Subanna* (8), where the plaintiff's mukhtear, who held a special power of attorney and not a general power of attorney as required by the rules of that High Court, had filed the plaint, held that that was a mere irregularity which could be cured. In *Shunmuga Chetty* v. *C. K. Narayana Ayyar* (9) Abdur Rahim and Burn, JJ., held that where a plaintiff had been described in the plaint as a minor but had really attained majority some four days before the plaint was filed by his next friend under a bona fide belief that he was still a minor, the suit should not be dismissed but the plaint should be returned for presentation after making the necessary amendments by striking off the description of the plaintiff as a minor suing through a next friend and making other consequential alterations in the plaint. It is thus clear that there is plenty of authority in support of this other view.

It seems to us that in *Ruhul Amin's* case (2) it was assumed that the Code of Civil Procedure expressly required that the plaint should be presented either by the plaintiff personally or by some person duly authorized by him. No doubt that is necessarily implied when the presentation of the plaint is necessary for the institution of a suit. But there is no rule which in express terms requires that the plaintiff should file the plaint personally. Nor is there any rule which expressly says that it should be filed by a person holding a general power-of-attorney on behalf of the plaintiff or otherwise duly authorised by the latter. The most that can be said is that this is implied by the scheme of the rules in Sch. 1 of the Code.

If the legislature had intended that the absence of the presentation of the plaint by the plaintiff or by some person duly authorized by him would altogether oust the jurisdiction of the Court the language used would have been definite and specific. Instead of that, S. 26 merely provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed, without saying in express terms that the presentation should be by the plaintiff or his duly authorized agent. As there is no specific rule either requiring or expressly authorizing the plaintiff to present the plaint it is doubtful whether O. 3, R. 1, of the Code would apply to such a case. If it does not apply, the presentation by a person orally authorized to do so would be valid. But even if it does we are clearly of opinion that the omission to comply with this provision would be a mere irregularity and not an absence of jurisdiction. The Court receiving a plaint which has not been properly presented would have jurisdiction to dismiss it and pass orders on it. It would not be acting without jurisdiction if it did so. We do not mean to imply that that a plaintiff has the right to get his plaint presented by a man in the street. If the person presenting it was not properly authorized, the presentation would be irregular. The Court would then have the discretion to allow the irregularity to be cured or not. If the plaintiff has acted in good faith and without gross negligence, and it is fair and just to allow the defect to be cured, the Court would undoubtedly do so. It is not absolutely helpless in the matter.

We may also refer to the case of *Mohini Mohun Das* v. *Buddan Saha Das* (10), decided by their Lordships of the Privy Council. There three suits had been filed by one of three joint creditors, the others being named as coplaintiffs with him in the plaints, which he alone had signed and verified. The record did not show that the other plaintiffs, who had omitted to sign the plaints or to verify them had repudiated the suits. It does not appear from the judgment that they had given any express approval of the suits to the Court before the period of limitation had expired. The question was whether the other two plaintiffs must be considered to have been plaintiffs to the suits from the very beginning or from the date when certain orders intended to cure the defects were passed. Their Lordships of the Privy Council clearly held that the other plaintiffs became parties to the suits from the time when the plaints were filed and that the suits were not barred by lapse of time. This in our opinion, is a clear authority for the proposition that the absence of signatures or verification or for the matter of that the absence of presentation on the part of some of the plaintiffs out of several does not affect the jurisdiction of the Court, and the suit must be deemed to have been duly instituted on their behalf if it was filed with their knowledge and authority.

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(6) [1894] 21 Cal. 866.

(7) A. I. R. 1926 Lah. 82=89 I. C. 363.

(8) A. I. R. 1923 Bom. 44=76 I. C. 34=47 Bom. 227.

(9) [1917] 40 Mad. 743=41 I. C. 510.

(10) [1890] 17 Cal. 580 (P.C.).

In this view of the case the plaintiff's suit could not necessarily be thrown out on the technical ground that the plaint as originally filed described him as a minor under the guardianship of his mother. The defect in its form should be cured as it was due to a bona fide mistake. As the defect does not affect the merits of the case, it is not necessary to have a trial de novo.

We accordingly allow this appeal and setting aside, the decree of the lower appellate Court send the case back to that Court with direction to allow the plaintiff to amend the description of himself in the plaint and then to dispose of the appeal according to law.

The costs of this appeal will abide the result.

V.B./R.K. *Appeal allowed.*

✲ ✲ A. I. R. 1931 Allahabad 512

Full Bench

SULAIMAN, Ag. C. J., MUKERJI, BANERJI, YOUNG AND BENNET, JJ.

Bankey Lal and *others*—Appellants.

v.

Durga Prasad and *others* — Respondents.

Second Appeal No. 13 of 1929, and First Appeal No. 157 of 1929, Decided on 13th April 1931, from order of Dist. Judge, Bareilly, D/- 23rd May 1929.

✲ ✲ (a) **Hindu Law—Debts— Son's liability —Partition without provision to pay debts— Creditor can proceed against separated shares of sons—Father becoming insolvent— Receiver can proceed against son's share in insolvency proceedings and separate suit is not necessary—Provincial Insolvency Act (1920), S. 59**: 50 *All.* 137=*A. I. R.* 1927 *All.* 714=104 *I. C.* 406, *Overruled*.

If the members of a joint Hindu family governed by the Mitakshara law choose to divide the family property and to separate without making any arrangement for the payment of the family debts, a creditor of the father is entitled to proceed against the separated shares given to the sons and grandsons of the father, to enforce the payment of the debt the debt being one which it is the pious duty of the sons and grandsons to pay. The receiver in insolvency of the father can proceed in the insolvency proceedings without recourse to a suit against the shares received by the sons and grandsons in the partition: (*Case law considered*). **50 All. 137=A.I.R. 1927 All. 714=104 I. C. 406, Overruled.**; *A. I. R.* 1929 *All.* 775; *A. I. R.* 1931 *All.* 131 *Expl.*

[P 521 C 2 ; P 523 C 1, 2]

✲ ✲ (b) **Hindu Law — Debts— Manager— Debts binding on family— Partition without provision to pay debts — Creditor can proceed against property allotted to several members —(Per *Full Bench*)— Insolvency of manager— Receiver can seize property received by other members (*Mukerji, J. contra*)— Provincial Insolvency Act (1920), S. 59.**

Per *Full Bench*. — Where a simple money debt binding on the entire family remains unpaid and the members of the family enter into a partition without making any provision for the payment of the family debt the creditor may enforce payment of his debt by proceeding against properties received by partition by the several members of the family. It is open to the receiver in the case of insolvency of the principal members of the family to seize the property received by the other members of the family not declared insolvent, to pay the family debts. [P 522 C 2]

Per *Mukerji, J.*—It is not open to the receiver in the case of insolvency of principal members of the family to seize the property, received by the other members of the family not declared insolvent, to pay the family debts. The receiver may proceed by suit in the proper Court for establishment of the liability of the non-insolvent members and on recovering a decree may proceed by way of execution. [P 532 C 2]

✲ ✲ (c) Provincial Insolvency Act (1920), S. 59—(Per *Full Bench*)—Manager of Hindu joint family declared insolvent — Partition suit subsequent to insolvency petition—Partition decree does not prevent receiver from selling property allotted to other members (*Mukerji, J. contra.*)

Per *Full Bench*.—When the managing member of a joint Hindu family is adjudicated an insolvent on debts contracted as managing member, and other members of the joint Hindu family bring a suit for partition, subsequent to the application in insolvency, the decree for partition does not prevent the receiver from selling property allotted to members of the family other than the insolvent. [P 533 C 2]

Per *Mukerji, J.*—When the managing member of a joint Hindu family is adjudicated an insolvent on debts contracted as managing member and the other members of the joint family bring a suit for partition subsequent to the application in insolvency, the receiver is not entitled to sell the property allotted to members of the family other than the insolvent. But the receiver may bring a suit in the Court of proper jurisdiction (not being the insolvency Court) against the divided members of the family and establish their liability and having done so may proceed to execute the same. [P 532 C 2]

(d) Hindu Law— Partition — "When bona fide" explained.

A bona fide partition can only mean a partition which is not only fair with regard to the shares of the members of the family, but is bona fide as regards the creditors also. For the partition to be bona fide either all the existing debts of the father, which are not tainted with illegality or immorality, should be discharged before the division of the property takes place, at any rate, adequte arrangements for their payment should be made. [P 520 C 1, 2]

(e) Hindu Law—Debts — Son's liability—Provision made for father's just debts at partition—Sons cannot be made to pay again.

If at the time of the partition there is an honest division of the net assets only, after making full provision for the payment of all the just debts of the father it is difficult to hold that the sons have not discharged their pious obligation. If the sons have provided for the payment, it ought to be as good as their actual discharge. There being no charge or lien on account of the simple debts, it would be against all principles of equity, justice and good conscience, and certainly not authorized by any known Hindu law text, if the sons were to be called upon to pay the debts a second time. [P 521 C 2, P 522 C 1]

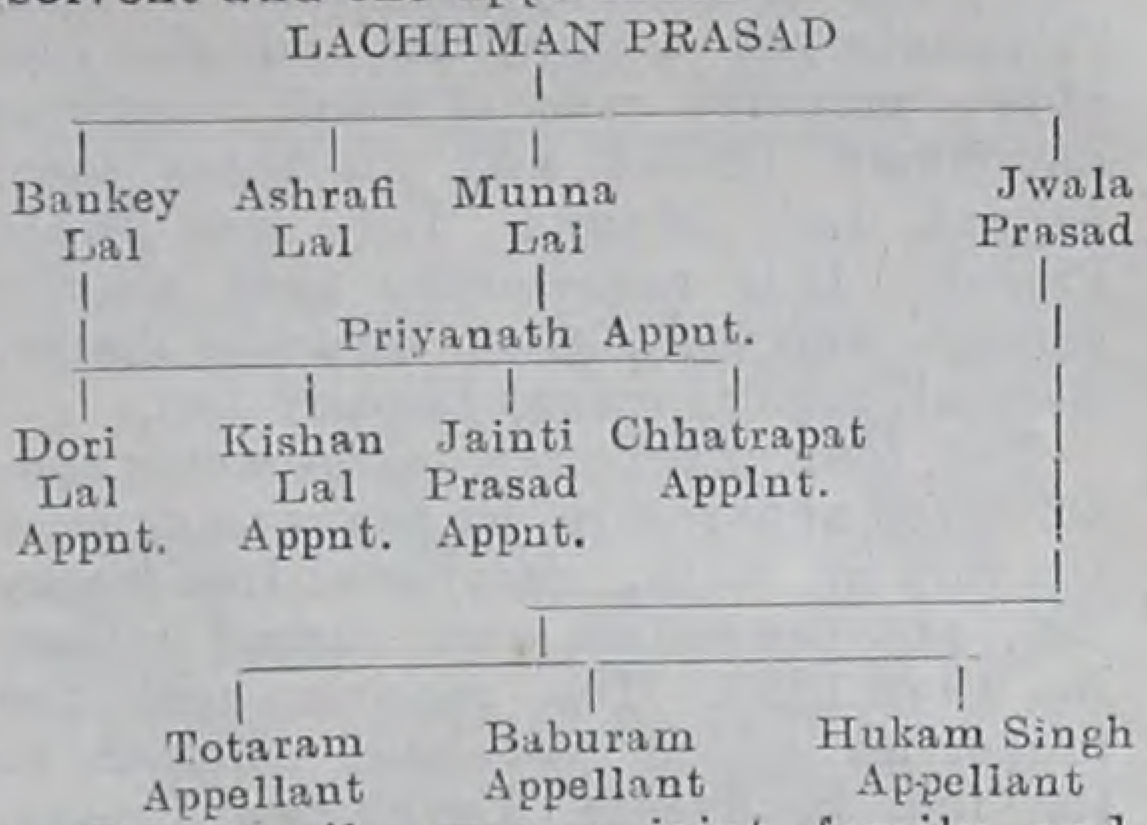
G. S. Pathak—for Appellants.

S. B. Johari and *Basudeva Mukerji*—for Respondents.

Order of Reference

Mukerji and Bennet, JJ.— This appeal arises out of insolvency proceedings and under the following circumstances. The facts will have to be gone into in some detail.

The following pedigree will show the relationship that exists between the insolvent and the appellants.



The family was a joint family and possessed a large amount of property. We are told that Bankey Lal, one of the sons of Lachhman Prasad, was mentally weak, and we do not find him figuring in any of the transactions with which the several applications in insolvency deal. On 30th August 1923, Lachhman Prasad and his sons, other than Bankey Lal, presented a joint application in the insolvency Court to be declared insolvents. Their application was that in spite of doing their best they were unable to pay certain debts, and they were anxious to place their entire property in the hands of the Court for payment of their debts. On 7th September 1923, the four applicants were told to make independent applications for insolvency. The applicants thereupon presented three other applications on 29th September 1923, and the original application was allowed to stand as the application of Lachhman Prasad alone. The first application was numbered as Case No. 43 of 1923, and the subsequent applications were numbered as 49 to 51 of 1923. Munna Lal's case is No. 49, Jwala Prasad's case is No. 50 and Asharfi Lal's case is No. 51. The four applicants are adjudicated insolvents on 26th October 1923.

Before the separate applications were presented, on 6th September 1923, a suit for partition of the family property was presented by the three sons of Jwala Prasad, who were all minors at the date of the suit. An ex parte partition decree was made on 8th October 1923. A final decree was made on 13th February 1924. By this decree, the family property was divided up into four lots. One lot was given to the plaintiffs, another lot was given to Bankey Lal and his sons, Priyanath got a third lot and the rest of the property was allotted jointly to Lachhman Prasad and his three sons, Asharfi Lal, Munna Lal and Jwala Prasad. It is noteworthy that all the persons who were given separate shares, were all minors except Bankey Lal.

The four insolvency cases were consolidated apparently on the principle of the rule in S. 15, Provincial Insolvency Act, and the orders were passed in Case No. 49 of 1923. The receiver sold the properties which had been allotted to the four insolvents, Lachhman Prasad, Asharfi Lal, Munna Lal and Jwala Prasad, and then proceeded to seize the property of the nine appellants, namely Bankey Lal and his minor sons and the minor sons of Munna Lal and Jwala Prasad. (We may note that Asharfii Lal has no son.) Thereupon an objection was filed on behalf of the appellant to the effect that their properties were not liable to be taken in payment of the debts of the insolvents.

As we have said, the family was a joint one, and the joint application that was presented to the Court covered the entire family property and all the debts payable by the family. When the applications were separated the original application was left in tact except for this: that the name of the sons of Lachhman Prasad were removed from the heading of the application. In the other applications the applicants stated that their property was 1/5th in the list of properties submitted in Lachhman Prasad's application and that their debts were 1/5th of the debts to be found in the list submitted with Lachhman Prasad's application. There can therefore be no doubt that the entire debt was joint family debt, and the entire property, which the applicants wanted to hand over to the insolvency Court, was the joint family property. So far therefore the applicants had no desire to take away any portion of the joint family property from the jurisdiction of the Court, for the purpose of sale, to pay the debts.

In some of the debts in this case, the father alone figures as the debtor and in other cases some of the sons carrying on business, namely Asharfi Lal, Munna Lal and Jwala Prasad, figure as the debtors with or without the father as a co-debtor. All these debts were acknowledged by Lachhman Prasad as his debts and the three sons of Lachhman Prasad who joined him in the original application for insolvency accepted their liability for the debts. We may therefore take all the debts to be paid by the family as the debts of the father Lachhman Prasad.

The learned District Judge on the objections of the appellants held that their shares in the family property were liable to be sold to pay what was virtually the joint family debt incurred by the father, and he accordingly dismissed the petition of objection.

In this Court, it has been contended that after the partition the shares of the appellants were not liable to be taken by the creditors of the family. It was further argued that if the appellants' shares were at all liable to be taken they could be taken by virtue of separate proceedings, but certainly not in the insolvency proceedings. Reliance has been place on a Full Bench case of the Madras High Court, *In the matter of Balusami Ayyar* (1), in which two learned Judges (the third Judge dissenting) took a view similar to the view contended for on the appellants' behalf.

The question that arises for determination is a question of law, and it is :

> "If the members of a joint Hindu family governed by the Mitakshara law choose to divide the family property and to separate without making any arrangement for the payment of the family debts, whether the receiver in insolvency, the head of the family, the father, being declared an insolvent, is entitled to proceed against the shares of the sons and grandsons in the joint Hindu family property for the purpose of payment of the joint family debts."

A Full Bench of five Judges has held in this Court that the insolvency of the father of a joint Hindu family does not release the shares of the joint sons from liability to pay the father's debts and the receiver can proceed against the sons' shares by enforcement of the father's right to bring the family property to sale to pay his own debts, it being always provided that the debts are such as a pious Hindu son is liable to pay.

As for the question whether a partition of the family property made by the father and sons, without providing for the payment of the family debts, would put a stop to the right of the creditor to proceed against what was once the joint family property has been answered differently by different Benches in this Court. In the case of *Kishan Sarup* v. *Brijraj Singh* (2) one of us was clearly of opinion that the right of the creditor is not extinguished by such partition. The learned Judge who composed with one of us the Bench decided the case on a slightly different point, he being of opinion that the partition itself was not bona fide one. This case professes to follow the Madras rulings in which it was definitely held that the creditor's right to proceed against the family property is not impaired. The Madras High Court upheld their own view in the Full Bench case of *Subramania Ayyar* v. *Sabapathy Aiyar* (3). The members of the present Bench are agreed that the view taken by one of them in *Kishan Sarup* v. *Brij Raj Singh* (2) was the proper view to take of the liability of the sons' shares.

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(1) A. I. R. 1928 Mad. 735=112 I. C. 541=51 Mad 417 (F. B).

In the case of *Ramsaran Das* v. *Bhagwan Singh, A. I. R.* 1929 *All.* 775, two learned Judges held that the creditor could not proceed against the divided property. The decision was mainly based on the ground that the simple money creditor had no charge on the family property. It ignores the principles on which son's liability is based. In *Gaya Prasad* v. *Murlidhar* (4), another Bench consisting of two other learned Judges held that the members of a joint family could deliberately enter into a partition in order to avoid a creditor of the family proceeding against the shares of the sons and in order to compel him to confine his remedy against the share of the father alone.

The aspect of the case that strikes us as most important is this. To put it by way of a homely illustration:

> "Till yesterday, the family was joint and the creditor of the father could enforce his claim against the whole family property. Today, the father and the sons sit down together and decide that they would cut down the credit of the father, not only in future but with retrospective effect, that they would cut down the remedy of the creditor and with that view agree to divide the family property and decide to leave the question of the debts untouched. When the creditor wants to enforce his remedy against the property, the sons tell him that they have divided the property, the father has got nothing but, say, a fifth share, and the creditor may proceed against that share if he chooses."

Is this fair, is this right? An honest division of the family property would involve a division of the family debts as well. If this be done, no difficulty will arise. But how, on what principle, a mutual arrangement among those, who were only "the debtors" till yesterday could defeat the remedy of the creditor, who is no assenting party to the division of the property? It is true the simple creditor has no charge on the property. But he did lend the money to the father on the credit of the entire family property.

When the law-givers of old decided to give the sons a share in family property, the moment they were born, they realized that this giving of the share to the sons meant the reduction of the credit of the head of the family to the extent of the share of the sons; nay, it was more; for nobody could know when another male member would be born in the house and would further reduce the credit of the head of the family. The law-givers, therefore, invented the doctrine of pious duty, by which the father's credit and therefore his debts became secure so long as there was any property left in the family. Nay, the old Hindu law was that the sons must pay their father's debt, whether or not they got any property of the father. Under the Hindu notion, all just debts must be paid. If we should now say that the division of the property by the debtors themselves should, for all practical purposes, nullify the debts, shall we not be killing the spirit of the Hindu law.

As already indicated, an honest division in the family cannot harm the creditors. All just debts would be divided and instead of a single debtor, there would be so many. The available property would be the same. After a partition of property has taken place, the father's credit would be reduced and thereafter, nobody would lend him money which could not be paid out of the father's share in the property. If anyone did make a larger advance, he would do so at his own risk. But all debts incurred on the credit of the family property must be paid out of the family property.

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(2) A. I. R. 1929 All. 726=121 I. C. 257=51 All. 932.

(3) A. I. R. 1928 Mad. 657=110 I. C. 141=51 Mad. 361 (F. B.).

(4) A. I. R. 1927 All. 714=104 I. C. 406=50 All. 137.

With all respect, we find ourselves in disagreement with the last mentioned two cases and are of opinion that the matter should go for decision before as large a Bench as may be possible, as the matter is very important and affects all the joint Hindu families in the province of Agra who may become subject to the insolvency laws and also their creditor.

Another question remains and it is this:

"Supposing it is held by the Full Bench that a creditor may proceed by suit against the sons' shares even after partition to recover what was joint family debts incurred by the father, can the receiver in insolvency proceedings enforce the father's remedy without recourse to suit?"

As we have stated at an earlier portion of this judgment, the Full Bench case of the Madras High Court: *In the matter of Balusami Ayyar* (1), has negatived the receiver's right, although the right of a creditor to proceed by suit has been approved. It will be desirable that the Full Bench before whom this case goes should also express an opinion as to the power of the Official Receiver to proceed in insolvency proceedings against the separated sons and grandsons' shares, in case it is held by the Full Bench that a creditor has a right to proceed by suit against the sons' shares in the circumstances indicated.

We think it desirable to draw the attention of the Full Bench to the difference in the language between S. 4, Provincial Insolvency Act, and S. 7, Presidency Towns Insolvency Act, as regards the jurisdiction of the insolvency Court to decide questions of title. This question may have some bearing on the decision to be given, because the Madras case: *In the matter of Balusami Ayyar* (1), was dealing with the Presidency Towns Insolvency Act.

The questions therefore referred to the Full Bench are as follows:

1. If the members of a joint Hindu family governed by the Mitakshara law choose to divide the family property and to separate without making any arrangement for the payment of the family debts, whether a creditor of the father is entitled to proceed against the separated shares given to the sons and grandsons of the father, to enforce the payment of the debt, it being taken for granted that the debt is one which it is the pious duty of the sons and grandsons to pay?

2. Where a simple money debt binding on the entire family remains unpaid and the members of the family enter into a partition without making any provision for the payment of the family debt, whether the creditor may enforce payment of his debt by proceeding against the properties received by partition by the several members of the family?

3. Whether in the circumstances mentioned in question No. 1 the receiver in insolvency of the father can proceed in the insolvency proceedings without recourse to a suit against the shares received by the sons and grandsons in the partition (the debt being one which it is the pious duty of the sons and the grandsons of the insolvent father or grandfather to pay the same)?

4. Whether in the circumstances described in question No. 2 it is open to the receiver in the case of insolvency of the principal members of the family to seize the property received by the other members of the family not declared insolvent, to pay the family debts?

5. When the managing member of a joint Hindu family is adjudicated an insolvent on debts contracted as managing member, and other members of the joint Hindu family bring a suit for partition, subsequent to the application in insolvency, does the decree for partition prevent the receiver from selling property allotted to members of the family other than the insolvent?

We direct that the record of the case be laid before the Hon'ble the Chief Justice for the formation of the Bench.

Opinion

Sulaiman, Ag. C. J. — Five definite questions have been referred to this Full Bench. They are as follows:

1. If the members of a joint Hindu family governed by the Mitakhshara law choose to divide the family property and to separate without making any arrangement for the payment of the family debts whether a creditor of the father is entitled to proceed against the separated shares given to the sons and grandsons of the father, to enforce the payment of the debt, it being taken for granted that the debt is one which it is the pious duty of the sons and grandsons to pay?

2. Where a simple money debt binding on the entire family remains unpaid and the members of the family entered into a partition without making any provision for the payment of the family debt, whether the creditor may enforce payment of his debt by proceeding against the properties received by partition by the several members of the family?

3. Whether in the circumstances mentioned in question No. 1 the receiver in insolvency of the father can proceed in the insolvency proceedings without recourse to a suit against the shares received by the sons and grandsons in the partition (the debt being one which it is the pious duty of the sons and grandsons of the insolvent father or grandfather to pay the same)?

4. Whether in the circumstances described in question No. 2 it is open to the receiver in the case of insolvency of the principal members of the family to seize the property received by the other members of the family not declared insolven to pay the family debts?

5. When the managing member of a joint Hindu family is adjudicated an insolvent on debts contracted as managing member, and other members of the joint Hindu family bring a suit for partition, subsequent to the application in insolvency, does the decree for partition prevent the receiver from selling property allotted to members of the family other than the insolvent ?

The facts are set forth fully in the order of reference. They may be stated briefly as follows :

Lachman Prasad had four sons, Bankey Lal, Asharfi Lal, Munna Lal and Jwala Prasad. Three of these, other than Asharfi Lal, have sons. There were a large number of debts due on mortgage deeds, bonds, and promissory notes. These had been executed by Lachman Prasad and three of his sons, other than Bankey Lal, but all of them had not joined in all the deeds. On 30th August 1923 Lachman Prasad and his three sons, other than Bankey Lal, applied to be adjudicated insolvents. On a technical objection being raised that there should be separate applications, three more applications were filed by the three sons on 29th September 1923.

A week after the filing of the original application, namely on 6th September 1923, a suit for partition of the joint family property was filed on behalf of the minor sons of Jwala Prasad. There was no contest and a preliminary decree for partition was passed ex parte on 8th October 1923. A final decree was passed on 13th February 1924. Four lots were prepared, one going to Bankey Lal and his sons, another to the son of Munna Lal, another to the son of Jwala Prasad and the fourth lot was given to the members who had been the applicants for insolvency, namely, Lachman Prasad and his three sons Asharfi Lal, Munna Lal and Jwala Prasad.

The receiver first sold the property allotted to the four insolvents, but it proved insufficient to pay up the debts. He then proceeded to seize the property of the other members of the family. They objected that in consequence of the partition their shares were not liable. Their objections were disallowed by both the Courts below and they appealed to the High Court. The questions of law arising in this appeal have been referred to us.

In order to answer the first question it is necessary to bear in mind certain well-established principles of Hindu law. If the debt is contracted by the father, then, whether he is the manager or not, the Courts below have recognized that there is a pious obligation on his sons to pay the debt, even though the debt is a separate debt taken by the father for his own personal purpose. There is however no such liability if the debt is tainted with illegality or immorality.

The authoritative pronouncement by their Lordships of the Privy Council in the leading case of *Brij Narain* v. *Mangala Prasad* (5) has now settled it finally that in a joint Hindu family governed by the Mitakshara law and consisting of a father and his sons, the whole family property is liable to be seized by the father's creditors, whether secured or unsecured, whether the money was borrowed by the father for his own use or for the benefit of the family, whether the father is alive or dead and whether the sons are minors or adults.

The position of the sons when they have separated from their father and taken away their shares of the family property by partition is in some respects different. As regards debts which have been incurred by the father before the partition took place and had been for family necessity or benefit, the liability continues on all the members even after the separation. The reason is obvious. These debts had been incurred by the manager for the benefit of all and his capacity was analogous to that of an agent. All the other members were therefore principal debtors, but their liability was not personal and was confined to the joint property that may be available. They cannot put an end to their liability by a private partition of the property among themselves, to which of course the simple money creditor would not be a party. Their separate properties are however safe. If these debts were secured or property had been transferred in payment of such family debts such alienation would stand.

Secured debts incurred by the father where there was no family necessity or benefit stand on the same footing as the unsecured separate debts of the father. The liability of the sons for the payment of such debts cannot rest on the power of the manager to bind the family. It must rest solely on the pious obligation of the sons to pay their father's debts. The Courts in India have consistently held that the separated sons are not liable to pay debts incurred by their father, subsequent to the partition, even though they still retain shares in the family property.

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(5) A. I. R. 1924 P. C. 50=77 I. C. 689=51 I. A. 129=46 All. 95 (P.C.).

There is no direct Privy Council case applicable to the liability of a separated son for the payment of his father's prepartition debts. The cases of *Girdhari Lall* v. *Kantoo Lall* (6), *Suraj Bansi Koer* v. *Sheo Prasad Singh* (7) and *Nanomi Babuasin* v. *Madun Mohan* (8) are all cases of our own High Court which have a bearing on this question, and I shall refer to them later. There has been a considerable diversity of opinion in the other High Courts and a recent Full Bench of the Madras High Court has overruled some of its previous cases. I shall discuss this judgment later. There is equally a difference of opinion between Patna and Oudh. It is thus clear that if authority were needed for the support of either view there is plenty available.

Obviously when a fresh point under the Hindu law arises and one is not bound by any previous authority, the inclination is not to restrict the liability if such exists under the strict Hindu law, and not to extend it if it does not exist under that law. But a great deal of difficulty is created by reason of the fact that the law as developed by judicial pronouncements is not exactly identical with the strict Hindu law. But long series of these decisions are binding upon us and lay down what may be called the Judge-made Hindu law.

As observed by their Lordships of the Privy Council in the leading case of *Brij Narain* v. *Mangla Prasad* (5) at p. 102 (of 46 *All.*) two seemingly conflicting principles have been allowed to develop. One is the rule that the manager cannot burden the estate for his own purpose, and the other is the obligation of the son to discharge his father's debts based on the doctrine of the pious duty, perhaps reflecting a remnant of the older law under which the son had no interest during the father's lifetime.

Their Lordships of the Privy Council again pointed out in *Masit Ullah* v. *Damodar Prasad* (9) that the Hindu lawyers made a difference in the obligations resting upon sons, grandsons and great grandsons. The son was bound to discharge the ancestral debts as his own, principal and interest, whether he received any assets or not from the father. The grandsons had to discharge the debt without interest and the great-grandson's liability arose only if he received any assets from the ancestors. The British Indian Courts have held that the son and the grandson are not liable for any debt unless they receive assets, and that the obligation of each of them, son and grandson, are co-extensive. The rule extends equally to great grandsons.

A reference to the Mitakshara, part. 1, Ch. 6, S. 3, would indicate how there has been a departure from the strict Hindu law.

The son's moral obligation to pay his father's debts was based on his religious duty to save his father's soul from unhappiness in the next world. It followed as a logical consequence that the duty would arise when the father died and his soul was in jeopardy ; or if the father was stricken by disease, or became insane, too old or had been away from the country for a long time, which period was fixed at 20 years, his sons should pay his debts. Again there was no pious obligation to pay the debts while the sons were minors. On the other hand, the obligation was absolute and wholly irrespective of any assets being received. It is also clear that this pious obligation existed both before and after the partition. It is doubtful whether there was any text authorizing an alienation in lieu of antecedent debts, as distinct from legal necessity or pressure. It is also doubtful whether the mere unequivocal expression of an intention to separate automatically brought about a complete separation in the joint status of the family. But judicial pronouncements have formulated certain principles of Hindu law in the light of commentaries and of the principles of justice, equity and good conscience.

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(6) [1874] 1 I. A. 231=14 B. L. R. 187=22 W. R. 56 (P.C.).

(7) [1880] 5 Cal. 148=6 I. A. 88=4 Sar. 1 (P.C.).

(8) [1886] 13 Cal. 21=13 I.A. 1=4 Sar. 682 (P.C.).

(9) A.I.R. 1926 P.C. 105=98 I.C. 1031=53 I.A. 204=48 All. 518 (P.C.).

The first principle is that the civil liability of a son based on his pious obligation is limited to the assets received by him in share of the joint family property or to his interest in the joint family property. The second is that this liability is not dependent on the majority of the minor sons. The third is that this pious obligation exists, no matter whether the father is alive or dead, and that the liability accrues immediately and the son is not entitled to wait for the lapse of a long interval of time. The liability is confined to the debts incurred previous to partition and does not extend to those incurred subsequently. A mere unequivocal expression of the intention to separate when communicated to the other members of the family brings about a legal separation, and a father is entitled to alienate joint family property in lieu of his own antecedent debts even though there may be no actual pressure at the time.

In the case before us, where the fathers are alive, the sons are minors, and they have also received assets as a result of the partition, it is to be seen whether it would be a departure from the Hindu law as recognized by the Courts if the doctrine of pious obligation were to be made applicable to the separated sons who have taken away a part of the family property without paying their father's debts.

It would be convenient to examine the reasons advanced for and against the son's liability in the recent Madras Full Bench case of *Subramania Ayyar* v. *Sabhapathi Ayyer* (3).

Waller, J., remarked that

> "he could see no reason why a partition should exempt a son's share from the liability for a prepartition debt for which it was liable before the partition. The creditor advanced money to the father on the credit of the joint family property. Why should he be deprived of all but a fraction of his security by a transaction to which he was not a party and of which he was not aware."

With great respect, this is conceding that a simple debt creates no charge and yet applying all the incidents of a charge to it. Similarly, the learned Judge remarked :

> " I conceded that it does not attach to post-partition debts, but, I am unable to see why a partition should have the effect of detaching it from prepartition debts."

Such an argument implies that there is a charge or a lien on the property. Jackson, J., observed :

> "A creditor may well say, I took the risk such as it was, of an alienation for family necessity, but I never expected to be confronted with a partition, undertaken voluntarily and under no necessity, which has resulted in my debtor having only a fraction of the assets previously available."

But was there necessarily any reasonable expectation ? The father might himself have transferred his property which could not be followed by the simple money creditor, and similarly the separated son can transfer it before it is attached. The creditor has nothing to complain in the one case more than in the other.

Similarly, Ayyangar, J., thought that it is difficult to see on what principle the creditor would lose that right simply because subsequently the father and the sons effected the partition among themselves. The learned Judge has, on p. 416 however referred to the Hindu law texts prescribing that the debts of the father should be paid at the time of the partition and only what is left should be divided. I shall take up this question in detail later on.

On the other hand, Ayyar, J., proceeded on the supposition that it was not a pious obligation of the Hindu son to pay his father's debt, but rather the power of the father to sell the family property in payment of his debts, which should be made the basis of the liability. The learned Judge concluded:

> "though the father's power of alienation and the creditor's right to proceed against the son's share are both based on the pious obligation of the son, still on a partition, what is put an end to is only the right of the father to alienate and not the right of the creditor."

The reply may be that the Hindu law texts based the liability on the pious obligation itself and not on the father's power to sell the son's share, and that their Lordships of the Privy Council also in all their pronouncements have put the liability on the same basis.

Coutts-Trotter, C. J., agreed generally with the reasons given by Ayyangar, J., and only added that the doctrine of pious obligation is an illogical relic of antiquity unsuited to any but a primitive and patriarchal society and therefore we must apply it within the limits made binding upon us by decisions, and further agreed that a father has power to alienate or charge any part of the property in lieu of his debts and the creditor's right is nothing but a right to exercise such power over the property.

I may, without meaning any disrespect, say that similar lines of reasoning have been adopted in the cases of the other High Courts which have been brought to our notice. As they are not binding upon us it is not necessary to discuss them in detail.

It seems to me that the true solution of the difficulty can be found if we consider the rights of a Hindu son to claim a partition of the joint property.

In none of the cases that have been cited before us there was any attempt made to base the liability on the nature of the partition itself. There was a brief reference to this matter in the judgment of Ayyar, J., at p. 416 of the Madras judgment quoted above. It has always been conceded that a collusive and fraudulent partition, whether it is private or by means of a decree of Court carried out with the intent to defraud, defeat or delay creditors, is not binding on such creditors; and that the son's liability continues for the father's simple debts even after such partition so long as any part of the family property remains in their hands. It has also been stated that a mala fide partition is not effective. But attention has not been focused on the question what is a bona fide partition.

Sometimes it has been assumed that as soon as the separation in status takes place, either by a very clear and unambiguous expression of an intention to separate communicated to the other members or otherwise, the sons not only become owners-in-common holding their legal shares in the gross assets but their liability to pay their father's debts also ceases. It has been assumed that it is the right of a separating member to take away his legal share in the gross assets of the family ignoring the simple money debts that may be due from the father. Even if the intention of the family be to give away shares to sons in order to enable them to defeat the claim of the simple money creditors of the father, it has been held at least in one case that the partition is effective to destroy the claims of such creditors. This position is utterly untenable.

A bona fide partition can only mean a partition which is not only fair with regard to the shares of the members of the family, but is bona fide as regards the creditors also. For the partition to be bona fide either all the existing debts of the father, which are not tainted with illegality or immorality, should be discharged before the division of the property takes place or at any rate adequate arrangements for their payment should be made. This may be done by dividing the assets as well as the liability among all the members, or by allotting sufficient property to the father in the first instance to satisfy all his debts, together with interest, which his creditors can claim within a reasonable time, and then giving him his legal share in the remainder on a par with his sons.

If the family sits down to divide up the gross assets without making any arrangement for the payment of the outstanding debts it is obviously ignoring the claims of the creditors. Such a partition cannot but be a mala fide one.

It has sometimes been thought that a Hindu son has an absolute power not only to claim a separation but also to get his legal share in the gross family assets without paying off the debts due by the father in the first instance. Judged from the point of view of the Hindu law such an assumption is a pure misconception.

Dr. Ganga Nath Jha, in his learned treatise on the "Hindu Law in its sources," Vol. 1, p. 202, onwards has quoted at one convenient place texts from ancient Hindu sacred books dealing with the liability of the son to pay his father's debts :

> "What is left after the discharge of the father's debts shall be divided by the brothers, so that the father may not remain a debtor: (Narad, 13, 32, vide, also Jolly's Translation, edited by Maxmuller Ch. 13, para. 32, p. 94)."

Dr. Jha has quoted a text of Katyayana and translated it as

> "the sons shall pay off the debts and the gifts promised by the father and divide the remainder among themselves (Katyayana)."

It may be noted here that perhaps owing to a defective manuscript this text was incompletely translated by Colebrooke in his "Digest of the Hindu law" Book 5, Ch. 6, S. 1, para. 369, p. 479, as

> "After delivering what is due as a friendly gift promised by the father, let the remainder be divided among the heirs."

Apparently the Sanskrit word corresponding to the word "debts" had either been left out in the manuscript by mistake or was omitted in the translation. Colebrooke quotes another text of Katyayana in para. 368 of the same chapter, p. 478:

> "On a partition by coheirs, all the wealth left by their father, or by his father and what they themselves have acquired by their joint efforts, shall be divided among them."

There are other texts from Katyayana also quoted by Dr. Jha. On p. 206 of his treatise we have another text:

> "On the father's death, so long as his debts remain unpaid, the sons receive his property, the son who inherits his property on his death shall pay the debts: Katyayana in Smriti-Chandrika.

Some of these texts are also discussed in Smriti Chandrika, Ch. 2, S. 2 para. 5, p. 342 in Ghose's Hindu law, Vol. 2.

It is therefore quite clear that the conception of the Hindu law was that the debts of the father should be discharged before the division of the property took place.

It has been contended on behalf of the sons that these texts relate to the division of the father's self-acquired properties only and not to the ancestral property. But the division of assets in the Hindu law books is not on any distinction of self-acquired and ancestral property of the father but on the basis of partitions in the lifetime of the father and after his death. There is nothing to suggest that the obligation to pay the father's debts before the division of the remaining assets is confined to his self-acquired property only and does not extend to the ancestral or joint family property in his hands. As the obligation was general, it would obviously apply to both classes of property when the partition of the joint family property takes place. As a matter of fact other texts of Katyayana quoted on p. 202 of Dr. Jha's book show that all binding debts have to be cleared when there is a partition by the coparceners.

As suggested by their Lordships of the Privy Council in *Brij Narain* v. *Mangla Prasad* (5) (at p. 102 of 46 *All.*) under the older laws of Manu, the son had no interest during the father's lifetime, perhaps he could not claim a partition, except in exceptional circumstances during the lifetime of his father. But it is quite clear that all the debts of the father had to be paid off or at any rate provided for before the estate was divided amongst the sons. So the case of the sons dividing the family property with the avowed object of defeating the claims of the creditors and making no provision for the payment of their debts is wholly repugnant to the Hindu conception of the son's rights and liabilities. A partition which is effected without providing for the payment of all the just debts, other than those which are tainted with illegality or immorality, no matter whether they be joint debts of the family or the separate debts of the father, is not a bona fide partition recognized under the Hindu law. It would therefore follow that if the gross assets only have been partitioned and either the private debts have not been discharged or no arrangement has been made for their payment by leaving sufficient property in the hands of the father, over and above his legal share in the net assets, the liability of the sons cannot come to an end merely because there has been a separation in the joint status of the family. The father can insist on the payment of all his debts before the actual division of the property. His right is not extinguished automatically by a mere legal separation. It follows that the creditors' remedy continues even after his legal separation and till the actual division, and if the division takes place in utter disregard of their right the partition is not a bona fide one and is not binding upon them.

On the other hand, if at the time of the partition there is an honest division of the net assets only, after making full provision for the payment of all the just debts of the father it seems difficult to hold that the sons have not discharged their pious obligation. There are three ways in which a proper arrangement can be made. The debts may be actually paid off, in which case no further trouble would arise. Similarly if the father's share is more than sufficient to pay off all his debts, no difficulty will be left. The debts may also be divided among the sons by a mutual contract. The liability to pay the debts may then perhaps be enforced in equity only against the son who has undertaken to pay it. It would be doubtful whether the simple money creditor has any civil right based on the pious obligation of the son which he can enforce. If property is sufficient to pay off the just debts (principal and interest) of the father in addition to his legal share in the remaining assets and the division is only of the net assets, the sons have obviously discharged their pious obligation to pay his debts. If the father does not thereafter pay his debts and by transfer puts the property out of the reach of his creditors, there is a breach of obligation on his part committed subsequent to the partition. I do not see on what valid ground the creditor can enforce the pious obligation of the sons twice over by proceeding against the property which they have received out of the net assets only.

No Hindu text has been brought to our notice which enjoins upon the sons the duty to discharge the pious obligation twice over. If the sons have provided for the payment, it ought to be as good as their actual discharge. There being no charge or lien on account of the simple debts, it would be against all principles of equity, justice and good conscience, and certainly not authorized by any known Hindu text, if the sons were to be called upon to pay the debts a second time.

Coming to the cases of our own High Court, the first is *Gaya Prasad* v. *Murli Dhar* (4). The Bench held that the separation of the family put an end to the creditor's right to recover his debt from the share of the separated son if the partition took place before attachment, even though it was with the express object of avoiding attachment and even if it had the effect of defeating or delaying the attachment. It was remarked that the mere fact that the object of the son was to save the joint family property from the hands of the creditors of the father would not render the partition voidable. In view of the reasons given above I would say, with great respect, that this case did not lay down the correct law. Sons cannot professedly partition the gross assets and refuse to pay the father's debts.

The second case is *Ram Saran Das* v. *Bhagwan Singh* (10), decided by a Bench of which I was a member. The invalidity of the partition was not challenged in appeal before us. Nor was it suggested that it was not a bona fide partition. Relying upon *Gaya Prasad* v. *Murli Dhar* (4), it was held that the effect of a partition between the sons and their father is to exempt their individual shares acquired on partition from liability to attachment in execution of a money decree against the father. As the bona fide nature of the partition was assumed in it, the case is no authority for the proposition that the same rule would apply to a mala fide partition where there is no proper arrangement for the payment of the father's debts.

The third case is *Ajudhia Prasad* v. *Data Ram* (11), decided by Young, J. and myself. In that case the family consisted of the grandfather, who was the manager, the father and his sons. In execution of a simple money decree against the father alone his share was sold at auction. When an objection had been raised by the grandsons it was expressly stated by the decree-holder that he had only put up for sale the rights and interests of the father, with which the objectors had no concern. We distinctly held that the rights and interests of the father alone had been sold and the combined interest of the father and the grandsons had not been sold. This finding was quite sufficient for the dismissal of the appeal. We however went on to observe, which was in the nature of an obiter dictum that as the father was not the manager the case did not come within the scope of any of the propositions laid down by their Lordships of the Privy Council in *Brij Narain* v. *Mangla Prasad* (5). We thought that in principle it seemed to follow that, in the absence of any express authority to the contrary, the interest of the minor grandsons could not be held liable for the personal debt of the father when the grandfather was alive and was the manager. I must confess that on a reconsideration I now think that this observation was incorrect. My learned brother Young, J., concurs in this view.

The propositions laid down by their Lordships of the Privy Council relate to joint families and cannot be considered as giving an exhaustive list so as to exclude the liability of a separated son.

The answer to the second question is simple. As regards debts incurred by a manager of a family, whether he be the father or not, which are required for family necessity or for family benefit, they are contracted on behalf of all the members who are represented by the manager in their dealings with the outside world. It cannot be doubted that the entire joint family property is liable for such debts.

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(10) A. I. R. 1929 All. 775=122 I. C. 673=52 All. 71.

(11) A. I. R. 1931 All. 131=130 I. C. 1.

"After separation the family members shall pay the family debt in proportion to their share in the inheritance (Vishnu): vide Dr. Jha's book p. 216."

On the other hand it is equally clear that the other members of the family not being his sons are not bound by his separate debts which are taken by him for his personal purposes.

Coming to the third and fourth questions which have been referred to us, it has been held by a Full Bench of this Court in *Anand Prakash* v. *Narain Das Dori Lal* (12) that where the father, who was the manager of the joint family owning ancestral property, was alone declared insolvent, his minor sons were under an obligation to discharge his debts, if not tainted with illegality or immorality that although the interests of the sons in the joint estate did not vest in the receiver upon the father's insolvency it was open to the receiver in insolvency to seize the sons' shares and sell the same in order to satisfy their father's debts. The decision was based substantially on the ground that in view of the pious obligation, the father had power to sell his son's interest also and that such power was "property" within the meaning of S. 28, Provincial Insolvency Act. The learned Judges distinguished the case of *Sat Narayan* v. *Behari Lal* (13) and affirmed the view previously expressed by Mukerji, J., and myself in *Om Prakash* v. *Moti Ram* (14).

Where the partition has not been a bona fide one in the sense referred to above, that is where the gross assets have been divided without making arrangement for the payment of the father's debts, the liability of the sons to pay those debts continues as before. The father's right to insist on the payment of his debts before the actual division of the property has not been extinguished inasmuch as the pious obligation of the sons has not been discharged. If the father is declared insolvent, the receiver who takes his place should have the right to enforce the same remedy.

The question whether this right can be enforced in the insolvency Court or by a separate suit, is purely a matter of procedure and not of substantive law.

Section 4, Provincial Insolvency Act, 1920, gives to the insolvency Court full power to decide "all questions whether of title or priority or of any nature whatsoever." S. 59 of the Act enjoins upon the receiver the duty of realizing the property of the debtor and distributing the dividends among the creditors entitled thereto by selling all or any part of the property of the insolvent. Simple money creditors cannot sue the insolvent separately, but must realize their debts through the insolvency Court. They have to prove their debts, but the realization of the assets and their distribution are to be done by the receiver. There is therefore no reason why the receiver should be compelled to go outside the insolvency Court and file a separate regular suit to enforce the payment of the creditor's debts out of the shares in the joint property, which have been taken by the separated sons, without making arrangement for their payment.

Lastly we come to the fifth question. It is clear that where a manager of the family has taken debts which are family debts, that is, debts taken for family necessity or benefit, they are debts incurred on behalf of all the members, and they are all liable to pay the same. On the other hand, if the managing member has incurred debts for his own purpose then the members other than his own sons and grandsons are not at all liable to pay the same out of their shares received on partition. If the debts had been contracted by the managing member and are family debts, then the insolvency of the manager would vest in the receiver the right to seize the property allotted to various members by partition without making provision for the joint debts.

As pointed out above the Full Bench in *Anand Prakash* v. *Narain* (12) held that the power of the father to sell the family property in payment of his own debts was "property" within the meaning of S. 28, Provincial Insolvency Act, and therefore vested in the receiver. The soundness of this decision is not in question before us.

The original Hindu texts, though laying down that the debts of the father must be paid before the division of the property, do not in express terms say that the father has the power to alienate family property in payment of his debts. But such power has been implied, and has now been held by the Full Bench to "property."

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(12) A. I. R. 1931 All. 162.

(13) A. I. R. 1925 P. C. 18=84 I. C. 883=52 I. A. 22=6 Lah. 1 (P. C.).

(14) A. I. R. 1926 All. 447=94 I. C. 175=48 All. 400.

In the case of debts incurred for family necessity by the manager, the latter has been given power by texts. There is the text of Brihaspati that the managing members of a joint family can make a mortgage, sale, or a gift of joint immovable property "during a time of distress, for the support of the family and for religous purposes." Dr. Jha in his book on p. 218 has quoted a text of Katyayana: "Debts incurred by the family members, for the maintenance of the family . . . . all these debts should be regarded as 'incurred under distressing circumstance' and shall be paid by the head of the family."

The manager is not merely an agent of the other members of the family some of whom may be minors newly born, but is also a joint owner. So long as the family is undivided his interest extends over the whole of the joint property and he has no defined share in it. He has power to alienate joint property to pay off joint debts of the family. When the manager has power to transfer the family property for payment of just debts of the family, I fail to see why in the case of the manager his power to sell should also not be "property" so as to vest in the receiver.

The question whether the remedy of the receiver to proceed against the joint property is in the insolvency proceedings or by a separate suit being purely a matter of procedure and not of substantive Hindu law, the principle enunciated in the Full Bench case of *Anand Prakash* (12) applies with equal force to the insolvency of the manager so far as the payment of family debts is concerned. If that case lays down the law correctly, there cannot be a different answer in the case of a manager so far as family debts are concerned.

It follows that if after his insolvency a partition takes place without making provision for the payment of the family debts it would not, as discussed above, be a bona fide partition at all, and will not be binding on the receiver. Such a mala fide partition cannot destroy the right to pay off the family debts which has become vested in the receiver. On the other hand, his insolvency after separation would vest no such right in the receiver.

Under S. 4, Provincial Insolvency Act, the Court has ample jurisdiction to decide against the other members whether particular debts are such as are binding on the family. Of course, the burden of proving that the debts are of such a nature will always be on the receiver, and the Court will have to try the issue as if in a regular civil suit after properly impleading the other members. If the issue is likely to be of a complicated nature, the Court has discretion under S. 4 to direct the receiver to proceed by a regular suit.

Therefore my answers to the first four questions are in the affirmative and to the fifth question in the negative.

Mukerji, J.—(After stating facts as given in the order of reference and the question referred his Lordship proceeded). The principle question is question 1, and there is a divergence of judicial opinion on it. The Madras opinion has now undergone a change and the majority of the Judges in a Full Bench case have definitely answered the question in the affirmative: see *Subramaniya Ayyar* v. *Sabapathy Ayyar* (3). In Bombay a Division Bench has taken the same view in *Annabhat* v. *Shivappa* (15) and a Full Bench decision in Oudh, *Raghu Nandan Prasad* v. *Moti Ram*, *A. I. R.* 1929 *Oudh p.* 406 (*F.B.*), has also answered the question in the affirmative. A Patna case, following the older Madras cases which are now to be treated as overruled, has accepted the old view as it prevailed in Madras, and has answered the question in the negative. In the Allahabad High Court the opinion was divided, the majority of the cases answering in the negative, and this has necessitated a reference to the Full Bench.

In this state of divided opinion among the highest Courts in India and there being no direct authority of the Privy Council bearing on the point it is open to us to examine the point raised independently and with reference to the texts of the Hindu law itself.

The peculiarity of Hindu law, as interpreted by the author of the Mitakshara, is this: that while on the one hand a son and grandson is allowed to acquire a share in the ancestral property jointly with the father and grandfather, they are laid under an obligation to pay the debt of the father and grandfather. The question therefore that arises is whether this liability to pay the debt is in any way dependent on the character of the estate acquired by the son and grandson by birth. In the case of the self-acquired property of the father or grandfather the law is the same as prevails in probably therest of the world, namely, the heir is liable for the debt of the deceased to the extent of the property inherited by him. Under the Mitakshara law, however in the case of ancestral property or in the case of a joint family property, the acquisition of right is not by inheritance but by birth and, therefore ordinarily there can be no question of any liability arising owing to the assets of a deceased person. A deceased person in such cases leaves no assets whatsoever.

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(15) A. I. R. 1928 Bom. 232=110 I. C. 269=52 Bom. 376.

If we closely examine the entire scheme of the Mitakashara law, we shall be able to understand what was really meant and how the conflicting interests of the father and grandfather have been reconciled with the interests of son and grandson.

So far as a debt is incurred for the benefit of the joint family, the liability of the whole family is there, irrespective of who may be the person who incurred the debt. Indeed the texts have gone even so far as to allow a liability to arise even where a servant has contracted a debt, in the interest of his master's family. For Manu says in Ch. 8, Sloka 167:

> "Should even a servant effect a transaction for the sake of the family, the master, whether in his own country or abroad, should not repudiate it."

The doctrine of legal necessity is well known and it authorizes, according to the text on which the doctrine is based, a single member of a joint Hindu family to transfer the family property. This doctrine is based on a text of Brihaspati as quoted by Ratnakara and has been translated as follows:

> "Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress for the sake of the family and especially for pious purposes."

The text is also quoted in the Mitakshara. Again the sage Yajnyavalkya, in Ch. 2, Sloka 46 says:

> "Any debt contracted in a joint family for the maintenance of the members thereof should be repaid by the head of the family. On his death or on his departure to a foreign country the member who inherited the property must repay it."

The question of joint family debt, therefore stands entirely on a different footing.

Now to go back to the apparent conflict between the interests of the father and grandfather on the one hand and son and grandson on the other, it appears that the liability to pay the debts of the father or grandfather has not been made dependent on the receipt of assets from the father or grandfather. It has been often stated that under the old Hindu law, the liability to pay the father's debt did not depend on whether or not the son or grandson had received any assets of the father or grandfather. This is stated by the author of the Mitakshara in his commentary in Part 1, Ch. 6, S. 3, para. 14. Indeed, the liability of the son or grandson to pay the debt of the father or grandfather, in a joint family could not, from the very nature of the holding of the family estate, be made to depend on the assets of the father or grandfather. There can be no assets of father or grandfather, unless he is separated from the rest of the family and then it would be a case of "self-acquired" property and not a case of joint family property. I shall presently quote texts of undoubted authority to support the view of the author of the Mitakshara, but, at present, I would point out that the author of the Mitakshara treats the question of debt as a thing entirely apart from the questions of the constitution of the family, the nature of the property and inheritance. In Ch. 1 Ss. 1 to 6, of the Vijnaneswar (the author of the Mitakshara) deals with the nature of property, the question of inheritance, and the nature of joint family property. Then he deals with cases of pure inheritance and other matters. Lastly, he comes to treat of "debts payable by whom and when." It will thus be noted that, under his scheme, the question of debt is a question which is entirely independent of the nature of the property or how the property is held by the several members of the family.

As is well known, the Mitakshara is a commentary on the Smiriti of Yajnyavalkya. It will therefore be interesting to know that the sage himself says on the question of father's debt. I have already quoted a text, being Ch. 2, Sloka 46, from Yajnyavalkya, which deals with joint family debt. After this sloka, in the 47th sloka Yajnyavalkya points out that a woman is not bound to pay a debt contracted by her husband on her sons or her father unless it is contracted for the maintenance of the family. In the 48th sloka, the sage deals with the cases in which a son is not bound to pay a father's or grandfather's debt. This sloka is the basis of the doctrine by which a son or grandson is not made liable to pay an ancestral debt which is tainted with immorality. Sloka No. 49 deals with the debts incurred by women who are members of a certain profession and among whom the women take as much part in the profession of the family as the men themselves. It is there laid down that where such women contract debts the husbands are also liable to liquidate them. In Sloka No. 50 the sage deals with the case of a debt contracted by a woman either alone or with her husband and, he lays down that in such a case the woman must repay the debt. Next comes the Sloka 51 (the most important text bearing on the question before us). It may be translated as follows:

> "If the father or the grandfather be long absent in a distant country, be dead or be suffering from an incurable disease the debt contracted by either must be repaid by the son or the grandson; in case of denial the claim must be established by evidence."

We thus see that the payment of the debt of the father or grandfather is not made dependent on receipt or acquisition of any assets. The sons and the grandsons are to pay where the father or the grandfather is unable to pay.

On the basis of this text it has been sometimes urged that the liability of a son or grandson to pay the debt of the father or grandfather does not arise till the father or grandfather has died. This is true in one sense and is untrue in the sense in which the doctrine is often sought to be utilized.

A father or grandfather, so long as he is alive, is bound to pay his own debt and if he is unable to pay the debt from his own earnings or from the profits of the joint family property, he is entitled to pay it out of the whole joint family property and this for the simple reason that the son and grandson must pay the debt where it is left unpaid. As I have already said, the question of debt, so far as the father or grandfather is concerned, is treated as a matter which has no concern with the nature of the family property, that is to say, whether it is self-acquired property or ancestral property. There being a debt in existence, it is to be paid by the father or grandfather and where either from absence or from disease or other incapacity he is unable to pay, the son and the grandson must pay the same. For the payment of his own debts a father or grandfather is the absolute master of the entire family property and no question of payment of the debt by the son or grandson in the lifetime of the father or grandfather can ever arise in the circumstances.

On this point, it would be interesting to recall the doctrine of antecedent debts. It is well-established law that a father or grandfather is entitled to sell the entire family property including the interests of his sons and grandsons to pay his own debts where such debts are not tainted with immorality. It has been often said, but quite incorrectly, that the doctrine of antecedent debt is a creation of the Privy Council and has no basis in the Hindu law itself. Nothing could be more wrong than this. Hindu law was a living law when the British took up the administration of justice in the country. To ascertain the Hindu law, pundits or persons versed in that law were employed to expound the tenets and the doctrines, and it was because the Courts were advised and correctly so, that a father or grandfather in his lifetime could pay his own debts out of the entire property available, that the doctrine of ancetedent debts came to be acted upon by British Indian Courts. It could not have been a pure invention on the part of High Courts or the Privy Council.

To go back then to the question of the liability of the son and grandson to pay the debt of the father or grandfather, that liability is absolute and arose only when the father or grandfather failed himself to pay the debts. This failure would arise in spite of family property being available, only when the father or grandfather died or went abroad and was not likely to return shortly. It will be remembered that in the days when these doctrines were laid down, the

Hindu was a migrating race and the prohibitions against crossing the "black seas" had not been imposed. If then the father, or grandfather was entitled to dispose of the entire property in which the son or grandson had an interest by their very birth, in order to pay his own debts, it would follow that a partition of the family property could take place only when there were no debts of the father or grandfather left to be repaid. So long as there was a debt to be repaid, the father or grandfather would insist on paying the same before a partition took place. As the father or grandfather had an absolute right to pay his debt, no son or grandson could possibly object to the repayment of the debts before effecting a partition. A perusal of the texts of Smriti dealing with debts will show that under the Hindu law, the nonpayment of a just debt was regarded as a very heinous sin. We should therefore not at all be surprised if we find that a partition of the family property was directed to be effected only after the payment of the ancestral debts.

A very valuable book has recently been published by the able and learned Vice-Chancellor of the Allahabad University, Dr. Mahamahopadhaya Ganganath Jha, under the name of 'Hindu Law in its Sources.' The learned author has compiled the various rules of Hindu law on several questions, and among others on the question of payment of debts. I shall freely quote from this book as quotations are all supported by reference to the original texts where they are still available, and by reference to the books where the texts were quoted in the cases where the original texts are no longer available.

At p. 202 of the book, quotation No. 210 is from the Smriti of Narada and has been translated as follows:

> "What is left after the discharge of the father's obligations after the payment of father's debts shall be divided by the brothers; so that the father may not remain a debtor: Institutes of Narada, Ch. 13, Sloka 32."

Dr. Jolly's translation of the same sloka runs as follows:

> "What remains of the paternal inheritance over and above the father's obligations and after payment of his debts may be divided by the brethren so that their father continue not a debtor."

In Dr. Jha's book p. 202, quotation No. 211 is from Katyayana. The translation is as follows:

> "The sons shall pay off the debts and the gifts promised by the father and divide the remainder among themselves."

Colebrook, in his translation of what appears to be the same text, has omitted the word "rinam" or debts: vide Colebrooke's Digest, Book 5 text No. 369, Vol. 5, page 479.

If the gifts promised by the father take precedence over partition, the debts of the father have stronger claim to precedence. There can therefore be no doubt that in translating the text Colebrook omitted the word "debt" either from inadvertence or because the text that was supplied to him for translation was incomplete.

The quotations No. 212 and 213 at p. 302 of Dr. Jha's book all go to show that the correct rule is to pay the debts of the father or grandfather before dividing the family property. At p. 204, Dr. Jha quotes another text from Katyayana and translates the same as follows:

Quotation No. 219:

> "Even when the father is alive if he is stricken by disease or has gone away from the country, his son shall pay the debts after 20 years."

The fixing of time limit of 20 years is meant to see if the father is returning home or recovers. The idea is that the father is to pay the debts, but where he is unable to pay the same, the sons must pay. Manu in Ch. 9, Sloka 218, lays down:

> "After due division of the paternal estate if any debt or estate of the father be found out let the brothers equally divide the same among themselves:" Translation by Monmathanath Shastri, M. A., published for the Society for the Resuscitation of the Indian Literature.

It is clear therefore when even after partition a father's pre-existing debts (prepartition debts) be discovered the sons are enjoined to pay the same rateably to their shares.

On the Hindu law texts, texts which are all of undoubted authority, the liability of a son or grandson to pay the ancestral debt stands supreme and stands irrespective of whether he has got or not any assets of the father or grandfather. It is also clear on the original Hindu rule of law, that a father or grandfather had an absolute right to have recourse to the entire family property including the shares of his sons and grandsons to pay his own debts. It is also clear that if a pre partition debt be discovered, it is the duty of the sons and grandsons to pay the same in proportion to their respective shares taken by them in the family property.

Such being then the law, is it open to the members of a joint Hindu family, consisting of a grandfather, sons and grandsons, to defeat the right of the creditors of the grandfather simply by sitting down and dividing the family property, ignoring the entire debts of the grandfather? In other words, if, as is undoubtedly the law as recognized in the British Indian Courts, the creditor could enforce a sale of the entire family property to recover the grandfather's debts, could the members of the family nullify that right by simply telling the creditor:

"Although all that property which you could sell are still in our possession, we won't pay you because we have now divided up the property and the worst that you can do is to sell the share which we have given to the grandfather?"

It is true a simple creditor has no charge on the property, but it is not a charge that he seeks to enforce. A simple creditor has no charge on his debtor's property, yet so long as the debtor has not transferred any property and is in possession of the same, the creditor can enforce his remedy against that property. When the debtor sells a portion of his property and the sale is a bona fide one, the creditor loses that property from his remedy against it, but that is because a third party has purchased the property for a consideration. In the case before us, to pay the grandfather's debt, the sons and grandsons are equally liable, the property in their hands is liable, no portion of it has passed out of their possession for a consideration, and yet it is contended that they should be allowed to say that by virtue of a partition among the very debtors themselves, the creditor's remedy is virtually gone. If this were the law, it would be a very bad law indeed.

The argument which is advanced on behalf of the sons and grandsons is this: The grandfather has a right to sell the family property to pay his own debts only so long asthe family is joint and he loses it the as ent the property is partitioned. But this is not a correct proposition of low. I have shown fromthe holy texts that this is not the idea of Hindu law. A partition must be preceded by payment of debts, but even if this had not been provided for, on ordinary notions of fairness, the entire assets available to the creditor could not have been taken away, by virtue of an act of those who were virtually debtors themselves.

No equity whatsoever comes into play in favour of the sons and grandsons who profess to have partitioned the property. Then again, no text of Hindu law has been quoted to show that the father or grandfather's right to pay his own debts out of the family property exists only so long as the family property remains undivided. It is true that if a debt is contracted after partition, the matter would be different. That is because the separation has come about before the debt was contracted and it cannot be said the father was contracting debts on the faith of property which was neither in his possession nor under his control. It may be that under strict Hindu law the separated sons' liability would still exist, but the modern notions of equity will not probably permit of the rules being strictly enforced. I have already shown above that the liability of the sons and grandsons to pay the debts of the father or grandfather was never regarded by the Hindu law-givers as being dependent on the nature of the property. Therefore it is not correct to say that a partition without paying the pre-partition debts of the father or grandfather will prevent a creditor of a pre-partition debt from enforcing his remedy against what was the family property before partition. For the foregoing reasons I would answer question 1 in the affirmative.

Question 2 is not at all difficult to answer. Where a debt is contracted for the benefit of the family, all the members of the family are liable to pay the same and the liability arises on the principle of representation. There is a large number of texts of Hindu law which recognize such liability and I may refer to without quoting them, the several texts quoted in Dr. Jha's admirable book: see quotations Nos. 252 to 254 at pp. 215 and 216, again Nos. 258 to 260 at pp. 216 and 217. Before however the creditor proceeds against the whole of the family property he has to obtain a decree against the members whose property he wants to seize in execution and establish the liability of such members for the debt. The liability may be there but it has to be established by means of a decree. I would answer question No. 2 also in the affirmative.

Question 3.—It has been urged on behalf of the appellants that although it may be open to a father or grandfather to sell the entire family property to pay his own debts, it is not open to a receiver in insolvency to proceed to sell the shares of the sons and grandsons in the insolvency proceedings. It is conceded that the receiver would be entitled to proceed against the sons and grandsons by way of suit, to establish their liability by means of a suit and then to enforce that liability by execution of a decree. But it is urged that a remedy by way of taking proceedings in the insolvency proceedings themselves is not open to the receiver. I really do not see that there is any substantial basis for this argument. A receiver, it is said, does not represent the creditors, but he represents the judgment-debtor. As a matter of fact, a receiver is neither a representative of the insolvent purely, nor is he purely a representative of the creditors. He is an officer of the Court and he has been created by the legislature to simplify procedure and to minimize the trouble of an indebted person and of his creditors. The scheme of the law of insolvency is well known and is this: The receiver is to take hold of all the properties of the judgment-debtors, i. e., all the properties which are available to the judgment-debtor to utilize for the payment of his debts are available to the receiver for the same purpose. The creditors are estopped from pursuing their usual remedy against the debtors by means of suits and executions. They have to go to the insolvency Court and prove their right to be paid and when they have done so, the receiver takes up their case and pays them either in full or rateably according as the assets of the insolvent will allow. If the creditors themselves could proceed against all the family property to recover their debts payable by the grandfather or the father, I fail to see why, on principle, the receiver should not be entitled to pursue the same remedies which are open to the creditors. The only difference is that the creditors are no longer entitled to proceed by suit and execution and the receiver is also not entitled to proceed by suit or execution, except where the Court grants sanction for the purpose. The Full Bench decision of the Madras High Court in the matter of *Balusami Ayyar* (1) has been relied on on behalf of the appellants. With all respect, I fail to see eye to eye with the decision and have no hesitation in answering the question in the affirmative.

Point No. 4.—In the circumstances mentioned in the question, namely, where a simple money debt, binding on the entire family, remains unpaid and the members of the family enter into a partition without making any provision for the payment of the family debt, there can be no doubt, that the creditor may bring a suit against all the members of the family and obtain an adjudication to the effect that the debt was incurred by the head of the family or other members of the family for the benefit of the family, and on getting a decree, may proceed to attach and sell the individual shares of the divided members of the family and realise the money. The question now to be answered is whether, if the principal members of the family, who, we take it, incurred the debt are declared insolvents, can the receiver in insolvency have recourse directly to the shares of the members who have not been declared insolvents, in the order to realise the debts payable by the insolvent?

Now there is an essential difference between the right of a father to sell his sons' share in the family property to pay his own debts, and the power of a manager or managers of a family to pay the debts incurred by them, as managers of the family out of the shares belonging to the other members of the family. Suppose *A*, *B*, *C* and *D* are members of a joint Hindu family and *A* is the manager, *B*, *C*, and *D* not being sons of *A*, but being say, brothers and nephews of *A*. *A* borrows a sum of Rs. 1,000 from *E* on a promissory note in order to pay arrears of land revenue or say for the marriage of *B*'s daughter. If *E* brings a suit for recovery of the money against *A* on the promissory note and recovers a decree, he cannot, in execution of that decree, attach the shares in the family property, belonging to *B*, *C* and *D*. In execution of the decree he can bring to sale only the individual share of *A* and no more. If however *A* were the father of *B*, *C* and *D* and then if the decree were against *A* alone, *E* would be entitled to take out execution against the entire family property belonging to *A*, *B*, *C* and *D* and to sell it, on the sole ground that *A* was the father of *B*, *C* and *D*. The only case in which *E* would not be able to attach and sell the entire family property would be the case of the debt being tainted with immorality.

The difference between the father's position and the position of the manager of the family who was not a father, was clearly recognised by their Lordships of the Privy Council in the famous case of *Brij Narain* v. *Mangla Prasad* (5) (at p. 104 of 46 *All.*). In respect of the managing coparcener of a joint undivided estate their Lordships simply said :

> "The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* the manager except for purposes of legal necessity."

But in the case of the father and sons their Lordships said that the father could:

> "lay the estate open to be taken in execution proceeding on a decree for payment of that debt."

The same could not be said of a simple money decree made against the managing member of family even if the debt were incurred for family necessity.

On the Hindu law texts, there can be no manner of doubt that the power of the managing member of a family to bind the other members in respect of debts incurred by himself arises out of the principle of agency, arising out of a necessity alone. It is not the case of the manager being appointed an agent by other members of the family some of whom may undoubtedly be minors.

Let us consider this point at length. The Mitakshara in Ch. 1, S. 1, placitum 27, points out that the family property is meant for the support of all, whether born or unborn, and therefore no gift or sale can be made of the family property. Then (in placitum 28) the learned author says that there is an exception to this principle. The exception, he points out, is based on a text of Brihaspati as quoted by Ratnakar and runs as follows:

> "Even a single individual may conclude a donation, a mortgage, or a sale of immovable property, during a season of distress, for the sake of family and especially for pious purposes."

It will be noticed that the rule is that there will be no sale of family property and the exception is necessity. The right of an individual member to transfer the property arises because necessity constitutes itself the agent of other members. Can it then be said that the individual member has a "power" to sell or transfer, which may be described as "property" which may be transferred or vested in a receiver as the property of the individual? This "power to transfer" is not confined to the managing member. The words "even a single individual" exclude the idea of the managing member. Indeed, in the case of payment of a debt incurred from necessity the texts have gone so far as to say that where even a servant incurs a debt for the benefit of the family, it is the duty of the master to pay the same: see for example Manu 8, S. 167, quoted at No. 270, p. 219 by Dr. Jha in his admirable book "Hindu Law in its Sources." The translation is as follows:

> "Should even a servant effect a transaction for the sake of the family, the master, whether in his own country or abroad, should not repudiate it."

The commentator Medatithi comments on this sloka as follows:

> "During the master's absence, whatever the servant does for the maintenance of the family must be held to be valid."

Now, no doubt, the creditor may bring a suit against the servant for the money borrowed by him for his master's sake. Can the creditor then, by obtaining a decree against the servant proceed to sell the master's property because the servant borrowed the money for the master's family necessity and the Hindu law enjoins it as the master's duty to pay the same? No doubt, if the creditor brings the suit against the servant and the master both, or against the master alone, on the ground of implied agency in the servant to contract the debt, the decree, when obtained, will be executable against the master's property. Nobody would say that the servant had a power to sell the family property and that power to sell may be utilized by the servant's receiver in insolvency and the receiver may seize the master's property to realize the debt.

There are numerous texts which have been all collected together from the Smritis to show that debts incurred for family necessity, by whomsoever it may be, must be paid by all for whose benefit the debt has been incurred. For these texts see Dr. Jha's "Hindu Law in its sources," pp. 215 to 217, paras. 252 to 270.

Now to go back to the question before us, we have to decide whether a debt incurred individually by a single member of the family, for the benefit of it, can be realized in the insolvency jurisdiction of a Court when the borrower alone has been declared to be an insolvent? The liability of the several members of the family who are not insolvents has to be declared by a suit by the creditor or receiver in insolvency and when a decree is obtained against the individual members, in execution of that decree the individual shares of the non-insolvent members may be brought to sale. In the illustration given above, let us take it that *A* becomes an insolvent on account of the promissory note of Rs. 1,000 that he executed in favour of *E*. Now if *A* could make out a case of "distress" and sell a portion of the family property to pay off the debt incurred by him under the promissory note, he, no doubt, might effect a sale which would bind the individual members of the family. But if there be no case of "distress", *A* would have no right to sell any portion of the family property simply because he had to borrow money on a particular occasion to meet a family necessity.

Take, for the sake of example, this case: The family consists of *A*, *B*, *C* and *D* and has a large property consisting of Government promissory notes and landed property. The Government promissory notes, let us further take, yield Rs. 5,000 every six months as interest, payable on 15th March and 15th September every year. Now suppose the land revenue payable in May has remained unpaid, and on 1st September this being sought to be recovered by the Collector's peon, by the arrest of the manager of the family. The manager borrows money from the village banker by executing a promissory note for Rs. 1,000 and pays it. He knows that 15 days later he would recover Rs. 5,000 from the Government Treasury as the interest of the Government promissory notes and he would pay up the banker. Surely, after borrowing Rs. 1,000 *A* could not be entitled to sell a part of the zamindari property so as to bind the other members of the family, although 15 days later a sum of Rs. 5,000 was available in order to pay off the debt. There is no case of "distress" which would justify an individual member of the family to sell a portion of the family property, but if *A* be the father and if *A* should sell a part of the family property on 10th September (having incurred the debt of 1st September) the sale would be binding on his sons *B*, *C* and *D* it being a bona fide sale in payment of an antecedent debt. In the father's case there is no question of "distress".

It will be seen from a study of the above illustration that there is an essential difference between a father's right to sell his sons' property to pay his own debts and the "emergency power" of an individual member or even a servant to enter into a transaction in case of distress. All debts are not incurred because of distress, and although a liability may be there to share a particular debt incurred by one of the members of the family, it does not follow that the person who incurred the debt is entitled to sell the property.

Then again, the several members of a joint family who are not the debtor but who have separated from the manager may escape liability by contributing their individual shares to the debt incurred for the family. If the individual quota is paid up there is no question of selling the shares.

I trust I have said enough to show that in the case of any member of the family, not being the father, whether he be the manager or not, it cannot be said that he has a right to sell the family property simply because he has an "emergency power" and it cannot be said that the other members of the family are liable to have their shares in the family property to be sold, as if they were the principal debtors.

It has been said that if the non-insolvent members of the family may be proceeded against by a suit, why should it not be possible for a receiver to proceed by way of an application before the insolvency Judge in order to establish the liability of the non-insolvent members of the family and then, after establishment of the liability, to proceed to execute, as it were, the decree so obtained. The suggestion may be plausible, but surely it is not safe or even right. The insolvency Court has a limited jurisdiction and only in matters where the jurisdiction has been granted that it may be exercised. The procedure in the insolvency Court is more or less summary. The right of appeal is limited. Then the right of appeal is not always to the same Court. For example, if a Subordinate Judge is declared to be an insolvency Judge, an appeal from his judgment, whatever may be the value of the property involved, would go to the District Judge, and not to the High Court. The insolvency Court then is a Court of limited jurisdiction and simply because in certain cases it has the power to decide questions of title that arises regularly and properly before it, it does follow that it is entitled to decide all suits and cases that do not fall within the purview of the Court.

Take for example the case of the insolvent's debtors. The insolvent may have 200 debtors. The receiver may say:

> "The insolvency Court may decide under S. 4, Provincial Insolvency Act, all questions of title. Why should I go to other Courts to realize the money due from the insolvent's debtors. Why should I not make appiications before the insolvency Court asking it to adjudicate upon the liability of the insolvent's debtors and then proceed to enforce the liability by seizing the debtor's property."

But the question of the liability of a third party does not fall within the jurisdiction of the insolvency Court, and however convenient it may be to the receiver to apply to the insolvency Court, he must go tothe regular Court to obtain a decree against the debtors of the insolvent. In the case under consideration the liability of the non-insolvent members of the family has to be established. The non-insolvent members are in no way under the jurisdiction of the Court. They are not sons of the insolvent, whose (sons') property is as good as the insolvent's to pay the insolvent's debts. Therefore there is no analogy between the case of an insolvent father and the case of a manager of the family who has become an insolvent. In the father's case it is enough that the father is a debtor, to seize the son's share for sale. The son must allow his share to be sold unless he can show that the particular debt sought to be realized is tainted with immorality. But in the case of an insolvent manager of a Hindu family there is no liability of the shares of the other members of the family. In particular cases the other members of the family may be liable to contribute to the payment of the debt incurred by the insolvent manager. It is only when that the non-insolvent members fail to pay that the question of the sale of their property in execution may arise. In the case of the son, as I have mentioned more than once, the son's share is as good as the father's share.

Let us look to S. 4, Prov. Ins. Act. Sub-S. (2) points out the cases in which a decision of the insolvency Court will be binding and final. These must be questions

> "between, on the one hand, the debtor and the debtor's estate and on the other hand all claimants against him or it, and all persons claiming through, under them or any of them."

A claim by the debtor or on behalf of the debtor's estate cannot be litigated in the insolvency Court. This follows from the language. When a receiver of the estate of the managing members will ask for an adjudication as to the liability of the other members of the family to contribute to the debt, he will be enforcing a claim by the insolvent estate against third parties. For this the insolvency Court has no jurisdiction.

On a consideration of the entire law I am of opinion that it is not open to the receiver in the case of insolvency of principal members of the family to seize the property, received by the other members of the family not declared insolvent to pay the family debts. The receiver may proceed by suit in the proper Court for establishment of the liability of the non-insolvent members, and on recovering a decree may proceed by way of execution.

Point No. 5.—For reasons given on Point No. 4 my answer to Point No. 5 is that when the managing member of a joint Hindu family is adjudicated an insolvent on debts contracted as managing member and the other members of the joint family bring a suit for partition subsequent to the application in insolvency, the receiver is not entitled to sell the property allotted to members of the family other than the insolvent. But the receiver may bring a suit in the Court of proper jurisdiction (not being the insolvency Court) against the divided members of the family and establish their liability, and having done so may proceed to execute the same.

Banerji, J.—I agree with the conclusions arrived at by the Ag. C. J., and for the reasons given by him.

Young, J.—With regard to the answers to questions 1 to 5 I agree with the Ag. C. J.

Bennet, J.—I agree with the judgment of the Hon'ble Ag. C. J., on all points.

By the Court.—The answers to the first four questions are in the affirmative and the answer to the fifth question is in the negative.

R.K. *Reference answered.*

A. I. R. 1931 Allahabad 533

MUKERJI AND BENNET, JJ.

Satya Nidhan Banerji—Defendant—Appellant.

v.

Muhammad Hazubber Ali Khan—Plaintiff—Respondent.

First Appeal No. 219 of 1930 (connected with F. A. F. O. No. 220 of 1930), Decided on 23rd December 1930, from order of Dist. Judge, Shahjahanpur, D/- 22nd August 1930.

(a) Agra Tenancy Act (1926), S. 249—" Order passed in appeal " explained.

Where an appeal is pending before a Judge any order that is passed with reference to that appeal is " an order passed on appeal. " [P 533 C 2]

(b) Interpretation of Statutes—Code dealing with suits and appeals—" Suit " has not same sense as " appeal. "

In a Code which deals with both " suits " and " appeals " it cannot be said that the word " suit " has been used in the same sense as the word " appeal. " [P 534 C 1]

(c) Agra Tenancy Act (1926), S. 3 (14)—Order dismissing appeal in default is not decree.

An order dismissing an appeal on default does not come within the definition of "decree" as given in S. 3 (14). [P 534 C 1]

(d) Agra Tenancy Act (1926), S. 249—Order refusing to restore appeal dismissed in default is not appealable.

No appeal lies from an order refusing to restore an appeal dismissed in default. [P 534 C 1]

A. P. Pandey and *N. C. Ganguli*—for Appellant.

Mukerji, J.—This appeal is against an order passed by the learned District Judge of Shahjahanpur by which he refused to restore an appeal which had been dismissed by him for default.

The preliminary point that arises is whether the appeal is competent.

It appears to us that S. 249, Agra Tenancy Act, being Act 3 of 1926, is conclusive on the point.

Section 249 runs as follows:

> " No appeal shall lie from any order passed in appeal. "

There can be no doubt that the order which is complained of is an order passed in appeal. When an appeal is pending before a Judge any order that is passed with reference to that appeal must be an " order passed in appeal. " In this particular case the learned Judge was not seised of any original suit or proceeding. He was exercising his appellate jurisdiction and the order complained of must necessarily therefore be an " order passed in appeal. "

If we look to the entire scheme of the Tenancy Act, 1926, we find that it starts with the heading, "Appeals from original decrees." Under it come Ss. 241 and 242. Next comes the heading. " Appeals from appellate decrees. " Under this heading come Ss. 243 to 246. Then comes the heading, " Appeals from orders. " Under this head come Ss. 247 and 248. The case under our consideration must come under the heading, " Appeals from orders. " It has not been contended, and it cannot be contended, that the order which has been complained of is a decree, it being an order which must come under the heading " Appeals from orders. " Now Ss. 247 and 248 deal with particular orders under which the present order does not come. S. 247 deals with orders passed by an Assistant Collector of the Second Class. Evidently these are orders passed in the exercise of original jurisdiction. In S. 248, sub-S. (1), the orders dealt with are clearly mentioned as original orders. Besides, they are orders passed by an Assistant Collector or a Collector. Sub-S. (2), S. 248, deals with the order passed by an Assistant Collector in charge of a sub-division under particular sections of the Act. Sub-S. (3) deals with orders by an Assistant Collector of the First Class or a Collector. These are orders passed in execution of a decree or orders which are not appealable as a decree but are appealable as orders. Sub-S. (4) of the same section deals with orders in which an appeal would lie to the Board of

Revenue. Apparently the order under consideration does not come under S. 248 at all. Then comes S. 249 and with that section the heading ends. We have already quoted that section. We see no reason why the particular order under consideration should escape from the operation of the general words used in that section.

The learned counsel for the appellant has drawn our attention to the definition of the word "decree" to be found in Cl. 14, S. 3, Tenancy Act, 1926. There "decree" is defined as this :

> "Decree means any order which so far as the revenue Court is concerned, finally disposes of a suit."

Now the order under appeal is, to start with, not an order passed by the Revenue Court. It has been passed by the District Judge. Secondly, the order does not profess or does not in effect dispose of a suit. It disposes of an appeal. The appeal no doubt is a continuation of a suit, but that is a different meaning altogether. In a Code which deals with both "suits" and "appeals" it cannot be said that the word "suit" has been used in the same sense as the word "appeal." Probably what was meant was that the word "decree" would include the kind of order described. But we cannot take it that the present order passed by a District Judge comes within the definition.

We may further point out that if the appeal was a continuation of the suit, it had been disposed of effectually and finally by the order which dismissed the appeal for default. The further proceedings that took place were for restoration of the appeal and therefore the result cannot be said to have finally disposed of the suit or the appeal. We think that this argument has no force.

We hold therefore that the order is not appealable and accordingly we dismiss this appeal under O. 41, R. 11, Civil P. C.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 534

SEN AND NIAMATULLAH, JJ.

Mahesh Narain Singh and *others* — Plaintiffs—Appellants.

v.

Besheshar Lonia and *others* — Defendants—Respondents.

Execution Second Appeal No. 1829 of 1929, Decided on 11th March 1931, against decision of 3rd Addl. Sub-Judge, Jaunpur, D/- 18th July 1929.

(a) Civil P. C. (1908), O. 21, R. 90—Defendant or judgment-debtor not raising plea of nontransferability of holding either in suit or execution—He is estopped from raising it by application under R. 90.

Where a defendant or a judgment-debtor has a right and opportunity to contest the suit or an application for execution upon a specific ground and has not availed himself of that opportunity with the result that the suit is decided against him or that the decree is allowed to be fully executed against him, he cannot be allowed to raise that point at a later stage of the case. Hence where the defendant does not contest the suit on the ground of the nontransferability of the holding at earlier stages of the case either in defence of the suit or in response to the notice issued under O. 21, R. 66 of the Code, he is estopped from raising the plea by his application under O. 21, R. 90 : *A. I. R.* 1926 *All.* 412 and *A. I. R.* 1921 *All.* 118, *Ref.* [P 535 C 2]

(b) Landlord and Tenant — In 1887 occupancy tenant relinquishing holding and obtaining patta from zamindar in perpetuity at uniform rate—Patta providing that tenant was to remain in enjoyment form generation to generation—Tenure sought to be created described as bataur sharamoian — Landlord held to have created transferable tenancy, S. 20 (3), Act of 1901, not being applicable to this case—Agra Tenancy Act (2 of 1901), S. 20 (3).

Apart from S. 20 (3), Act of 1901, there is nothing to prevent a landlord from creating a heritable and transferable tenancy.

In 1887 an occupancy tenant relinquished his holding in favour of the zamindar and obtained from the latter a patta in perpetuity at a uniform rate of rent. The patta provided that the grantee was to remain in possession and enjoyment of the holding from generation to generation, and the tenure sought to be created was described as bataur sharamoian.

Held : that although a zamindar by executing a deed in favour of a tenant could not make him a fixed rate tenant, still on a proper construction of the patta he must be held to have created a transferable tenure. There was nothing to prevent him from doing so in the year 1887, i. e., before the Act of 1901 was passed, the holding was therefore capable of being sold in execution of a decree ; 28 *All.* 747; *Cons.* 41 *All.* 323 and *A. I. R.* 1926 *All.* 412, *Dist.* and *A. I. R.* 1930 *All.* 315, *Rel. on.* [P 536 C 1]

(c) Landlord and Tenant — It is open to tenant to surrender his holding and to land-

lord to reconfer upon tenant same with enlarged powers.

If the landlord and tenant are agreed on improving the position of the latter *qua* the land held by him, it is open to the tenant to surrender his holding and to the landlord to reconfer the same upon the tenant with enlarged powers. [P 537 C 1]

Haribans Sahai—for Appellants.

Kedar Nath Sinha—for Respondents.

Sen, J.—This is an appeal from the appellate judgment of the Third Additional Subordinate Judge of Jaunpur oversetting a decision of a Munsif of the same district. Bisheshar Lonia executed a simple mortgage in favour of the plaintiffs-appellants on 15th September 1911. The security consisted of two houses, certain trees and a holding described as No. 12 and having an area of 1 bighas 19 biswas and 4 dhurs. This was originally an occupancy tenure held by the predecessors-in-title of the mortgagor. On 8th September 1887, Bisheshar Lonia appears to have relinquished the holding in favour of the zamindar Shah Mohammad Husain and obtained from the latter a patta in perpetuity at a uniform rate of rent. The patta provided that the grantee was to remain in possession and enjoyment of the holding from generation to generation. The leasehold property was therefore heritable. The document however did not prescribe any special rule of inheritance. The tenure sought to be created under this instrument was described as bataur sharamoian. The tenure created therefore was not the creature of statute but was the creature of a special contract and unless there was something repugnant to the statute or opposed to principles of public policy, such a tenure could be validly created by a zamindar.

The mortgagee sued on his mortgage and obtained a preliminary decree on 4th July 1924. A final decree was obtained on 4th December 1926. Bisheshar Lonia does not appear to have contested the suit on the ground that the holding was not transferable and that no decree for sale should or could be passed in respect of the mortgage security. On an application for execution being made by the decree holders for sale of this property, notice under O. 21, R. 66, Civil P.C., was issued to the judgment-debtor in due course, but the latter did not raise any objection on the score that the property was not saleable in execution of the decree. In due course, the decree was executed, the property was sold and eventually purchased by the decree-holders. The judgment-debtor applied under O. 21, R. 90, Civil P. C, for avoidance of the sale on the ground that the proceedings were vitiated by fraud and material irregularity in publishing and conducting the sale. He also contended that the property in dispute could not be sold in execution of the decree inasmuch as it was the occupancy holding of the judgment-debtor. These pleas were repelled by the trial Court and the application was dismissed on 19th November 1928.

The judgment-debtor preferred an appeal which was heard by the Third Additional Subordinate Judge of Jaunpur. The learned Judge agreed with the first Court that the judgment-debtor had failed to substantiate that the sale was vitiated by fraud or material irregularity in publishing and conducting the sale, but he held that in view of certain decisions of this Court the leasehold property was not transferable. Reliance was placed upon *Majid Husain* v. *Kurban Ali* (*A.I.R.* 1926 *All.* 412) and *Katwari* v. *Sita Ram* (*A. I. R* 1921 *All.* 118). He further held that, although the defendant had not contested the suit on the ground of the nontransferability of the holding at earlier stages of the case either in defence of the suit or in response to the notice issued under O. 21, R. 66 of the Code, he is not estopped from raising the plea by his application under O.21, R. 90, Civil P. C. I may state at once that I do not agree with the lower appellate Court on this point. Where a defendant or a judgment-debtor has a right and opportunity to contest the suit or an application for execution upon a specific ground and has not availed himself of that opportunity with the result that the suit is decided against him or that the decree is allowed to be fully executed against him, he cannot be allowed to raise that point at a later stage of the case.

To permit him to raise that point is obviously to take away that finality and repose which should, after a certain stage indicated by the statute, attach to all judicial proceedings and pronouncements, both upon the ground of public expediency as also in the interests of the parties concerned.

I am further of opinion that the lower appellate Court has failed to appreciate the nature and incidents of the mortgaged property. The property in question was not an occupancy tenure. The holding in the hands of the predecessor-in-title of the mortgagor was at one time an occupancy holding. Bisheshar Lonia however relinquished that holding in favour of the zamindar, and under the lease, dated 8th September 1887, he obtained a fresh tenure. And as already pointed out this tenure was not the creature of statute but was the result of a special contract between the parties. In some of its incidents, this tenure bore a close resemblance to a fixed rate holding, but it was not open to the parties to create a fixed rate holding by contract. It was held by Banerji, J., in *Bachchi* v. *Bachchi* (1) that a zamindar by executing a deed in favour of a tenant could not make him a fixed rate tenant within the meaning of S. 8, Act 2 of 1901. A tenant at fixed rates is "not a tenant who under a contract with the zamindar holds at a fixed rate of rent." I do not however agree with the view that where a zamindar confers upon a person a right to occupy land in perpetuity at a fixed rate of rent, he makes him thereby an occupancy tenant of that land. It may be noticed here that under the terms of that instrument dealt with in *Bachchia's* case (1) the lessor did not confer upon the lessee a transferable right and the question of transferability of the holding was not in issue in the case.

The decision in *Bhola Nath Tewari* v. *Suraj Bali Rai* (2) has been pressed upon this Court, but the point now under consideration did not arise there. I am not aware of any law which precluded a land holder in the year 1887 from conferring upon a tenant a heritable and transferable interest in the land. Upon a true construction of the lease referred to above, the zamindar intended to confer a right upon the lessee which was both heritable and transferable. The right to transfer has not been granted in terms. The document however provides that the property is to remain in the possession of the grantee from generation to generation and that he should possess all the rights as are possessed by a fixed rate tenant. These rights include the right to transfer. The bestowal of such a right did not contravene the tenancy laws of the land and was not opposed to public policy. The principle underlying a transaction of this description has been discussed by my learned colleague in a case reported in *Raghunath Tewari* v. *Buddhu Ram Tewari* (*A. I. R.* 1930 *All.* 315 at p. 317). I am in complete accord with his view. Reference has been made to the decision of this Court in *Majid Husain* v. *Kurban Ali* (*A. I. R.* 1926 *All.* 412). This case has no application to the facts of the case in hand. The lease in the present case was executed when Act 12 of 1881 was in force. There was no provision in that Act corresponding to S. 20, sub-S. (3), Act 2 of 1901. This subsection could not operate retrospectively upon the rights of the parties under the document, dated 8th September 1887. In my view the interest of the judgment-debtor in plot 12 was capable of being sold in execution of a decree. I would accordingly allow the appeal, set aside the order of the lower appellate Court and restore that of the Court of first instance.

Niamatullah, **J.**—I entirely agree. Apart from S. 20, sub-S. (3), Act 2 of 1901, which is not applicable to this case, there is nothing to prevent a landlord from creating a heritable and transferable tenancy by executing a registered lease in favour of the grantee. Where the lease expressly confers upon the grantee the right to transfer the holding or part thereof, no difficulty can arise. The law does not prescribe any particular mode or expression by which alone transferable rights can be conferred upon a grantee. The intention to create such rights may be expressed by any appropriate words employed in the instrument conferring them. In the case before us the landlord professed to create a fixed-rate tenancy, which is transferable. He must therefore have intended to confer upon the lessee all the rights which are enjoyed by a fixed-rate tenant including the right to transfer.

A fixed-rate tenancy in the technical sense cannot however, be created by a landlord for the obvious reason that a holding of that description as defined in S. 5, Act 12 of 1881, and S. 8, Act 2 of 1901, must be in a permanently settled district and the tenant must have held it from the time of the permanent settlement, conditions which, unless the tenure already exists, cannot be brought into existence by the landlord. As already stated there was nothing to prevent a landlord from creating a transferable tenancy, at any rate before Act 2 of 1901 was passed. Where the law provides a particular mode of devolution on the death of a tenant, it is not permissible for the landlord to create a tenancy carrying with it a different rule of succession. Any attempt to circumvent the rule of inheritance laid down by special enactment will be abortive. This question however does not arise in the case before us. All we are concerned with is whether Bisheshar Lonia had a transferable right in the land to which the lease in his favour related. If it is conceded that the landlord intended to confer upon him the right of transfer, as I think he did by the use of the word "sharahmoian" in the lease, nothing in Act 2 of 1901 which was subsequently passed could affect the right of transfer which he previously enjoyed.

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(1) [1906] 28 All. 747=(1906) A.W.N. 219.
(2) [1919] 41 All. 323=49 I. C. 357.

It has been argued that it is not open to a landlord to alter the terms of the tenancy already existing between the parties to a lease. Without expressing any opinion on the legal proposition involved in the contention, I am prepared to hold that the transaction we are concerned with was valid, even though Bisheshar Lonia was an occupancy tenant before he obtained the lease which considerably added to his rights. If the landlord and tenant are agreed on improving the position of the latter qua the land held by him, it is open to the tenant to surrender his holding and to the landlord to reconfer the same upon the tenant with enlarged powers. In the case before us this is what happened in substance. Bisheshar Lonia agreed to accept the rights mentioned in the lease granted to him. The landlord who was equally willing to confer those rights should be deemed to have accepted the surrender implied in the act of the tenant and to have made a fresh grant in terms stated in the lease. For these reasons I am clearly of opinion that the argument above referred to is not sound. For the foregoing reasons I am in agreement with the view expressed by my learned colleague. The decree passed by the lower appellate Court is not sustainable and I agree in the order proposed.

S.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 537

MUKERJI AND BENNET, JJ.

Ram Sewak Kueri—Appellant.

v.

Ram Rup Teli and *another*— Respondents.

First Appeal No. 16 of 1930, Decided on 23rd December 1930, against order of Second Addl. Sub-Judge, Jaunpur, D/- 13th December 1929.

Deed—Construction—Mortgage bond—Default in paying interest is not act of bad faith.

Where the annual interest was payable and the deed stated that "in the case of default of payment at the time fixed or on the discovery taking place within the stipulated period of any act of bad faith, the creditor would be entitled to recover his money, principal and interest, in any way by filing a suit."

Held: that the act of bad faith which the parties had in contemplation was not the mere default in the payment of annual interest. A person failing to pay interest might be causing a breach of contract but could not in the usual sense be said to be acting in bad faith. "Bad faith" would connote some other acts, e. g,, destruction of the property mortgaged by the mortgagor etc. but not failure to pay interest which may be due to mortgagor's negligence or inability to pay it at proper time. [P 538 C 1]

Shiva Prasad Sinha—for Appellant.

Haribans Sahai—for Respondents.

Bennet, J.—This is a defendant's appeal against an order of remand by a lower appellate Court. The plaintiff brought a suit for sale on the basis of a mortgage bond executed on 12th May 1912 by Muneshwar, the father of the defendant in favour of Bihari Lal, the predecessor of the plaintiff for Rs 400. This bond provided for interest at the rate of 14 annas per cent per mensem, and it further provided that interest would be paid yearly. There was no stipulation in the bond for the payment of compound interest. The bond provided that the principal would be paid within five years. The defence which has been urged before us is that the bond is time barred because the period of limitation should run from the end of the first year, that is, 12th May 1913 when as is admitted, no interest was paid. The suit was not brought until 9th April 1929, and this is within a period of 12 years from the date when the principal money became due under the bond, that is, 12th May 1917. The question therefore in appeal turns solely on the construction of certain provisions which the defendant claims relate to the failure to pay annual interest. The provisions are as follows:

> "*Dar surat wada khilafi ya andar wada kisi tarahki bad ahdi zahur pizir ho to dayan ko ikhtiyar hasal ho ga jis tor se mumkin ho basabil nalish mubligh mazkura bala asal mai sud wasul kar lewe.*,'

It is argued for the appellant that these words cover the default of the payment of interest. We consider that the use of such words for this purpose would be a very extraordinary use, and no authority is shown for the proposition that these words are used in that sense. We would translate the particular words as follows:

> "In the case of default of payment at the time fixed or on the discovery taking place within the stipulated period of any act of bad faith then the creditor would be entitled to recover his money, principal and interest in any way by filing a suit."

We consider that the act of bad faith which the parties had in contemplation was not the mere default in the payment of annual interest A person who fails to pay interest cannot in the usual sense of the words be said to be acting in bad faith. He is no doubt breaking a term of his contract but he is doing so either from negligence or from inability to pay, and it does not appear that there is any question of bad faith in his action. It was contended by the learned counsel for the appellant that these words could not bear any other meaning. But we consider that under the circumstances of this case it is quite possible that they could bear another meaning. The property in question which was mortgaged consisted of a house and zamindari and in the deed there was a recital that this property was free from all encumbrances. One act of bad faith which might become apparent during the period stipulated would be the fact that there had been some previous incumbrances which the mortgagor had concealed from the mortgagee. Another act of bad faith could be the destruction of the property by the mortgagor such as by burning intentionally this house. There is therefore a meaning which might be attached to those words and we consider that the meaning which the appellant desires to attach is a meaning which the words would not cover in their ordinary sense. Accordingly we hold that the meaning placed by the lower appellate Court on this condition in the mortgage is the correct meaning. There was therefore no default by the mortgagor which would entitle the mortgagee to realize the whole of the mortgage money within the period of five years. Limitation therefore dates from the expiry of the period of five years and the suit is within time. Accordingly we dismiss this appeal with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 538

MUKERJI AND BENNET, JJ.

Collector of Etawah — Decree-holder — Appellant.

v.

Bindraban — Judgment-debtor — Respondent.

Execution First Appeal No. 118 of 1930, Decided on 18th December 1930, against decision of Sub-Judge, Mainpuri, D/- 26th November 1929.

Civil P. C. (1908), O. 20, R. 12 (2), and S. 47—Assessment of mesne profits is proceeding in suit and not in execution—Plaintiff should assess mesne profits and pay court-fees—Court-fees.

The assessment of mesne profits is a proceeding in the suit and it has nothing to do with the execution department. When the mesne profits are assessed a final decree is to be passed. The law requires the plaintiff in a claim for mesne profits, to assess the amount of mesne profits and to pay court-fee on that amount. When on a subsequent enquiry an assessment of mesne profits is made, if any further court-fee is payable, it has to be paid. On payment of the court-fee a regular decree comes into existence. [P 539 C 1]

U. S. Bajpai—for Appellant.

B. Malik—for Respondent.

Mukerji, J.—This appeal has been filed as an appeal against an order made in execution of a decree. This seems to be wrong. The appellant brought a suit for recovery of possession over three properties and he asked for mesne profits. The suit was decreed in respect of one of the properties and a certain order was passed in respect of mesne profits. It was to the effect: "The amount of mesne profits will be settled in the execution department."

The appellant made an application to the Court below for preparation of a final decree under the provisions of O. 20, R. 12 (2), Civil P. C. His application has been disallowed on the ground that the judgment did not direct payment of any mesne profits to the appellant. It is against this order that the present appeal has been filed.

The assessment of mesne profits is a proceeding in the suit and it has nothing to do with the execution department. When the mesne profits are assessed a final decree is to be passed under the provisions of the Civil Procedure Code already quoted. The law requires the plaintiff in a claim for mesne profits, to assess the amount of mesne profits and to pay court-fee on that amount. When on a subsequent enquiry an assessment of mesne profits is made, if any further court-fee is payable, it has to be paid. On payment of the court-fee a regular decree comes into existence. The same rule would apply to the present case.

The appellant has valued his claim for mesne profits at Rs. 15,106-12-7. His right to this amount has been negatived. His appeal is therefore directed against what amounts to a decree and not an order in the execution department. We hold that an ad valorem court-fee is to be paid on the above mentioned sum.

We have heard the counsel for the parties and they accept our finding as to the liability of the appellant to pay court-fee as correct. The learned counsel for the appellant asks for six weeks' time to make good the deficiency. We grant the time. After the deficiency is made good, the parties will be entitled to have such documents as they think necessary for the determination of the case translated and printed. The appeal will be treated as a regular appeal.

Mr. Malik for the respondent asks for costs. The question of costs will be determined when the matter is finally decided.

B.V./R.K. *Order accordingly*

A. I. R. 1931 Allahabad 539

KENDALL, J.

Har Bilas—Defendant—Appellant.

v.

Mahadeo Prasad—Plaintiff — Respondent.

Second Appeal No. 753 of 1929, Decided on 2nd December 1930, from decision of Dist. Judge, Allahabad, D/- 6th March 1929.

Contract Act (1872), S. 27 — Agreement containing clause in restraint of trade is void not in toto but only to that extent.

An agreement by which the defendant undertook to sell a particular article to the plaintiff and not to sell it to four specified factories and promised to pay to the plaintiff damages at a fixed rate, if the article were supplied to these fourfactories, being in restraint of trade, is void but the whole agreement is not invalidated by the inclusion of such a clause : 8 *Cal.* 809; 37 *All.* 212 and 34 *All.* 587, *Ref.* [P 540 C 2]

S. K. Dar, L. P. Zutshi and *Gopinath Kunzru*—for Appellant.

Shiva Prasad Sinha —for Respondent.

Judgment.—This second appeal arises from a suit for a perpetual injunction and for damages for breach of contract. The parties had entered into a contract by which the defendant-appellant agreed to sell silica sand to the plaintiff-respondent under conditions of which the essential ones are as follows :

1. That the defendant undertook not to sell silica sand to four specified factories.

2. That he should sell it to the plaintiff at a specified rate and get it loaded in a wagon.

3. That he should supply 2,068 maunds of white sand per mensem at the current rate and get it loaded.

4. That if the defendant should sell silica sand to any of the four factories named he should pay damages at the rate of Rs. 100 per wagon of sand so sold.

5. That the plaintiff should pay in cash the price of the sand between the 20th November and the 19th December 1927 at the time of loading the goods and thereafter should pay an advance of Rs. 400 on 20th December 1927 as earnest money.

6. That the contract was to be in force for one year.

According to the findings of the trial Court the defendant failed to supply the 2,068 maunds during the first month, and thereby broke the contract but the Munsif dismissed the suit because the contract itself offended against the provisions of S. 27, Contract Act, in that it contained an agreement prohibiting the defendant from selling sand to four factories and thus restrained him from exercising a lawful profession, trade or business. The lower appellate Court however found that the agreement was not a breach of S. 27, and gave the plaintiff a decree for the damages claimed, viz., Rs. 200 on account of two wagons said to have been sold by the defendant in contravention of the prohibitory clause in the contract.

It was argued in appeal before me that as the plaintiff did not pay the first instalment of Rs. 400 the defendant-appellant was justified under S. 51, Contract Act in not supplying more sand. But the fact is that the defendant was the first to break the contract because he did not supply the sand stipulated for during the first month, and the plaintiff was therefore under no obligation either to pay for anything that had not been supplied or to pay the advance of Rs. 400 on 20th December.

The real ground of appeal which has been argued before me is that the decision of the lower appellate Court in regard to S. 27, Contract Act, is incorrect, and I am asked to hold that the clause prohibiting the defendant from selling sand to the four factories named is an agreement restraining the defendant from exercising a lawful trade or business and is therefore void. Several decisions have been referred to on either side, but I do not propose to refer to all of these at length, because they are only conclusive in respect of the special circumstances of the cases decided. The provisions of the Act are, it is true, capable of a wide and also of a narrow interpretation and the lower appellate Court in dealing with this issue relied on the case of *Carlisles Nephews* & *Co.* v. *Richnauth Bucktear Mull* (1). There is a passage in this judgment on which special stress has been laid by the learned counsel for the repondent, namely:

> "The question is whether such a stipulation as this which prohibits any sales being made by the plaintiffs of goods of this description to other persons during the particular time, is a stipulation in restraint of trade within the meaning of that section (S. 27). . . . The language of S. 27 is no doubt somewhat general and unsatisfactory but I am clearly of opinicn that it was never intended to prohibit such a stipulation as that with which we are now dealing in contract for the sale of goods. If we were to hold that it did I think we should not only be stultifying ourselves but the legislature who passed the Act."

Neither in that case nor in the two cases of our own High Court on which reliance has been placed *Kuber Nath* v. *Mahali Ram* (2) and *Pothi Ram* v. *Islam Fatima* (3) is there any elaborate discussion of the limitations of S. 27. In 37 *Allahabad* the circumstances are altogether different from those in the present case, since two zamindars had mutually agreed not to allow cattle markets to be held on their land on the same day, an agreement which was certainly not made in restriction of trade. Moreover the case of *Carlisles Nephews* & *Co.* v. *Ricknauth Bucktar Mull* (1), which the lower appellate Court considers to be "quite on oll fours with the present case" seems to me to be distinguishable. One firm had to supply 136,000 pairs of animal bordered dhotis before a specified date and agreed to make no sales of these dhoties to others before a prior date. The object of this agreement apparently was to enable the requisite number of dhotis to be supplied in time, and had the full number been supplied before the prior date named, it is scarcely conceivable that the firm would have been held to be prohibited by that agreement from selling other dhotis of the description in the open market.

In the present case there is nothing to show that the defendant was not in a position to supply the plaintiff with silica sand to the amount stipulated for, and at the same time to provide other sand to the four factories. It is not the case that he was only prohibited from supplying sand to those factories until he should have supplied a specified amount to the plaintiff. It seems to me therefore that it is not possible to interpret agreement in the present case in any other way than as a restraint on trade, though the evidence is not sufficient to show how great or how small the restriction was.

An agreement of this kind is only void to the extent to which it restrains trade or business, and I am of opinion therefore that the whole agreement between the parties would not be invalidated by this clause. The decree however is one only for damages in respect of a breach of this particular clause, and therefore in my opinion that suit must fail. The result is that the appeal is allowed, the order and decree of the lower appellate Court are set aside and the plaintiff-respondent's suit is dismissed. The appellant will receive his costs throughout. The cross objection has not been pressed and is dismissed.

K.N./R.K. *Appeal allowed.*

N. B.—Permission to file a Letters Patent Appeal was granted to the Respondent.

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(1) [1882] 8 Cal. 809.
(2) [1912] 34 All. 587=16 I. C. 631.
(3) [1915] 37 All. 212=27 I. C. 871.

A. I. R. 1931 Allahabad 541

SULAIMAN AND YOUNG, JJ.

Sarju Prasad and *another* —Appellants.
v.
Ramsaran Lal and *others* — Respondents.

First Appeal No. 177 of 1929, Decided on 27th January 1931, against decision of Addl. Sub-Judge, Shahjahanpur, D/-22nd December 1928.

(a) Civil P.C. (1908), Sch. 3, Paras. 1 to 10 —Property in charge of Collector for execution of decree — Judgment-debtor is incompetent to mortgage or charge property—Such mortgage is wholly void.

Where on the date of the mortgage the property of the mortgagor is under the charge of the Collector under Sch. 3 and he can exercise or perform in respect of the judgment-debtor's (mortgagor's) immovable property any of the powers or duties conferred or imposed upon him by paras. 1 to 10, Sch. 3, the judgment-debtor or his representative is incompetent to mortgage or charge the property without the permission of the Collector. Nor can any civil Court issue any process against such property or part of it in execution of any decree for payment of money. Such mortgage is wholly void and ineffective to create a charge on the property. [P 542 C 2]

(b) Evidence Act (1872) S. 114, Illus. (d)—Presumption—Transfer of decree to Collector for execution proved—Presumption is in favour of continuance of that state of things —Civil P. C. (1908), Sch. 3.

Once it is proved that a decree was transferred to the Collector under Sch. 3, Civil P. C., for execution, the presumption of law under S. 114, Evidence Act, would be in favour of continuance of that state of things. The mere fact that a party proves that the civil Court got the papers relating to the decree on a date subsequent to the material date does not necessarily destroy the presumption. [P 543 C 1]

(c) Hindu Law—Joint family — Presumption.

The presumption of jointness continues and is not rebutted by proof of separation at a date subsequent to the material date. [P 543 C 1]

(d) Hindu Law—Debts—Father — Debt by father not illegal and immoral—Creditor can sell whole estate in satisfaction of judgment against father alone.

Where the debt incurred is not for illegal or immoral purposes the executing creditor is entitled to sell the whole of the estate in satisfaction of the judgment obtained against the father alone. The mere fact that in the proclamation of sale only the right, title and interest of the judgment-debtor are ordered to be sold would not prevent the whole interest from passing : *A. I. R.* 1916 *P. C.* 220, *Foll.* [P 544 C 1,2]

(e) Hindu Law — Alienation — Mortgage decree against father transferred to Collector for execution—Collector seised of all property—Junior member cannot deal with the property—Civil P.C. (1908), Sch. 3, Para. 11.

While a decree on basis of a mortgage deed executed by a Hindu father in joint family is transferred for execution to theCollector and the Collector is seised of all the property and is taking steps to sell the whole property a junior member of the family cannot be allowed to deal with the property. To allow the member to deal with the property would be to nullify the provisions of Para. 11, Sch. 3, Civil P. C. : *A. I. R.* 1930 *All.* 856, *Dist.* [P 544 C 2]

(f) Hindu Law—Alienation — Junior member cannot alienate family property.

A junior member of a joint Hindu family cannot alienate the family property. He may in the absence of the eldest member become karta and in that contingency may be equipped with the authority of the karta. [P 544 C 2]

M. L. Agarwala—for Appellants.

P.L. Banerji, Shiva Prasad Sinha and *Hazari Lal Kapoor*—for Respondents.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for the enforcement of a simple mortgage dated 21st March 1922 executed jointly by Lakhan Singh and his son Bijai Bahadur in favour of the plaintiff Ram Saran Lal for Rs. 4,700 with interest at 2 per cent per mensem compoundable every six months. The properties mortgaged were the entire villages Deotra and Amaipur-Sanda as well as a house which is no longer in dispute in appeal. The plaintiff urged that the mortgage had been executed for legal necessity and in order to pay off a previous antecedent debt, and was therefore binding on the family. The suit was contested on two main grounds, first that it was made during the pendency of the previous attachment, and secondly that it was made while the Collector was in charge of the property under Sch. 3, Civil P.C.

The learned Subordinate Judge has come to the conclusion that the estate of Lakhan Singh was in charge of the Collector on the date of the mortgage and that therefore Lakhan Singh was not competent to dispose of the property ; but he has held that Bijai Bahadur was not disqualified on that account and his interest in the mortgaged property was liable.

Some of the defendants, who have purchased fractional shares in the two villages, to be specified hereafter, have appealed. There is no cross-objection by the plaintiff.

The appeal therefore is confined to 4 biswas share in village Deotra which had been purchased by the appellant Sarju Prasad in execution of a simple money decree No.14 of 1921, and to 59/201 share in Amainpur-Sanda which was purchased by the appellant Bishambhar Nath in execution of a decree No. 40 of 1921.

The facts of this case and the previous history of the various items are somewhat complicated but they have been set forth in detail by the learned Subordinate Judge. For the purposes of this appeal it would be necessary to recite only a few leading facts.

It cannot be disputed now that Lakhan Singh and Bijai Bahadur were members of a joint Hindu family at the time of the mortgage and that the property mortgaged was their joint ancestral property. Bijai Bahadur in his plaint the reliefs of which were incorporated in the decree dated 12th December 1923 took up the position that the properties were joint ancestral properties of the family. The plaintiff in para. 3 of the plaint also admitted that the mortgage debt in question was contracted by Lakhan Singh as the head and a managing member of the joint family of which he and his sons and grandsons were the members. The mere fact that subsequent to the mortgage Bijai Bahadur filed a suit for the separation of his share which might have had the effect of bringing about separation in the joint status would not alter the position.

There were several simple money decrees in execution against Lakhan Singh and some against Lakhan Singh and his sons also. Among these were two decrees in Suit No. 131 of 1919 and Suit No. 132 of 1919 in favour of Kunj Behari and a decree in Suit No. 132 of 1920 in favour of Sheo Ghulam. There was also a decree No.14 of 1921 in favour of Kashi Nath and a decree 40 of 1921 in favour of Kake Mal. This last decree was against Lakhan Singh and his two sons.

The entire villages Deotra and Amaipur Sanda were attached in execution of Kunj Behari's decree. There was personal attachment in execution of one decree and then an application for rateable distribution in the other. The execution of both these decrees were transferred by the civil Court to the Collector because it was found that the properties attached were ancestral properties. It is not necessary to refer to any debts previous to 21st November 1921 when the execution of the decree was transferred again to the Collector. The record of the Collector has been weeded out and neither party is in a position to produce copies of any papers of that record. But the order sheet of the civil Court shows that the munsarim noted the date of the admission of the papers on the record as being 27th March 1922. It is therefore clear that papers were received in the civil Court on or before 27th March of that year. The mortgage deed in question was executed on 21st March 1922. In view of the pronouncement of their Lordships of the Privy Council in the case of *Gaurishankar Balmukand* v. *Chinnumiya* (1) it is quite clear that if on the date when the mortgage deed was executed by Lakhan Singh the property was in charge of the Collector and he could exercise or perform in respect of the judgment-debtor's immovable properties any of the powers or duties conferred or imposed upon him by paras. 1 to 10 of Sch. 3, Civil P.C., Lakhan Singh the judgment-debtor or his representative in question was incompetent to mortgage or otherwise charge the property without the permission of the Collector, nor could any civil Court issue any process against such property or part of it in execution of any decree for payment of money. If therefore the Collector was still seized of the case on 21st March 1922 the mortgage by Lakhan Singh was wholly void and inoperative and would not be effective to create a charge on the property. On the other hand, if the Collector had sent the papers to the civil Court and had ceased to be in charge of it then the disqualification would not exist.

The finding of the learned Subordinate Judge is clearly against the plaintiff. After discussing various circumstances his final conclusion in his finding on issue 7, which was the material issue on this point, was to the effect that the papers were in charge of the Collector on that date and "Lakhan Singh was not competent to dispose of the property."

As the learned advocate for the respondents wishes to challenge this finding we think it convenient to deal with this point first before taking up the question which has been decided against the appellant.

The documentary evidence on this point is no doubt meagre. This is due to the fact that the Collector's record has been weeded out. But it seems to us that when the defendants established that the execution was transferred to the Collector on 21st November 1921 the presumption of law under S. 114, Evidence Act, would be in favour of the continuance of that state of things: vide S. 114, Illus. (d). The mere fact that the plaintiff establishes that the civil Court got the papers on a date subsequent to the material date would not necessarily destroy the presumption. There is no retrospective presumption going backwards from 27th March 1922 which would justify us in presuming that unless the contrary is shown the Collector had sent the papers before 21st March. In analogous cases of jointness and separation their Lordships of the Privy Council have made it clear that the presumption of jointness continues and is not rebutted by proof of separation at a date subsequent to the material date.

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(1) A. I. R. 1918 P. C. 168 = 48 I. C. 312=45 I. A. 219=46 Cal. 183=14 N. L. R. 181 (P.C.).

The second circumstantial evidence in favour of the defendants is that the only reason why the execution was sent back to the civil Court appears to be a request by the decree-holder for a share in the amount which had been deposited in the civil Court. It appears that the Decree No. 132 of 1920 in favour of Sheo Ghulam was not transferred to the Collector because apparently there was no proof in the proceeding relating to it that the property was ancestral. Under this decree both these properties had been attached and were ordered to be sold by the civil Court itself. The sale as indicated by the proclamation of sale took place on 20th February 1922. An application for setting aside the sale was filed on 21st March 1922 by depositing the purchase-money plus the necessary costs et cetera. This was the very date on which the mortgage deed was executed. The mortgage deed itself recites that the money was raised for the purpose of getting the sale set aside. The sale was accordingly set aside after the deposit of this amount. The order is dated 13th March 1922. There can be no doubt that it was to get a share in this deposited amount that Kunj Behari Lal applied to the civil Court after the papers had arrived from the Collector's Court on 27th March 1922 praying that as the judgment-debtor had deposited the entire consideration money in Suit No. 132 of 1920 a rateable amount out of it should be caused to be realized and in connexion with the remaining amount the paper may be sent to the Collector. This is to be found in the endorsement on the order sheet of that date. The Court directed this application to be put up for disposal on 1st May 1922, on which date it dismissed the application on the ground that the decree referred to had been struck off on full payment. It then and there ordered that the papers received from the revenue Court be sent back to that Court for proceeding with the sale.

This endorsement undoubtedly indicates that the record had been sent by the Collector to the civil Court shortly before 27th March 1922 because the decree-holder desired a share in the amount deposited in Suit No. 132 of 1920, and that as soon as the application for a rateable share was dismissed the record was immediately ordered to be sent back to the Collector. It is not suggested on behalf of the plaintiff that there was any other reason for the record to come from the Collector's Court to the civil Court. As a matter of fact it should not have come in the ordinary course as the decree was not fully satisfied. If this inference is justified then it will follow that the Collector must have been approached with a request to send the record to the civil Court before 27th March 1922. We know the date of the deposit which was 21st March 1922. This deposit was made just after the execution of the mortgage deed in which the money was raised. It therefore seems that the Collector must have been approached after the execution of the mortgage deed, and that the mortgage deed was executed at a time when the Collector was still seised of the case.

A third minor circumstance may also be noted. The Court of the Collector and the Subordinate Judge's Court are situated in the same town of Shahjahanpur. There is no reason to imagine that a long interval of time would take place between the sending of the record by the Collector and the receipt of it by the civil Court. If we refer to a similar proceeding of July 1921 we find from the order sheet that the note made by the munsarim of the date of the admission of papers was identical with the date on which the papers were actually received back from the Collector's Court.

Having regard to all the circumstances we are of opinion that the finding of the learned Subordinate Judge that the Collector was still in charge of the properties on 21st March 1922 must be accepted.

Lakhan Singh was accordingly not competent to make a mortgage of his interest in Deotra or Amaipur-Sanda. Although the attachment in execution of Decree No. 14 of 1921 was made in 1924 subsequent to the mortgage, nevertheless as the mortgage deed was void the plaintiff is not entitled to enforce it against the purchaser of the share unless it be held that Bijai Bahadur Singh's interest was transferable.

As regards Amaipur-Sanda the position of the purchaser is even stronger. Not only was this property in charge of the Collector in execution of the decree in Suit No. 132 of 1919 on the date of the mortgage, but there had actually been a previous attachment of this property in execution of Decree No. 40 of 1921 in pursuance of which a part of the property was purchased by Bishambhar Nath. A mortgage during the pendency of the attachment would therefore also be equally voidable. Thus in this view of the case Lakhan Singh was incompetent to transfer the property to the plaintiff.

The ground on which the learned Subordinate Judge has exempted four biswas share in Deotra and 59/201 share in Amaipur-Sanda is that this represented the interest of Bijai Bahadur, who was not disqualified from making the mortgage. The learned Subordinate Judge has thought that the disqualification referred to in para. 11, Sch. 3, Civil P. C., applies to the judgment-debtor only, that is to say, to Lakhan Singh and not to the other members of his joint family like Bijai Bahadur, with the result that Bijai Bahadur was not disqualified from mortgaging his own interest in the family property.

There are two serious objections to this view. In the first place, it is not suggested that the decretal amount in Suit No. 132 of 1919 was in any way tainted with immorality or illegality. The decree was against the father Lakhan Singh and could be executed against his family property. Where the debt is not incurred for illegal or immoral purposes the executing creditor is entitled to sell the whole of the estate in satisfaction of the judgment obtained against the father alone. The mere fact that in the proclamation of sale only the right, title and interest of the judgment-debtor are ordered to be sold would not prevent the whole interest from passing. This is made clear by the pronouncement of their Lordships of the Privy Council in the case of *Sripat Singh Dugar* v. *Maharaja Sir Prodyat Kumar Tagore* (2). Thus Kunj Behari was perfectly entitled to attach the whole of the interest belonging to the family in execution of his decree against Lakhan Singh. That he did attach the whole of the interest admits of no doubt inasmuch as the entire villages were attached and the execution of the decree against the entire villages was transferred to the Collector. The Collector therefore was perfectly justified in selling the whole interest of the family in execution of the decree against Lakhan Singh alone. It is therefore difficult to see how a junior member of the family could be allowed to deal with the property while the Collector was seised of the entire estate and was taking steps to sell the whole estate.

In the second place, the exemption of Bijai Bahadur's interest could be justified only on the assumption that he had authority to execute a mortgage of the family property or at any rate of his interest in it. We have already pointed out that it was not plaintiff's case in the plaint that Bijai Bahadur was a separated member of the family. The learned Subordinate Judge has not based his conclusion on this point, but it has been pressed on behalf of the plaintiff that there is nothing to prevent a junior member of the family from mortgaging the family property in case the karta for the time being is disqualified from transferring it. No reported case has been cited in support of this contention. The case of *Mahabir Prasad* v. *Mahesh Prasad* (3) is distinguishable because there the decree had already been passed against the father and the sons and no question as to whether the mortgage was or was not enforceable against the son could arise at that stage. In the present case the plaintiff is seeking to enforce the mortgage and he cannot do so unless Bijai Bahadur was competent to make it as a junior member of the family.

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(2) A. I. R. 1916 P. C. 220=39 I. C. 252 = 44 I. A. 1=44 Cal. 524.

(3) A. I. R. 1930 All. 856=128 I. C. 825.

Apart from any question of Hindu law it is patent that to allow a junior member of the family to deal with the family property when it has been placed in charge of the Collector would amount to nullify the provisions of para. 11, Sch. 3, Civil P. C. While the karta as such is prevented from dealing with the property a junior member of the family would be at liberty to mortgage the same and in this way set at naught the power of the Collector to sell it. To accede to the contention of the learned advocate for the plaintiff would therefore lead to this result.

We also find no authority for the proposition that a junior member of the family can alienate the family property. Where the eldest member is absent a junior member may become the karta in his place and in that contingency may be equipped wfth the authority of the karta. But this is not the case here. Lakhan Singh was on the spot and in the absence of any evidence to the contrary we take it that he was acting as the karta of the family in respect of all those properties, which had not been placed in charge of the Collector. There is no suggestion anywhere that Bijai Bahadur had become the karta of the family and had superseded Lakhan Singh. The mere fact that Lakhan Singh although disqualified from transferring, joined in the transfer and gave his consent to it, would not authorize the junior member to transfer the property.

It is also quite clear that so long as the family remained joint the shares of the various members were not defined and separated. Bijai Bahadur had no distinct share in the family properties belonging to him exclusively which he could transfer by means of a mortgage deed. We think that the mortgage by Bijai Bahadur as a junior member of the joint family property must fall to the ground and is not enforceable. Of course if Bijai Bahadur had been a separated member the position would have been just the reverse.

The learned advocate for the respondent has urged that the effect of the decree dated 12th December 1923 is that the share of Bijai Bahadur stands on a different footing and does not go along with the other shares in the family property. There is no force in this contention. The decree in question was passed in a suit brought for a declaration that the joint ancestral properties described in the two schedules attached to the plaint were not saleable in execution of two decrees respectively. The village Deotra alone with other properties had been attached in execution of decree No. 40 of 1921 and 15 biswas of village Amaipur-Sanda had been attached in execution of decree No. 132 of 1919. The decree which was passed in this suit directed that Bijai Bahadur's suit was decreed to this extent only that out of the entire property advertised for sale in execution of a simple money decree No. 40 of 1919 only the rights and interests of the plaintiff which will be determined at the time of partition are not saleable, and that the plaintiff's share in the property advertised for sale in execution of decree No. 132 of 1919 will be saleable to the extent of 2/3rds and unsaleable to the extent of the remaining 1/3rd.

As 4 biswas in Deotra have been purchased by Sarju Prasad in execution of decree No. 14 of 1921 and not in execution of decree No. 40 of 1921, there is no res judicata as regards this share. Similarly 59/201 share in Amaipur-Sanda which has been purchased by Bishambhar Nath has been purchased in execution of decree No. 40 of 1921 and not of decree No. 132 of 1919. It is therefore not in any way affected by the decree in Bijai Bahadur's suit mentioned above. We therefore think that the decree is in no way a bar to the defence.

The Court below has reduced the rate of interest from the compound rate to the simple rate. There is no appeal, as regards any further reduction in the rate of interest.

The other shares in these two villages are not in dispute in this appeal as they have been exempted by the Court below.

The mortgage as a charge has been found to be enforceable. There is no suggestion that the debt was not due or that the consideration was not paid. The Court below has also found that the debt was for legal necessity and is fully proved. The suit was filed within six years of the date of the mortgage. The plaintiff therefore is clearly entitled to a simple money decree on the basis of this deed against the mortgagors Lakhan Singh and Bijai Bahadur.

We accordingly allow this appeal and modifying the decree of the Court below dismiss the plaintiff's suit also for sale of 4 biswas share in Deotra purchased by Sarju Prasad in execution of decree No. 14 of 1921 as also 59/201 of Amaipur-Sanda purchased by Bishambhar Nath in execution of decree No. 40 of 1921, and in place of it pass a simple money decree for Rs. 4,700 with interest, at 24 per cent per annum simple from 21st March 1922 till the date of suit and thereafter at the Court rate of interest i. e., 6 per cent per annum till realization against Lakhan Singh and Bijai Bahadur. Defendants-appellants will have their costs of this appeal from the plaintiff-respondent Ram Saran Lal who will bear his own costs. The other respondents excepting Lakhan Singh and Bijai Bahadur, who are merely pro forma respondents will bear their own costs and will not be liable to pay the costs of the appellants.

R.M./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 546

BENNET, J.

Jai Narain and *others*—Plaintiffs—Appellants.

v.

Rashik Behari Lal and *another*—Defendants—Respondents.

Second Appeal No. 779 of 1929, Decided on 12th December 1930, from decision of Dist. Judge, Bareilly, D/- 26th February 1926.

Transfer of Property Act (1882), S. 82—Mortgagors are liable inter se to contribution in proportion to value of property included in joint mortgage and not according to extent of benefit they have received from mortgage money.

Inter se mortgagors are liable to contribution in proportion to the value of their property which has been included in the joint mortgage and not according to the extent of the benefit they have received from the mortgage money unless there is a contract contrary to the principle laid down in S. 82 and mortgagee has given his consent to such contract: 24 *Mad.* 85; *A.I.R.* 1926 *All.* 352 and 96 *I.C.* 765, *Rel. on.* [P 547 C 1]

G. S. Pathak—for Appellants.

Ram Nama Prasad—for Respondents.

Judgment.—This is an appeal by the plaintiffs whose suit for contribution against defendants has been allowed by the lower appellate Court to the extent only of 1/9th instead of 1/2 claimed by the plaintiffs of the sum of Rs. 719-11-0 which the plaintiffs admittedly paid to discharge a joint mortgage decree. The facts are that on 17th May 1923 a mortgage deed was executed by Ram Charan Lal, the predecessor-in interest of the plaintiffs, and by his nephew defendant 1 Rashik Behari Lal. On that mortgage-deed the mortgagee Chotey Lal brought a suit No. 321 of 1926, and obtained a decree on 28th August 1926, and he put up for sale a house which belonged jointly to the mortgagors and the plaintiffs had to pay Rs. 719-11-0 in order to get the sale set aside. The plaintiffs have brought this suit for contribution of one-half of that amount and interest against defendant 1 and defendant 2, who is a transferee of the property from defendant 1. The basis of the suit is that in the mortgage deed the property pledged belonged to Ram Charan Lal to the extent of one-half and to his nephew Rashik Behari Lal to the extent of one-half. Accordingly the claim is that under S. 82, T. P. Act the property pledged by Rashik Behari Lal should contribute to the extent of its rateable value, that is one-half. The Court of first instance decreed the suit. The defendant Rashik Behari Lal appealed, and the lower appellate Court has decreed the suit for only 1/9th of the money paid to the decree-holder Chotey Lal instead of one half. The principle which has been adopted by the lower appellate Court is that the joint mortgagors should only contribute in proportion to the amount of benefit which they received from the mortgage money. The lower appellate Court held that out of the mortgage money the major portion was taken for the marriage of a son of Ram Charan Lal and that Rashik Behari Lal only benefited to the extent of his interest in the payment of revenue which was Rs. 42 for a payment required in May 1920.

It was not found by the lower appellate Court that there was any contract contrary to the principle of contribution laid down in S. 82, T. P. Act, nor was there any definite pleading in the written statement to that effect. What the written statement did say was that the mortgage money had been borrowed for the marriage of the son of Ramcharan Lal and that defendant 1 merely signed the mortgage deed for the satisfaction of the mortgagee and at the instance of Ram Charan Lal. Now it would have been necessary for a clear pleading to have been put forward that there was a contract between the parties to the effect that Ramcharan Lal was solely responsible for the payment of the mortgage money in whole or in part as between the mortgagors, and that Rashik Behari Lal was not liable for any part or only for a small part. No such contract was alleged. Secondly any such contract would have had to be a contract to which the mortgagee would have assented. This principle has been laid down in *Rama Bhadrachar* v. *Sriniwas Ayyangar* (1) and has been followed by two rulings of this Court in *Charan Singh* v. *Ganeshi Lal* (2) and *Muhammad Inamullah Khan* v. *Aisha Bibi* (3).

The learned counsel for the respondents was not able to produce any authority for the proposition of law which has been adopted by the lower appellate Court, that is, that mortgagors are only liable inter se to the extent of the benefit they have received from the mortgage money. Such a principle might no doubt have been adopted by the legislature but in point of fact the legislature has adopted a contrary principle in S. 82, T. P. Act. That section lays down that inter se mortgagors are liable for contribution in proportion to the value of their property which has been included in the joint mortgage. In the present case the property included in the joint mortgage was owned half by Ramcharan Lal and half by Rashik Behari Lal and therefore they are liable half and half. As regards the question of jointness or separation this did not form an issue before the lower Courts. Rashik Behari in giving evidence stated that he was separate. An application to contest this was made by the plaintiff who produced a number of documents to show that the marriage expenses of Rashik Behari Lal had been paid for from the joint family, as the family was joint at the time of this marriage, and on this application the counsel for the defence made a written statement to the effect that the question of jointness or separation was irrelevant for the present case. That being so the question cannot now be agitated in second appeal.

There were other grounds of second appeal, but I have not considered it necessary to go into those grounds. But the learned counsel for the appellant desires this note to be made in order that it may not be said that he had abandoned those grounds. I consider that the principle of law on which the lower appellate Court proceeded was an incorrect principle, and accordingly I allow this appeal and I restore the judgment of the Court of first instance and direct that the plaintiffs shall obtain their costs in this Court and in the lower appellate Court. The period of six months granted under O. 34, R. 4, for the defendants will run from the date of this order in second appeal. Permission to file a Letters Patent appeal is granted.

P.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 547

MEARS, C. J. AND SEN, J.

Chunni—Defendant—Appellant.

v.

Mt. Bibi Rafiunnisha Begam—Plaintiff—Respondent.

Letters Patent Appeal No. 153 of 1929, Decided on 30th January 1931, against judgment of Dalal, J., D/- 7th March 1929.

(a) Custom—Existence—Burden of proof explained.

Where a custom is proved to exist, that custom must be held to continue, and the onus to prove discontinuance of that custom lies upon the party denying its existence. [P 548 C 1]

(b) Wajibularz—Evidence—Record of custom—Specific instance is not necessary.

The Wajibularz is prima facie a record of custom, and it is not necessary to corroborate the entry in the Wajibularz by evidence of specific instances: *A.I.R.* 1914 *P.C.* 11, *Foll.* [P 548 C 1]

S. B. L. Gaur—for Appellant.

A. M. Khwaja—for Respondent.

Sen, J.—The facts of the case which have given rise to this appeal lie within a very narrow orbit. The plaintiff is Zamindar of Mauza Baghthari. The defendant, who is a Lodh by caste, is a reyaya living in the village abadi. Plaintiff alleged that, according to a custom which was recorded in the Wajibularz prepared at the time of Mr. Currie's settlement, certain ryots settled in the village had to pay Rs. 1 to the zamindar as bau (the fee of a landlord when a daughter of one of his tenants is married) on the occasion of each marriage or dharicha. The defendant married his daughter in January 1925 and the customary bau was not paid to the zamindar; hence the suit. The defendant denied that the custom obtained in the village and pleaded that the Wajibularz referred to by the plaintiff was a record of contract and not of custom The Court of first instance, upon a consideration of the entire evidence came to the conclusion that the custom was established. It accordingly gave the plaintiff a decree. The lower appellate Court disbelieved the oral evidence produced by the plaintiff. It held that the Wajibularz recorded a custom which obtained 60 years before suit but it dismissed the claim upon the ground that the plaintiff failed to prove the continuance of the custom at the date of the suit.

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(1) [1901] 24 Mad. 85.
(2) A. I. R. 1926 All. 352=94 I. C. 1048.
(3) [1926] 96 I. C. 765.

On appeal, a learned single Judge of this Court has reversed the decision of the lower appellate Court and restored that of the Court of first instance. It has been contended that the finding arrived at by the lower appellate Court was a finding of fact, which could not be displaced by this Court in second appeal. We are clearly of opinion that the lower appellate Court had misdirected itself and that its finding was not binding in second appeal. Where a custom is proved to exist, that custom must be held to continue, and the onus to prove discontinuance of that custom lay upon the defendant. The Wajibularz was prima facie a record of custom and it was not necessary to corroborate the entry in the Wajibularz by evidence of specific instances. This was held by the Judicial Committee in *Digamber Singh* v. *Ahmad Said Khan* (1). The Wajibularz therefore was good evidence of custom. The defendant had not pleaded in his written statement that the custom had fallen into desuetude. This Court therefore was justified in holding on the strength of the entry in the Wajibularz that the custom existed and continued.

We accordingly uphold the judgment of this Court and dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

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(1) A. I. R. 1914 P. C. 11=28 I. C. 34=42 I. A. 10=37 All. 129 (P.C.).

A. I. R. 1931 Allahabad 548

SULAIMAN AND YOUNG, JJ.

Ram Dhani Ram—Plaintiff—Appellant.

v.

Ram Rikh Singh and *others*—Defendants—Respondents.

Second Appeal No. 603 of 1929, Decided on 27th January 1931, against decision of Dist. Judge, Ghazipore, D/- 16th January 1929.

(a) **Deed—Construction—Mortgage or sale—Transaction held to be mortgage—Transfer of Property Act (1882), S. 58 (c).**

Where a deed was ostensibly a sale deed with a condition for retransfer on payment of the amount and the condition was embodied in the document itself:

Held: that the case was covered by the definition of a mortgage by conditional sale and hence the deed was a mortgage by conditional sale and not an out and out sale: *A. I. R.* 1929 *All.* 619, *Ref.* [P 548 C 2]

(b) **Agra Pre-emption Act (1922), S. 4 (1)—"As proprietor"—Meaning explained.**

The words "as proprietor" mean by virtue of his proprietary right and would not apply to a case of a mortgagee in possession or to a case where a person is in possession of the property and his title falls short of the proprietary interest. [P 549 C 1]

K. Verma—for Appellant.

Mushtaq Ahmad and *S. N. Verma*—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for pre-emption. The plaintiff claimed the right of a cosharer under the Pre-emption Act by virtue of a deed dated 19th October 1894 which was ostensibly a deed of sale with a condition for retransfer on payment of the amount. The condition was embodied in the document itself. Both the Courts below have held that this was a mortgage deed and not a sale deed. The case is covered by the definition of a mortgage by conditional sale as given in S. 58, sub-Cl. (c), and there can be no doubt that this was a mortgage by conditional sale and not an out and out sale: *Man Singh* v. *Guman Singh* (1).

The next point urged is that even as a mortgagee in possession the plaintiff is a cosharer entitled to pre-empt the property. A cosharer is now defined in S. 4, sub-Cl. (1), Pre-emption Act, as meaning any person other than a petty proprietor entitled as proprietor to any share or part in the mahal or village. It is quite clear that the plaintiff is entitled to a share of the profits as the mortgagees, but not in the capacity of a proprietor. We think that the expression "as proprietor" means by virtue of his proprietary right, and would not apply to a case where a person is in possession of the property and his title falls short of the proprietary interest. We therefore think that the view taken by the Court below is corrrect and the plaintiff has no locus standi to sue.

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(1) A. I. R. 1929 All. 619=119 I. C. 108.

No other point is discussed before us.

The appeal is dismissed with costs including in this Court fees on the higher scales.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 549 (1)

PULLAN AND NIAMATULLAH, JJ.

Dwarka Prasad and *others*—Appellants.

v.

Ulfat Rai and *others*—Respondents.

Second Appeal No. 65 of 1929 (connected with Nos. 254 to 256 of 1929), Decided on 11th February 1931, against decision of Addl. Sub-Judge, Farrukhabad, D/- 19th May 1928.

Civil P. C. (1908), O. 34, R. 1—Suit by puisne mortgagee—Prior mortgagee is not necessary party.

A puisne mortgagee is not bound to implead a prior mortgagee, subject to whose encumbrance the mortgaged property can be sold in enforcement of the subsequent mortgage, nor is it necessary for the subsequent mortgagee to declare prior encumbrances in favour of third persons or himself: *A. I. R.* 1928 *All.* 278, *Doubted.* [P 549 C 2]

H. C. Mukerji—for Appellants.

P. L. Banerji—for Respondents.

Niamatullah, J.—This is a defendant's appeal arising out of a suit brought by the plaintiff-respondent for enforcement of a mortgage deed executed by respondent 2, Mathura Prasad, by sale of the mortgaged property. The appellants are subsequent transferees. Both the Courts below have decreed the plaintiff's suit. Hence this appeal.

The only ground pressed in appeal is that the plaintiff omitted to mention the mortgage now in suit in an earlier suit based on a subsequent mortgage, and he is therefore precluded from enforcing the mortgage which ought to have been, but was not, mentioned. This question does not seem to have been raised and argued in the Courts below. The judgments of the two Courts are silent on that point. We do not however wish to base our judgment solely on that aspect of the matter. We think the contention must fail on its merits.

A puisne mortgagee is not bound to implead a prior mortgagee, subject to whose encumbrance the mortgaged property can be sold in enforcement of the subsequent mortgage. We fail to understand why it is necessary for the subsequent mortgagee to declare prior encumbrances in favour of third persons or himself. Reliance is placed on the judgment of Ashworth, J., in *Ram Saran* v. *Abdul Ghaffar* (1). The learned Judge has expressed himself in an obiter dictum as follows:

> "Where a person holds two mortgages over the same property, he cannot sue on the first mortgage alone without forgoing the second mortgage. He can however sue and sell on a second mortgage, provided that he declares the existence of the first mortgage and has it entered in the sale proclamation."

The learned Judge has quoted no authority, statutory or otherwise, in support of his view, nor is it clear whether an omission to declare the prior mortgage will in his view, preclude the mortgagee from suing on foot of such prior mortgage. The learned Judge apparently had in mind the necessity of prior encumbrances being mentioned in the sale proclamation. We do not think he intended to lay down that if a subsequent mortgagee did not have his prior mortgage specifically mentioned in the sale proclamation drawn up in execution of a decree passed for enforcement of a subsequent mortgage, the prior mortgage is extinguished or that the mortgagee's remedy is barred. We are satisfied that the contention put forward before us has no force. The appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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(1) A. I. R. 1928 All. 278=50 All. 742.

A. I. R. 1931 Allahabad 549 (2)

YOUNG AND PULLAN, JJ.

Zaitun Aheer—Appellant.

v.

Sat Ram Singh—Respondent.

Second Appeal No. 1612 of 1928, Decided on 12th March 1931, against decision of Addl. Sub-Judge, Azamgarh, D/- 8th August 1928.

Limitation Act (1908), Art. 61—Mortgagor leaving money with mortgagee to pay prior creditor — Mortgagee failing to pay — Mortgagor forced to pay—Suit by mortgagor to recover from mortgagee — Art. 61 does not apply.

Where mortgagor leaves money with mortgagee for payment to prior creditor, but mortgagee fails to make the payment, and the mortgagor is forced to pay, a suit by the mortgagor to recover that money from the mortgagee is not governed by Art. 61 inasmuch as the payment made is not payment made for the defendant: 6 *I. C.* 878, *Disc.* and *Dist.*; *A. I. R.* 1921 *All.* 133, *Ref.* [P 550 C 2]

A. P. Pandey—for Appellant.

Shiva Prasad Sinha—for Respondent.

Pullan, J.—The facts giving rise to this suit are as follows: Sat Ram Singh and Maharaj Singh mortgaged certain property to one Zaitun and another for Rs. 750 out of which Rs. 400 were left with the mortgagees for payment to prior creditors of the mortgagors. The mortgagees did not pay that sum. The mortgagors, being threatened by their creditors with a suit, were forced to pay the money, and they have brought this suit to recover the amount so paid with interest by way of damages from the mortgagees. The date of the mortgage was 11th June 1921, and the payments were made by the mortgagors on 12th June 1922 and 14th June 1923. The suit was brought on 14th June 1927 and is within six years from the date of the mortgage. The claim has been decreed by the lower appellate Court, who held that the period of limitation was one of six years and that the article applicable was Art.116, Sch.1, Lim. Act. The appeal is based on the contention that this is not a suit to which Art. 116 is applicable, but is a suit governed by Art. 61. There is no other point before us for decision. Art. 61 deals with a suit for money payable to the plaintiff for money paid for the defendant. Limitation runs from the date when the money is paid. If this article is applicable, the suit is beyond time, as it was filed more than three years after the last date of payment. In order that this article of the Limitation Act should apply it must be proved that the suit was for (1) money payable to the plaintiff, (2) for money paid for the defendant.

Certainly the suit is for money which the plaintiff alleges to be payable to himself. But we do not agree with the learned counsel who has argued the case with great skill for the appellant; that this is a suit for money paid for the defendant. The only person who was liable to the creditors for the payment of this money was the plaintiff in this suit. It was his debt and it was not the debt of his mortgagee. It is conceded that the plaintiff himself could not have sued his mortgagee in any way so as to compel him to pay this money to the creditors, and that the creditors could not have sued the mortgagee. This money, in our opinion, was paid by the mortgagor for himself to save his own property from his creditors, and it was not paid by him for the mortgagee in any true sense of the term. Reliance is placed by the learned counsel for the appellant on a decision of this High Court reported in *Girraj Singh* v. *Raghubans Kuar* (1). In that case there was a compromise between two persons providing that the encumbrances affecting a certain village would be paid by one of the parties. That party failed to discharge the encumbrances, which appear to have been in the nature of mortgage debts. The encumbrances were paid off by the other party and he sued to recover the amount so paid. It was found by the Court that this was a suit for money paid for the defendant within Art. 61, Lim. Act. But there is no discussion in the judgment showing the reasons for which the Court held that that payment was made for the defendant. We are unable to say that that case is exactly parallel with the one before us. There is a parallel case also decided by this Court and reported in *Ishri Prasad* v. *Mohammad Sami* (2). The facts of that case are indistinguishable from those of the present case, and the decision of the Court was that Art. 116, Lim. Act applies. But in that case also the question which is before us was not discussed. We consider therefore we are free to decide this question as res integra, and are of opinion that a payment of this nature is not a payment made for the defendant and therefore that Art. 61, Sch. 1, Lim. Act does not apply.

The lower appellate Court has held that the article applicable is Art. 116. This again is an article which may be distinguished from the present case. It applies to a suit for compensation for the breach of a contract in writing registered and the time from which the period begins to run is the time when the contract is broken. Nor the mortgagee undoubtedly entered into an agreement with the mortgagor that he would pay off his debt; but it is argued, and not without force, that that agreement is not enforceable by the mortgagor, and it is difficult to say when, if ever, there has been a breach of the contract. But it is no part of the pleadings in this case that the plaintiff has no right to recover the money paid by him. The only dispute arose as to whether the suit to recover it was or was not within time. We do not think it necessary therefore to enter into a minute argument as to whether Art. 116 can or cannot be made to fit into the facts of this case. It was for the appellant to show that the suit was barred by some article of the Limitation Act which provided for a shorter period than six years, and in our opinion the appellant has failed to do so. Thus, even if Art. 116 did not apply, we see no reason why we should not apply Art. 120, which deals with suits for which no period of limitation is provided elsewhere in the schedule. It is true that under Art. 120 the time from which the period begins to run is the time when the right to sue accrues, and it has been argued, not without reason, that we would be forced to give some date in this case when the right to sue did accrue. Again, we do not think that it is necessary to answer this question. The right could not accrue before the mortgage was executed, and even if that were taken as the date, the suit is within time. Roughly speaking, the suit being one for which the cause of action is clearly the necessity for the mortgagor to pay off his debt the period might be held to commence at the date of that payment. But there is authority for the view that the failure of the mortgagee to pay off his debt commenced from the date of the mortgage, and the period of limitation might be held to run from that date. In either case the suit is within time and we do not think it necessary to decide a point which is of no importance for the decision of this appeal.

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(1) [1910] 6 I. C. 878.

(2) A. I. R. 1921 All. 133=60 I. C. 829.

One other question raised was that the rate of interest allowed by way of damages is excessive. But this point was not raised in the Courts below, and the learned Subordinate Judge has stated that in his opinion interest at 2 per cent per mensem is not excessive. We accordingly dismiss this appeal with costs, including fees in this Court on the higher scale.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 551

NIAMATULLAH, J.

Amjad Ali and *another*—Defendants—Appellants.

v.

Azizuddin and *others*—Plaintiffs—Respondents.

Second Appeal No. 124 of 1929, Decided on 13th January 1931, against decision of Addl. Sub-Judge, Meerut, D/- 13th September 1928.

Civil P. C. (1908), S. 102—Suit for mesne profits in respect of share of occupancy holding held in common by parties—Such suit is therefore cognizable by Court of Small Causes—Provincial Small Cause Courts Act (1887), Art. 31—Applicability.

Where one of several cosharers in an occupancy holding is in actual cultivating possession thereof, his possession cannot be considered to be wrongful, nor can he be said to be in wrongful receipt of the profits accruing from the holding belonging to them in common. Possession of one of the cosharers or receipt of income derived by him from the joint holding is on behalf of all the cosharers. Art. 31, Provincial Small Cause Courts Act, therefore does not apply to a suit for mesne profits by persons in respect of their share of an occupancy holding held in common by the parties. Such suit is cognizable by a Court of Small Causes and a second appeal is barred. [P 551 C 2 ; P 552 C 1]

Vishwa Mittra—for Appellants.

A. M. Khwaja—for Respondents.

Judgment.—This appeal arises out of a suit for mesne profits by the plaintiff-respondents in respect of their share of an occupancy holding comprising 10 bighas 7 biswas held in common by the parties. The sum claimed in the plaint is Rs. 96-10-3. No ancillary relief for accounts was taken. Their claim was dismissed by the first Court but on appeal it was decreed by the lower appellate Court.

A preliminary objection is taken by the learned counsel for the respondents that a second appeal is barred by S. 102, Civil P. C. It is pointed out that the suit is one cognizable by a Court of Small Causes, and the value does not exceed Rs. 500. A reference to Sch. 2, Provincial Small Cause Courts Act, shows that a suit for profits between co-tenants is not excepted from the cognizance of a Court of Small Causes. The only article which can have a semblance of application is Art. 31, which however provides:

> "for the profits on immovable property belonging to the plaintiff which have been wrongfully received by the defendant."

Where one of several cosharers in an occupancy holding is in actual cultivating possession thereof his possession cannot be considered to be wrongful, nor can he be said to be in wrongful receipt of the profits accruing from the holding belonging to them in common. Possession of one of the cosharers or receipt of income derived by him from the joint holding is on behalf of all the cosharers. I am satisfied that Art. 31 has no application. It follows that the suit which has given rise to this appeal is of the nature cognizable by a Court of Small Causes and therefore a second appeal is barred by S. 102, Civil P. C., the value of the subject-matter being less than Rs. 500. The appeal is accordingly dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 552

YOUNG AND PULLAN, JJ.

Haji Abdul Shakur—Appellant.

v.

Nandlal and *others*—Respondents.

Second Appeal No. 1255 of 1928, Decided on 19th March 1931, against decision of Sub-Judge, Benares, D/- 2nd May 1928.

(a) Transfer of Property Act (1882), S. 40 —Covenant to pay certain sum of money on the happening of certain event is not restrictive covenant.

Restrictive covenants are covenants restraining the use to be made of the land. A contract to pay a certain sum of money on the happening of a certain event cannot possibly be held to be a restrictive covenant : 41 *All.* 417, *not Appr.* [P 552 C 2]

(b) Transfer of Property Act (1882), S. 40 —*H* executing kabuliyat and agreeing to pay zarichaharam in case he sold his interest in plot—*H* selling his interest to *M*—*M* is not liable to pay zarichaharam—S. 40 does not apply to this case—Equity.

H executed a kabuliyat in favour of *N*, a zamindar and agreed to pay zarichaharam (i. e. one-fourth of the sale price) in case he sold his interest in the plot. He sold his interest to *M*, and *N* sued both *H* and *M* for the zarichaharam.

Held : that *M* could not be held to be liable for the personal obligation of his transferor to pay the zarichaharam.

Held, further, that S. 40 would not apply to an obligation arising out of a contract, such as an obligation to pay zarichaharam : *Tulk* v. *Moxhay*, 2 *Phil.* 774, *not Appl.* ; 41 *All.* 417, *not Appr.* [P 553 C 2]

(c) Transfer of Property Act (1882), S. 41 —Obligation to pay zarichaharam.

An obligation to pay zarichaharam cannot be said to be "annexed to the ownership of immovable property." [P 553 C 2]

M. A. Aziz and *Zahur Ahmad Naqui*—for Appellant.

K. N. Malaviya—for Respondents.

Young, J.—This is an appeal against the judgment of the Subordinate Judge of Benares. The plaintiffs were the zamindars of a plot of land. The predecessor-in-title of the appellants executed a kabuliyat by which he agreed to pay to the plaintiffs annual parjot, and he also agreed to pay zarichaharam, that is one-fourth of the sale price received by him whenever he sold his interest in the plot. Doman the defendant's predecessor-in-title defendant 1 in the suit, sold the plot to defendant 2, and the plaintiff zamindars sued both the defendants for the zarichaharam. Defendant 1 did not defend the suit. The trial Court held that defendant 2 was not liable but the lower appellate Court held on the authority of *Prabhu Narain Singh* v. *Ramzan* (1) that both the defendants were jointly and severally liable for the amount of the zarichaharam, and gave a decree in favour of the plaintiffs against defendant 2. Defendant 2 appeals.

The sole question before us is whether, under the circumstances given above, the assignee of defendant 1 is liable to pay to the zamindars the zarichaharam. We agree with the lower appellate Court that defendant 2 must be held to have notice of the *haq* chaharam payable by defendant 1. We have carefully considered the case of *Prabhu Narain Singh* v. *Ramzan* (1). We notice that Piggott, J., decided that case on the nature of the plea set up by the defendant Ramzan in the trial Court. Walsh, J., alone decided the actual point before us in favour of the zamindars. With great respect to the learned Judge, we are of opinion that that case was wrongly decided. The learned Judge appears to have based his judgment upon the view that *haq* chaharam was a restrictive covenant of the kind dealt with in the English authority of *Tulk* v. *Moxhay* (2). We are of opinion that *haq* chaharam cannot be considered to be such a restrictive covenant. Restrictive covenants are covenants restraining the use to be made of the land. A contract to pay a certain sum of money on the happening of a certain event cannot possibly, in our opinion, be held to be a restrictive covenant. It appears to us that the whole of the judgment of the learned Judge is based upon this misapprehension. In any event, it was held in *Haywood* v. *Brunswick Building Society* (3) that the rule in *Tulk* v. *Moxhay* (2) that

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(1) [1919] 41 All. 417=49 I. C. 865.

(2) [1847] 2 Phil. 774 =13 Jur. 89 = 18 L. J. Ch. 83=1 Hall. & P. W. 105.

> "anyone coming into possession of land with notice, actual or constructive, of a covenant entered into by some one through or under whom he claims, restricting the use of that land, will be prohibited from doing anything in breach of the covenant,"

applies only to a negative and not an affirmative covenant. Equity would not allow the assignee to use the land in contravention of the restriction. *Tulk* v. *Moxhay* (2) cannot be used to place the pecuniary liability of an assignor upon his assignee. In any event, it has long been held in English law that no action of covenant will lie against the assignee of the lessee, except for breaches of covenant happening while he is assignee. In our opinion it is clear that the whole of the argument of the learned Judge based upon restrictive covenants and *Tulk* v. *Moxhay* (2) is misconceived. Further, the learned Judge appears to be impressed with a paragraph taken from Gour's Transfer of Property Act, in which the learned author of that work quotes Dat's Vendors and Purchasers Edn. 6, 927, as to the knowledge of a purchaser of land of an encumbrance on the property either before or after the execution of the conveyance and the learned Judge proceeds to state that that substantially was the position in the case he was then deciding. An encumbrance is a mortgage or charge upon the property purchased, and cannot be held to mean a liability such as that of paying the zarichaharam. He further relies upon the general principles of equity. We fail to conceive how the transferee in this case can be held to be found in any way in equity to pay the personal obligation of his predecessor-in-title, especially when the transferee had paid the full purchase price to his predecessor, and when, we must conclude, the vendor, having to pay the zarichaharam to the zamindar, must have taken that into consideration in fixing the price which he demanded for his interests in the land.

Reliance is placed by the respondents however on S. 40, T. P. Act. The first part of that section merely adapts to the law of India the English doctrine of restrictive covenants illustrated in *Tulk* v. *Moxhay* (2) and *Haywood* v. *Brunswick Building Society* (3). Para. 2 is more difficult to construe. But we are of opinion that it cannot possibly apply to an obligation arising out of a contract, such as an obligation to pay zarichaharam. The illustration given to the section confirms us in this view. That illustration is concerned solely with an equitable right to enforce the specific performance of a contract entered into by *B* with *A* against *C* to whom subsequently the land was sold with notice of the previous contract. It would be, we think, a strained construction, of the section to apply it to a personal obligation, such as the payment of zarichaharam arising out of a contract of lease. We think that the legislature by this part of the section merely meant to adapt to the law of India the English rule of conferring an equitable title in land on the holder of a contract relating to the transfers of land. Such a contract does not amount to an "interest in land or an easement thereon" within the meaning of this part of the section. It confers merely an equitable title. We see no reason to apply this part of the section to a merely personal obligation to pay a sum of money to a third party arising out of a contract, and further we do not think an obligation to pay zarichaharam could be said to be "annexed to the ownership of immovable property" within the meaning of this part of the section. A contract giving rise to a right of pre-emption or a contract of sale both would create an obligation annexed to the ownership of property and it is to such obligations that this part of the section is meant to apply. We allow the appeal, set aside the decision of the lower appellate Court and restore that of the trial Court, with costs.

S.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 553

SULAIMAN AND NIAMATULLAH, JJ.

Bahadur and *another*—Appellants.

v.

Narain Singh—Respondent.

Second Appeal No. 409 of 1928, Decided on 18th February 1931.

(a) Agra Tenancy Act (1926), S. 268—Suit for declaration in respect of grove lands in civil Court—Objection to civil Court's juris-

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(3) [1882] 8 Q. B. D. 403 =51 L. J. Q. B. 73= 30 W. R. 299=45 L. T. 699.

diction in second appeal should be allowed in cases to which S. 268 does not apply and where objection is well founded.

A suit for declaration in respect of the grove land was filed in the civil Court. An objection was taken to the jurisdiction of the civil Court during second appeal.

Held: that S. 268 had no application to a case, where the civil Court had disposed of a matter, which even if brought in the revenue Court, no appeal would have lain to the civil Court. The objection as to the want of jurisdiction, if well founded must therefore be entertained although it had not been raised earlier: *A.I.R.* 1930 *All.* 713, *Rel. on.*[P 554 C 2]

(b) Agra Tenancy Act (1896), Ss. 269 and 84—Bar of limitation to suits under S. 84.

Section 269 does not override the bar of limitation which is placed on suits for ejectment under S. 84. [P 555 C 1]

(c) Agra Tenancy Act (1926), S. 84—Land losing character as grove—No suit lies in civil Court for possession and declaration, but suit for ejectment lies in revenue Court.

Where a grove land loses its character as a grove, as having been used for building purposes a civil Court has no jurisdiction to entertain the plaintiff's suit for declaration and possession of the land. The plaintiff's remedy, if any, is to eject the defendant grove holder under S. 84 through a revenue Court. The revenue Court has exclusive jurisdiction in such cases. [P 555 C 2]

K. Verma—for Appellants.

P. L. Banerji, *Badri Narain* and *Gadadhar Prasad*—for Respondent.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for declaration that the defendant has no power to make construction, recovery of possession and perpetual injunction. In the plaint it was admitted that the land in dispute was entered in the revenue papers as a grove and it was further alleged that for some time the trees standing upon it dried up and the land became vacant and no fresh trees were planted ; that the defendants without the permission of the plaintiff began to construct a pucca and kuchcha house on a portion of the plot, which action was wrongful. The cause of action was alleged to have accrued in December 1916 when the constructions were commenced. Many pleas were taken in the written statement. It was alleged that the land was an ancestral muafi grove of the defendants, that all the trees had not dried up and that the land had never changed its character as a grove, as trees were still standing on a large portion of the land. It was further pleaded that the constructions complained of were made 12 years ago, and the claim was barred by the six years rule of limitation. But no plea as to want of jurisdiction was raised.

The first Court found that over half of the land occupied formerly by the grove odd trees still stood and that building had been made on the eastern portion of the land over which there were only a few trees left. It came to the conclusion that the plot had not lost its character as a grove and accordingly dismissed the suit. On appeal the learned District Judge has affirmed the findings of fact that for about half the area to the west of the plot there are 15 trees while on the eastern side there are only three trees and on this portion there are no less than four buildings two of which appear to be quite recent. He came to the conclusion that as matters stood now the defendants would be prevented from using nearly half the land to the east for purely building purposes, and that accordingly in view of the definition of "grove land" given in the new Tenancy Act, the land no longer retained the character of a grove. He set aside the decree of the first Court and decreed the claim.

On appeal it is urged for the first time that the civil Court had no jurisdiction to entertain the suit. It has been settled by the pronouncement of the Full Bench case of *Ram Iqbal Rai* v. *Tilesari Kuari* (1) that S. 268 of the new Tenancy Act, would have no application to a case where the civil Court had disposed of a matter which even if brought in the revenue Court no appeal would have lain to the civil Court. The objection as to the want of jurisdiction if well founded, must therefore be entertained, although in view of the fact that it was not raised earlier the defendants may be deprived of their costs.

According to the allegations contained in the plaint the defendants had the status of grove holders who have converted the land into a building site by making constructions thereupon and have broken a condition. Ch. 12 of the new Tenancy Act deals with the rights and liablities of grove holders. A grove holder is a non-occupancy tenant, presumed to be holding under a lease, the term of which expires when the land ceases to be a grove land. He is liable to be ejected under S. 84 or on the ground that he held under a lease the term of which has expired. It is noteworthy that the provisions relating to the rent free grantees contained in Ch. 11 are not applicable to grove lands.

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(1) A. I. R. 1930 All. 713=127 I. C. 434 (F.B).

Assuming the finding of the District Judge to be correct that the land has lost its character as a grove inasmuch as it has been built upon, the plaintiff would have been entitled to institute a suit under S. 84, Ten. Act, for the ejectment of the defendants on the ground that the condition that the character of the grove would be retained had been broken and the land was being used in a way inconsistent with the previous grant. No doubt the valuation of the suit being much more than Rs. 200 the appeal from the decree passed in such a suit, even if filed in the revenue Court, would have lain to the civil Court, and under S. 269, Ten. Act, all the materials being on the record, the High Court can dispose of the appeal as if the suit had been instituted in the right Court. But this section would not override the bar of limitation which is placed on suits for ejectment under S. 84, Ten. Act. The suit is to be instituted within one year from the date when the forfeiture is incurred or the condition is broken. In the present case there is no allegation in the plaint that any construction was made within one year of the suit. As already pointed out the cause of action was alleged to have accrued in 1916. The learned Munsif who inspected the locality thought that some buildings were very old and that some were about three or four years standing. The claim under S. 84 would therefore be barred by the law of limitation. It is therefore not possible for us to give relief to the plaintiff on the ground that although the suit should have been instituted in the revenue Court, all the materials being on the record the matter should now be disposed of in appeal by us.

It is next urged on behalf of the plaintiff that as the grove has lost its character as a grove the defendants have become mere non-occupancy tenants holding from year to year and are liable to ejectment and the right to eject them is a recurring right without any question of limitation.

But even if this position be assumed to be correct, the plaintiff's remedy would be to eject the defendants not under S. 84 but under S. 86, Ten. Act, which is the same as the ground mentioned in S. 197, sub-Cl. (e) of the Act treating the defendants as tenants from year to year originally holding grove land the term of which has expired. Such a suit however is cognizable exclusively by the revenue Court and an appeal lies in that case to the revenue Court and not to the civil Court. In this view of the matter it is not possible for us to entertain this claim treating it as one for the ejectment of a non-occupancy tenant from year to year. The relief as regards the declaration is substantially one as to the rights of a tenant against the landholder and was entertainable by the revenue Court; similarly under S. 85, Ten. Act, even a relief for an injunction could have been asked for in the revenue Court. We may also point out that the relief as regards the injunction is very vaguely worded and merely asks for restraining the defendants from doing any act prejudicial to the rights of the plaintiff and does not in so many words ask for restraining them from going on with any construction. There is no suggestion that there is any reasonable apprehension of further construction being made on the plot. Having regard to all these circumstances it must be held that the civil Court had no jurisdiction to entertain this plaint. The plaintiff's remedy, if any, may be to eject the defendants through the revenue Court treating them as persons in occupation of the land which has lost its character of a grove or where a condition has been broken. The plaintiff will recover his costs from the defendants in both the Courts below, who will bear their own costs in those Courts, and the plaintiff will bear his own costs of this appeal and will pay the costs of the defendants in this Court including fees on the higher scale. We accordingly allow this appeal and setting aside the decrees of the Courts below direct that the plaint be returned to the plaintiff for presentation to the proper Court, if so advised. The costs will be taxed as indicated above.

B.V./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 555

PULLAN, J.

Allah Bakhsh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 20 of 1931, Decided on 10th April 1931.

Criminal P. C. (1898), S. 421—Court has complete discretion to dismiss summarily jail appeals without showing cause.

The law does not mean to fetter the discretion of a Court receiving jail appeals. A Court can in its discretion summarily dismiss such an appeal, when it is of opinion that there are no sufficient grounds for interference with the lower Court's decision: 17 *All.* 241, *Ref.* [P 556 C 1]

Mansur Alam—for Applicant.

Asst. Govt. Advocate—for the Crown.

Order.—This is an application in revision of an order of the Additional Sessions Judge of Meerut rejecting summarily an appeal received from the jail. The Court was doubtless acting under S. 421, Criminal P. C., which lays down that a Judge on receiving such a petition shall peruse the same, and if he considers that there is no sufficient ground for interfering he may dismiss the appeal summarily. The same section lays down in clear words that the Court hearing such an appeal is not bound to call for the record in the case. I have been referred by the learned counsel to a Full Bench decision of the Allahabad High Court passed three years before Act 5 of 1898 was enacted, *Empress* v. *Nannhu* (1) which shows that at that time this Court thought that it was advisable for a Court rejecting an appeal summarily to give some reasons. But that opinion of the Full Bench of this Court was not incorporated in the subsequent Criminal Procedure Code. The law, in my opinion, does not mean to fetter the discretion of a Court receiving such jail appeals and there is no ground of revision arising from the action of the learned Additional Sessions Judge in this case. I have been into the case on its merits and I find that the order rejecting the appeal summarily was, in the circumstances of the case, the only proper order which the Court could have passed. I dismiss this application.

The bail bond of the applicant is discharged, and he will surrender to serve out his sentence.

B.V./R.K. *Revision dismissed.*

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(1) [1895] 17 All. 241=(1895) A. W. N. 68 (F.B.).

A. I. R. 1931 Allahabad 556

MUKERJI AND BENNET, JJ.

Mangal Ram Seho Ram—Appellant.

v.

Jagar Nath and *another*—Respondents.

Second Appeal No. 386 of 1928, Decided on 8th January 1931.

(a) Civil P. C. (1908), S. 100 — Finding as to accrual of cause of action at particular place is finding of fact.

Finding as to the accrual of cause of action at particular place is a finding of fact and cannot be set aside in second appeal. [P 557 C 1]

(b) Civil P. C. (1908), S. 21—Objection to place of suing in Court of appeal or revision —Failure of justice must be proved.

In order to be able to interfere on the ground of absence of jurisdiction and allow an objection as to the jurisdiction, the Court of appeal or revision must find that there was failure of justice. [P 557 C 1]

(c) Civil P. C. (1908), O. 41, R. 2 — Objection to place of suing — Appellate Court returning plaint for proper presentation — Ground under S. 21 in second appeal is ground of law and can be taken without being specifically set forth in memo of appeal.

If an appellate Court interferes with the place of suing on the ground of absence of jurisdiction and returns the plaint for proper presentation, it is open to the plaintiff to advance the ground under S. 21 in second appeal, it being a question of law. It can even take that ground under the provisions of O. 41, R. 2, even though it may not be specifically set forth in the memorandum of appeal. [P 557 C 1]

J. P. Bhargava—for Appellant.

Shiva Prasad Sinha—for Respondents.

Bennet, J.—This is an appeal from an order of the learned Additional Subordinate Judge of Basti directing that a plaint should be returned to the plaintiff for presentation to the proper Court. By an error of counsel in this Court the case has been presented in this Court as a regular second appeal from a decree. The facts are that the plaintiff who resided in Basti sent certain grain to Fyzabad, and that grain was sold by the defendants in Fyzabad, and the plaintiff brought a suit in the Court of the Munsif of Basti for recovery of the price of the grain. One of the defences raised was that the Court in Basti had no jurisdiction to try this suit as the cause of action arose solely in Fyzabad. The learned Munsif held that his Court in Basti had jurisdiction to try this suit, because there was a novation of contract on account of certain letters which subsequently passed between the parties. The learned Munsif decreed the suit in part for the plaintiff. The defendants brought an appeal, and the lower appellate Court held that these letters did not amount to a novation of contract and accordingly that the Munsif did not have jurisdiction, and directed that the plaint should be returned for presentation to the proper Court. The plaintiff has come in appeal against this order. In the first place it was argued that the finding of the lower appellate Court in regard to the cause of action not arising in Basti was incorrect, but this is a finding of fact and in second appeal it is not open to this Court to reverse that finding. We consider therefore that the order cannot be set aside on this ground. But a further ground was urged before us which was not taken in the memorandum of appeal. That ground is that under S. 21, Civil P. C., no objection as to jurisdiction shall be allowed by an appellate Court unless there has been a consequent failure of justice in the Court of first instance. We consider that this is a point of law which may be taken under the provisions of O. 41, R. 2, although it was not specifically set forth in the memorandum of appeal, and the learned counsel for the respondents has stated that he does not desire any further time to meet this point of law.

In the order in appeal of the lower appellate Court there is no mention whatever of any consideration of the question as to whether there was a failure of justice in the Court of first instance. We have carefully examined the judgment of the learned Munsif and we do not find any indication in that judgment that there was any failure of justice on account of the trial being held in Basti instead of in Fyzabad. These two districts are close together, and there is nothing on the record to which the learned counsel for the respondents can point to indicate that the defendants were in any way prevented from producing their witnesses or their other evidence on account of the trial being held in the Court of the Munsif of Basti. Accordingly we conclude that there was no failure of justice on account of this trial being held in the Court of the Munsif of Basti. A necessary ingredient being absent as laid down by S. 21, the order of the lower appellate Court therefore must be set aside. Accordingly we set aside that order, and we remand this case to the lower appellate Court for disposal according to law on the other grounds of appeal.

Objection has been taken by the learned counsel for the respondents that the appellant has incurred unnecessary costs in this Court by bringing the matter before this Court as a regular second appeal instead of a first appeal from an order on which the court-fee of Rs. 2 only would be paid. The actual court-fee paid amounts to Rs. 55-8-0. The excess court-fee of Rs. 53-8-0 must therefore be paid by the appellant plaintiff. In regard to the Rs. 2 balance of court-fee and other costs hitherto incurred in this Court and in the lower Courts we direct that these costs shall abide the ultimate result in the case.

V.B./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 557

MUKERJI AND BENNET, JJ.

Bishambhar—Plaintiff—Appellant.

v.

Radha Kishunji—Defendant—Respondent.

Second Appeal No. 538 of 1928, Decided on 24th February 1931, against decision of Second Sub-Judge, Cawnpore, D/- 2nd March 1928.

Civil P. C. (1908), O. 23, R. 3—Parties agreeing that pleader be appointed referee and case decided in accordance with statement which he makes in Court without any oath being administered to him—They further agreeing to accept it and desiring not to produce evidence—Agreement is not adjustment—Any party may resile from such agreement before statement is made by pleader and action taken on it.

Where the parties to a case agree that a pleader be appointed referee, the case be decided in accordance with the statement which he may make in Court without any oath being administered to him or send it in writing and that they shall accept and agree to it and that they did not wish to produce any other evidence, such agreement does not amount to an adjustment but only amounts to agreement on a procedure which might eventuate in an adjustment and it is open to a party to resile from the agreement before the statement has been made by the pleader and action taken by the Court on that statement: *A. I. R.* 1927 *All.* 584; *A.I.R.* 1927 *All.* 590; 29 *All.* 49 and *A.I.R.* 1924 *All.* 570, *Dist.*; *A. I. R.* 1930 *All.* 162, *Rel. on.* [P 558 C 2; P 559 C 2]

U. S. Bajpai and *P. M. L. Verma*—for Appellant.

K. N. Katju and *M. L. Chaturvedi*—for Respondent.

Bennet, J.—This is a second appeal by plaintiff against a decree of the lower appellate Court dismissing his appeal and upholding the decree of the Court of first instance dismissing the suit of the plaintiff. The plaintiff brought a suit for a declaration that a will dated 10th September 1926 executed by his cousin Mathura Prasad was illegal, null and void and ineffectual as against him. In the Court of first instance it was recorded as follows on 31st August 1927:

> "The pleaders for the parties state that the parties to this case agree that Babu Jwala Prasad, pleader, may be appointed referee, that the case may be decided in accordance with the statement which he may make in Court without any oath being administered to him or send it in writing, that the parties shall accept and agree to it and that they do not wish to produce any other evidence."

On 5th September 1927 Babu Jwala Prasad applied for one day's further time and on 6th September 1927 the plaintiff made an application to the Court stating that he no longer desired to abide by the statement of Babu Jwala Prasad as he had found that Babu Jwala Prasad was going to decide that there was a separation between the plaintiff and his deceased cousin Mathura Prasad effected by the mere fact that Mathura Prasad in his will had stated that he was separate. The Court came to the following finding on that date 16th September 1927:

> "The parties have appointed Babu Jwala Prasad vakil as a referee in this case and they have agreed to stand or fall by his statement. Babu Jwala Prasad has submitted his statement and he states that the plaintiff's suit should be dismissed and that the parties should bear their own costs. Suit dismissed."

It is apparent therefore that on that date Babu Jwala Prasad made a statement before the Court, not on oath to the effect that the plaintiff's suit should be dismissed. Before us in second appeal it has been contended that the plaintiff was entitled to resile from his agreement to abide by the statement of Babu Jwala Prasad. Dr. Katju for the respondents has contended that the plaintiff should not be allowed to resile from such a statement.

Various rulings have been referred to and these rulings fall firstly under the heading of cases coming under the Oaths Act. These cases are *Deoraj Misra* v. *Abhai Raji* (1), *Salik Ram* v. *Wali Ahmad* (2) and *Chiddu* v. *Kunwar Sen* (3). These cases do not apply to the present case because in the present case statement of Babu Jwala Prasad was not made on oath. Secondly there are some cases in which the statement was not on oath of a person to whom the parties had made a reference. Such a case is *Himanchal Singh* v. *Jatwar Singh* (4). In that case there had been a very similar reference in the following terms:

> "It has been settled between the parties that Rai Sahib Pandit Gopal Das Sharma, vakil, shall hear out the whole affair and that we shall accept any statement that he may make before the Court."

Although therefore this reference did not indicate that the statement should be on oath, nevertheless on p. 711 of the ruling it is stated that the statement was made on oath. However that ruling is to be differentiated from the present case on another more important ground. In that ruling no objection was taken by either party before the statement was made and before decree was passed by the Court of first instance in accordance with that statement. It was only on appeal that the plaintiff made objections to the procedure. Now the procedure in that case may be regarded as an adjustment or compromise of the suit under O. 23, R. 3 and accordingly a decree may validly be passed by a Court on such an adjustment or compromise. It was argued that the agreement to refer in the present case would amount to such an adjustment. But we consider that the present agreement does not amount to an adjustment but only amounts to agreement on a procedure which might eventuate in an adjustment and that until the referee had given his statement there could be no question of any adjustment. An objection was taken by the plaintiff before Babu Jwala Prasad had made his statement and before any decree had been passed by the Court in accordance with that statement.

A case which was similar to the present case is reported in *Tumman Singh* v. *Sheodarshan Singh* (5) and this case was decided by a Bench of which one of us was a member. In that case it was held that a similar agreement did not come within the purview of O. 23, R. 3 and that a party could resile from that agreement before the statement of the person to whom reference has been made has been recorded.

Now the Code provides in Sch. 2 for the appointment of an arbitrator who shall decide a case and make an award in writing to a Court and on such an award the case allows a period of ten days for objection to be filed. In addition to this procedure of arbitration there is also the procedure under the Oaths Act by which reference may be made to a person to state on oath certain facts within his knowledge and the parties may agree to be bound by such a statement. Reference has also been made to S. 20, Evidence Act, which deals with statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute. It is contended that the statement of Babu Jwala Prasad would be an admission and an admission by which the plaintiff would be bound. In the first place, an admission under the Evidence Act is not conclusive. Secondly an admission must be a statement of fact and in the present case it is not shown that Babu Jwala Prasad made any statement of fact. Accordingly we consider that there is no question here of any admission by Babu Jwala Prasad which would have any binding effect on the plaintiff.

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(1) A. I. R. 1927 All. 584=102 I. C. 38=49 All. 842.

(2) A. I. R. 1927 All. 590=100 I. C. 473=49 All. 388.

(3) [1906] 29 All. 49=(1906) A. W. N. 280.

(4) A. I. R. 1924 All. 570=80 I. C. 16=46 All. 710.

(5) A. I. R. 1930 All. 162=122 I. C. 186=52 All. 235.

Now it is clear that there are two kinds of proceedings which are allowed to parties who do not wish their suit to be tried by a Court in the usual manner. Firstly, the parties may agree to abide by the statement on oath of some person under the Oaths Act, or secondly, the parties may make a reference to arbitration under Sch. 2, Civil P. C. For the defendants-respondents it is contended that under S. 151, Civil P. C., this Court by its inherent jurisdiction should sanction a third method of procedure, that is, the method adopted by the parties in this case, and should further hold that once a reference has been made to the statement of a person to whom the parties referred, then each party to the case cannot resile from such an agreement.

It is contended that the agreement to make a reference would be a legal agreement under the Contract Act the consideration being in the case of each party that the opposite party had also made a promise to abide by the result. That may be so, and it is apparently correct that such an agreement would not be invalid under S. 23, Contract Act. But although the breach of such an agreement might entitle a party to sue for damages, we do not consider that such an agreement binds the parties to it anh prevents them from resiling from suhc an agreement, and we do not consider that such an agreement must necessarily be specifically enforced. We do not see that any advantage would accrue from the setting up of a third method of procedure in addition to the method of Sch. 2 and the methods of Oaths Act. If parties desire that the case should abide by the knowledge of facts possessed by some person, then it is open to the parties to make an agreement under the Oaths Act that the case should abide by the statement on oath of that person. If on the other hand, the parties desire that the case should be decided by some person instead of being decided by the Court, then it is open to the parties to have that person appointed as arbitrator under Sch. 2. But the particular kind of reference in the present case which is by no means uncommon seems to us to serve no useful purpose.

In the present case Babu Jwala Prasad was apparently not stating anything of his own knowledge and at any rate he was not to make a statement on oath. He was apparently deciding points of law in a manner which would prevent the parties having any appeal on those points of law. If Babu Jwala Prasad had been an arbitrator then he would have had to proceed in a particular manner determined by the reference to arbitration and his award would have had to be in writing and to have been filed in Court and a period of ten days would have been allowed for objections. We consider that the objection of the plaintiff to the procedure in the present case is therefore well founded and that it was open to the plaintiff to resile from the agreement before the statement had been made by Babu Jwala Prasad and action had been taken by the Court on that statement. Accordingly we allow the appeal with costs and we restore the case and send it back to the Court of first instance for trial according to law. Costs incurred here and in the lower Court will abide the result.

P.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 560

MUKERJI AND BENNET, JJ.

Pandit Salig Ram—Defendant—Appellant.

v.

Radhay Shiam — Plaintiff—Respondent.

Second Appeal No. 714 of 1928, Decided on 25th February 1931, against decision of Addl. Sub Judge, Moradabad, D/ 24th January 1928.

Evidence Act (1872), S. 91—Terms of contract to be found in older note—Renewed promissory note inadmissible in evidence as being insufficiently stamped—Plaintiff can fall back on old note—Subsequent pro-note acts as acknowledgment under Limitation Act (1908) S. 19—Contract Act (1872) S. 62.

Where defendant borrows money from the plaintiff on the security of promissory note and later the promissory note is renewed by another promissory note which is found to be inadmissible in evidence being insufficiently stamped, the plaintiff can fall back on the original promissory note and succeed in his claim, provided the terms of contract are to be found in the older promissory note, and subsequent pro-note can be used as an acknowledgment : 20 *I.C.* 10 ; 42 *Mad.* 637 ; *A. I. R.* 1929 *All.* 980 ; *A. I. R.* 1931 *All.* 183 (*F.B.*) and 36 *All.* 259, *Ref.*

U. S. Bajpai, *Gopi Nath Kunzru* and *Hari Ram Jha*—for Appellant.

S. K. Dar and *Baleshwari Prasad*—for Respondent.

Bennet, J.—This is a second appeal by the defendant against a decree of the learned Additional Subordinate Judge of Moradabad in appeal decreeing the suit of the plaintiff with costs. The plaint as originally brought was based on a promissory note of 7th November 1925 for Rs. 1,350 with interest at Re. 1-4-0 per cent. Subsequently the plaint was amended and the suit was based on an earlier promissory note of 10th November 1922 for Rs. 1,000 at the same rate of interest of Re. 1-4-0 per mensem. Both the promissory notes were stated to be executed by Salig Ram, the appellant, in favour of the father of the plaintiff.

As regards the second promissory note it is admitted that this promissory note was not properly stamped. Accordingly, S. 35, Stamp Act, applies which states :

> "No instrument chargeable with duty shall be admitted in evidence for any purposes unless such instrument is duly stamped."

It is contended that this promissory note of 7th November 1925 is inadmissible for evidence for any purpose and therefore we leave it entirely out of consideration. The suit was brought on 27th June 1927, and it is claimed for the appellant-defendant that the suit on the transaction of 10th November 1922 is time barred. For the respondent it is claimed that limitation is saved by an admission of liability under S. 19, Lim. Act. This admission is contained in an endorsement on the back of a promissory note of 10th November 1922 and is on the following terms :

> "7th November 1925 ko promissory note *haza ke ewaz men dusra* promissory note tadadi 1350 *rupia ka takrir kaidya yeh hhoka hogaya.*"

Thetranslation of this is that on 7th November 1925 in lieu of the present promissory note, a second promissory note of the amount of Rs. 1,350 has been executed and this promissory note has become void.

If this is a valid acknowledgment under S. 19, Lim. Act, then the suit of the plaintiff would be within time and if it is not a valid acknowledgment, then the suit of the plaintiff would be time barred. The learned counsel for the appellant has contended firstly that there is no valid acknowledgment and secondly that there was no subsisting contract of 1922 on which the suit could be based. In regard to the first point as to whether there is a valid acknowledgment in this endorsement, it was argued by learned counsel that S. 19 requires "an acknowledgment of liability." Learned counsel alleges that there is no clear acknowledgment of liability because the endorsement of 7th November 1925 amounts to an allegation that the liability on the promissory note of 10th November 1922 has terminated and he therefore says that this writing denies liability. He supports his argument by reference to *Badri Das* v. *Manohar Das* (1) and *Rangaswami* v. *Thangavelu* (2). In both these cases it was held that the alleged acknowledgment was no admission of liability, because in each case the person making the acknowledgment had stated that the debt which had previously existed had been paid. In the present case however we consider that the acknowledgment is to be distinguished, because in the cases quoted, the allegation was that payment had been made and the debt had been discharged. In the present case the acknowledgment set forth not that the debt of Rs. 1,350 had been paid but that a different form of security had been given for that debt. The allegation is not that the liability had terminated but that a different form of security for the subsisting liability had been created. What had been terminated was the promissory note of 10th November 1922 and that promissory note had been replaced by a promissory note of 7th November 1925.

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(1) [1913] 20 I.C. 10.

(2) [1919] 42 Mad. 637=50 I.C. 380.

Reference was also made to a ruling reported in *Govind Singh* v. *Bijay Bahadur Singh* (3). In that case which was somewhat similar, there was in 1925 a promissory note executed for Rs. 349 which was due under an earlier promissory note of 1923 and as in the present case the later promissory note was insufficiently stamped. In addition however to the promissory note of 1925 there was also executed a receipt on the same date. It was held on p. 1285 by Sulaiman, J. :

> "Even if the receipt and the inadmissible promissory note were not executed in payment of a cash payment but were in renewal of a previous debt, either that previous debt has been acknowledged afresh or very likely it had been substituted by a new contract including a fresh promise to pay. In either case, the plaintiff's claim lies and is within time."

We do not consider that the case for the defendant receives any support from this ruling and it is to be noted that the facts in the present case are not parallel, because in the present case there was no receipt executed on 7th November 1925 by which there purported to be a transaction of repayment of the loan and a fresh contract.

Reference was also made to the Full Bench ruling of this Court in *Nazir Khan* v. *Ram Mohan* (4). In that case the question was whether S. 91, Evidence Act, barred or did not bar a suit which was based on a transaction in which the promissory note figured. It was held that where there is a completed cause of action for recovery of money on foot of a distinct and separate transaction and a promissory note is given as a collateral security, the plaintiff will be entitled to sue for the original consideration, even if, for some flaw in the promissory note, the promissory note itself may not be sued upon, being inadmissible in evidence. On the other hand where the plaintiff would not have lent the money without the promissory note, the making and handing over of the note and the payment of the money are "concurrent conditions" (i. e. part and parcel of the same transaction) and if the promissory note turns out to be inadmissible in evidence for any reason (such as the absence of a proper stamp), it is not open to the plaintiff to recover his money by proving orally the terms of the contract, in the teeth of the provisions of S. 91, Evidence Act (i. e. by setting up a case independent of the note).

Now in the present case the language of S. 91, Evidence Act, clearly shows that it cannot be a bar to the suit of the plaintiff based on the transaction of 1922. S. 92 states :

> "When the terms of a contract . . . . have been reduced to the form of a document . . . . . no evidence shall be given in proof of the terms of such contract . . . . . except the document itself . . . . ."

Now it is clear that the inadmissible promissory note of 1925 does not contain the terms of the contract of 1922, and that the transaction of 1922 is quite independent of the promissory note drawn up three years later. Accordingly, S. 91 cannot be used as a defence in the present case.

The next point which we may examine is whether the acknowledgment under S. 19 is to be an acknowledgment which must be taken absolutely literally or whether the Court should have regard to the sense and meaning of the words used and to what is implied by the words used. Reference was made by learned counsel for the respondent to *Maniram Seth* v. *Seth Rupchand* (5) at p. 1059 where their Lordships of the Privy Council apparently held the view that the literal meaning of the words should not be given undue stress as their Lordships held that the use of the words "alleged indebtedness" did not prevent the statement being an acknowledgment of liability. We consider that the meaning implied by the endorsement of 7th November 1925 is that there was a subsisting debt of Rs. 1,350 due by the defendant to the father of the plaintiff and that in lieu of that debt the defendant was executing another security. There is no suggestion whatever that the debt which had previously been due had been paid up or was being paid up by the security, but the suggestion is that the debt remained unpaid and that new promissory note which was inadmissible in evidence was created for the purpose of collateral security of the debt. We therefore consider that there is a perfectly valid acknowledgment in the endorsement of 7th November 1925 and that that endorsement is valid for the purpose of saving limitation.

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(3) A.I.R. 1929 All. 980=121 I.C. 108

(4) A.I.R. 1931 All. 183 (F.B.)

(5) [1906] 33 Cal. 1047=33 I. A. 165=2 N.L.R. 130 (P.C.).

We now turn to the second point which was advanced by the learned counsel for the appellant and that is that there was no subsisting contract at the time of the suit for the loan of 1922. This portion of the argument was based on the theory that the loan of 1922 became merged in the promissory note of 1925 and as it is impossible for plaintiff to sue on the promissory note of 1925, therefore it ought to be impossible for the plaintiff to sue on the loan of 1922. In this connexion we would refer to S. 62, Contract Act, which states :

> "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

It was therefore argued by the learned counsel for the appellant that in place of the original promissory note the parties had substituted a new promissory note therefore the terms of the original promissory note need not be carried out. This however would involve more than one fallacy. In the first place the original promissory note is merely a security for the loan which was granted at the same time and the later security of 1925 having failed, there is no reason why the plaintiff should not sue on the original agreement to repay. Secondly, S. 62 contemplates a new contract being substituted. Now under S. 62 (h) of that Act : "An agreement enforceable by law is a contract." The agreement embodied in the promissory note of 1925 is admittedly not enforceable by law and therefore as this agreement cannot be proved owing to S. 35, Stamp Act, therefore, we consider that it does not amount to a contract such as is contemplated by S. 62, Contract Act.

A similar view of the law was held in *Jagan Prasad* v. *Indar Mal* (6) where it was held where defendants had borrowed from plaintiffs and paid security of certain hundis and later these hundis were renewed by hundis which were found to be inadmissible in evidence being insufficiently stamped, that the plaintiffs could fall back on the original hundis and succeed in their claim. Accordingly we consider that there was a subsisting contract between the parties at the time of the suit based on the transaction of 1922 and that the plaintiff is competent to recover the amount which was due on the loan of 10th November 1922.

We therefore dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

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(6) [1914] 36 All. 259=23 I.C. 589.

** A. I. R. 1931 Allahabad 562

Full Bench

SULAIMAN, AG. C. J., MUKERJI
AND BOYS, JJ.

Mohammad Ishaq Khan and *another*—Plaintiffs—Appellants.

v.

Rup Narain Singh and *others*—Defendants—Respondents.

Second Appeal No. 50 of 1929, Decided on 13th July 1931, from decision of Sub-Judge, Ghazipur, D/- 21st August 1928.

* (a) **Transfer of Property Act (1882), Ss. 76 (h) and 77—Mortgagee in possession cannot contract out of liability under S. 76 (h) and liability is absolute except in cases covered by S. 77 :** 7 *I. C.* 293, *impliedly overruled.*

The liability of mortgagee in possession under S. 76 (h) to give credit for the receipts after deducting the expenses and interest, in the account is absolute unless the case comes within the purview of S. 77 and the parties would not be at liberty to contract themselves out of the statutory liability : **7 I. C. 293, impliedly overruled.** [P 566 C 2]

** (b) **Transfer of Property Act (1882), S. 76 (h)—Mortgagee in possession taking usufruct in lieu of portion of interest is liable under S. 76 (h) to render account :** 7 *I. C.* 293, *impliedly overruled.*

A mortgagee in possession who has agreed to accept the whole of the usufruct of the mortgaged property in lieu of a portion of the interest due to him is liable under S. 76 (h) to render account and give credit for the surplus income if any, and S. 77 has no application to the case : **7 I. C. 293, impliedly overruled.** [P 566 C 2, P 567 C 1]

Mansur Alam for *Iqbal Ahmad*—for Appellants.

V.D. Bhargava for *K. Verma*—for Respondents.

Order of Reference.

Mukerji, J.—This is a plaintiffs' appeal and arises out of a suit for redemption of mortgage dated 17th June 1867.

The plaintiffs are the transferees of the defendants second party who were the original mortgagors. The defendants first party represent the original mortgagees.

The plaintiffs' case was that owing to an increase in the income of the property mortgaged usufructuarily, the mortgage money has paid itself and there is a surplus of Rs. 410-5-2 in favour of the plaintiffs. They accordingly ask for possession and for the said amount of money as surplus due to them. The defence was that there was no increase in the income of the property mortgaged; on the other hand, there was a decrease in it and there was a document of further charge and the plaintiffs could not redeem without paying the amount due on that document also. In the mortgage deed there was a stipulation that a part of the estimated income of the property would be taken towards a part of the interest and the balance of Rs. 7 a year would be paid by the mortgagors. As to this, the plaintiffs' allegation was that the sum of Rs. 7 a year was paid up to 1290 F, and thereafter it was not necessary to pay this sum because the income from the property increased by more than Rs. 7 a year. The lower appellate Court has held that it is a fact that the mortgagors paid Rs. 7 a year up to 1290 F.

The first Court found that there was a considerable increase from time to time in the profits of the mortgaged property and that after paying the stipulated interest there was a surplus which went to liquidate the principal amount and a large amount of surplus money was left in the hands of the mortgagees amounting to Rs. 3,943. On these findings, the learned Munsif decreed the suit for possession and for recovery of the surplus amount.

Before the learned Subordinate Judge who heard the appeal, it was contended that under the terms of the mortgage the mortgagees were not bound to render an account and that the subsequent deed did amount to a deed of further charge. On both these points the learned Subordinate Judge found in favour of the defendants. The result was that he decreed the claim for redemption of the mortgage money on condition of payment of the principal mortgage money and Rs. 7 a year, the deficiency in the interest every year, from 1291 F to the date fixed for payment and also on payment of the principal amount secured by the deed of further charge and the interest thereon.

The plaintiffs have come in second appeal and two points have been urged before us. The first is that the learned Judge of the Court below was wrong in holding that there could be no accounting, that the document for which a further charge is claimed creates no charge on the property and therefore the plaintiffs are not liable to pay the money due on it. By way of a side issue, it was contended on behalf of the respondents that the amount of Rs. 187 stated in the deed of mortgage as the total income per year, was taken by the parties as the income from the property mortgaged for all time. In reply to this, it was argued on behalf of the appellants, that such stipulation would be void under the law.

The points that arise for decision in this case therefore are:

1. Whether the parties are agreed that Rs. 187 was to be taken to be the annual income of the property for all time, irrespective of whether there was actually an increase or decrease in the income from the mortgaged property.
2. If the parties did so agree, whether the agreement is binding on them or whether the same is void and contrary to law.
3. Whether the plaintiffs are entitled to claim an account of the income of the property.
4. Whether the deed dated Jait Sudi 15th 1274-F for the amountof Rs. 250 creates a charge on the property mortgaged.

It will be noticed that if issue 3 is decided in favour of the plaintiffs, an issue will have to be sent down, as to the account in order that the Court below may find out what was the income from the property during the years of the mortgagee's possession and whether the plaintiffs have to pay anything or whether they are entitled to any surplus?

As to the first point, as a true construction of the document in suit, we are of opinion that the parties agreed that Rs. 187 was to be taken as the total annual income of the property. The term of the mortgage was nine years and there is nothing in the document to show that it was contemplated that there might be an increase in the income within this term of the mortgage, or even thereafter.

Points 2 and 3 go together. These are the points which are most important in this appeal. The argument on behalf of the appellants is that, except in cases covered by S. 77, T. P, Act, a mortgagee in possession is bound to render an account and if he really acquires from the property a larger amount than was contemplated by the mortgagor at the date of the execution of the mortgage, the mortgagee cannot keep the surplus to himself on the ground that the mortgagor and he had agreed that the income from the property would be a fixed amount. It is pointed out that S. 77 contemplates the cases where the whole of the interest is to be covered by the usufruct or where the usufruct covers the whole of the interest and a defined portion of the principal amount. S. 77 does not contemplate a case in which, by agreement, the usufruct of the mortgaged property is to be taken in lieu of a part only of the entire interest due to the mortgagee.

On the other hand, S. 76, T. P. Act, lays down the liabilities of the mortgagee in possession. In the case of Cls. (c) and (d) of this section, the expression "in the absence of a contract to the contrary" appear.

Thus where those clauses apply, it is open to the parties to contract themselves out of those rules and in that case the mortgagee will not be bound to act in the way he would be bound, in the absence of a contract to the contrary. In Cls. (a), (b), (e), (f), (g), (h) and (i) the words, "in the absence of contract to the contrary" do not appear and therefore the liability of the mortgagee would appear to be absolute and he is not entitled to contract out of those liabilities. For example, in the case of Cl. (a) which lays down that a mortgagee must manage the property as a person of ordinary prudence would manage it if it were his own, a mortgagee cannot be permitted to agree with the mortgagor that he would manage the property in any way and as carelessly as he chose and that he would not account for the income of the property or would not be liable for any loss occasioned to the property of the mortgagor by the mortgagee's mismanagement. There can be no doubt that in the case of Cl. (a) the liability of the mortgagee is absolute and he cannot contract himself out of it. Similarly in the case of Cl. (g), the mortgagee is required to keep clear, full and accurate accounts. This seems to be an absolute liability and the mortgagee cannot agree validly with the mortgagor that any account that he keeps, however slipshod it may be, will have to be accepted by the mortgagor. Similarly in the case of Cl. (h) the mortgagee is required to apply the receipts from the mortgaged property, after deducting the expenses and interest thereon, in a certain way. If his income from the property is large, it is contended on behalf of the appellants that it is not open to the mortgagee to agree with the mortgagor that he would keep anything over and above the interest due to him for his own benefit and would not account for the same to the mortgagor.

The argument adduced on behalf of the appellants seems to have great force. The omission from S. 77 of the case in which only a part of the interest is to be paid out of the usufruct must have been intentional and not accidental. One can see the reason for it without much difficulty. Where the parties agree on a stipulated amount of interest to be paid by one party and to be received by the other, it is that amount alone to which the mortgagee is entitled and he is entitled to nothing more. The exception is where no interest is stipulated for specifically, and it is agreed that whatever be the interest and whatever be the usufruct one will be set off against the other. There need be no accounting in such a case. But where such is not the case, there must be an accounting.

This view which has been strongly urged on behalf of the appellants and which, as at present advised, seems to us to be the correct view, was not accepted in the case of *Shafiunnissa* v. *Fazal Rab* (1) by two learned Judges of this Court. That case was similar to the present one. Karamat Husain, J., remarked that a usufructuary mortgagee would be liable to render account only and further held that the case before him was covered by S. 77, T. P. Act, though the facts did not fall within the four corners of that section. His learned colleague, Knox, J., contented himself with the remark that on the stipulation contained in the deed of mortgage, he agreed with his brother Karamat Husain, J., This case of *Shafiunnisa* v. *Fazal Rab* (1) was cited in a more recent case in this Court, namely *Behari Lal* v. *Shib Lal* (2), but it was neither approved nor disapproved. In the Patna High Court, the case in *Shafiunnisa* v. *Fazal Rab* (1), was cited in the case of *Kishun Lal* v. *Hira Lal* decided by Das and Kulwant Sahay, *A. I. R.* 1929 *Pat.* 571, and the decision on the point of law was dissented from. The judgment however contains a dictum to the effect that the judgment in the Allahabad case was correct, if it was to be based merely on the interpretation of the document. No doubt this dictum was obiter, but it shows, at any rate, that the learned Judges thought that it was open to the mortgagees to contract themselves out of the liabilities laid down by the law under S. 76 (h), T. P. Act. This view is controverted before us by Mr. Iqbal Ahmad, who has argued the case for the appellants.

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(1) [1910] 7 I. C. 293.

Mr. Kamla Kant Verma has drawn our attention on behalf of the respondents to another case decided by the Patna High Court, namely, *Raghubar Narain Chaudhuri* v. *Mohit Narain Jha* (3) which quotes without disapproval the opinion of Karamat Husain, J., in the case in *Shafiunnisa* v. *Fazal Rab* (1), viz., in the absence of a contract to that effect, a mortgagee with possession is not bound to account for the usufruct of the property. If that is the view which the learned Judges took in the case in *Raghubar Narain Chaudhuri* v. *Mohit Narain* (3) there is a conflict of views among the Judges of the Patna High Court.

We are of opinion that the case in *Shafiunnisa* v. *Fazal Rab* (1) requires reconsideration and for this purpose we refer this case to a larger Bench. The point that has to be decided by the Full Bench, such as may be constituted by the learned Chief Justice, will be as follows :

> Whether it is open to a mortgagee who has agreed to accept the whole of the usufruct of the mortgaged property in lieu of a portion of the interest due to him, to escape the operation of S. 76 (h), T. P. Act, and a rendition of account of the income of the property, by an agreement to that effect with the mortgagor.
>
> 2. Whether, on a true construction of S. 77, T. P. Act, a case where the whole of the usufruct of the mortgaged property is taken in lieu of a part of the interest due on the mortgage money, is covered by it?

We have read the document dated Jait Sudi 15th 1274 Fasli for the sum of Rs. 250 and we are of opinion that it creates a charge in clear terms over the property mortgaged by way of conditional sale with the mortgagees. The language does not call for a detailed examination. The document itself is called a hypothecation bond and the mortgagors agree that till the amount secured by the deed is paid off, they will not transfer any of the properties mortgaged by way of conditional sale. Further, they agree that in case the property mortgaged by way of conditional sale is foreclosed, the amount for which the foreclosure would take place would include the amount due on the present deed.

We direct that the case be laid before the Hon'ble the Chief Justice for constitution of a Bench to decide the two points formulated by us above.

On return of findings from the Full Bench, we shall consider whether a remand of the issue indicated above will be necessary or not.

Opinion

Sulaiman, Ag. C. J.—This is a plaintiff's appeal arising out of a suit for redemption of a mortgage of 17th June 1867, by way of conditional sale, for a sum of Rs. 1,333-5-4. The mortgagor promised to pay interest at the rate of As. 7-6 per mensem which came to Rs. 75 per annum. These figures were expressly recited in the deed. It was further stated that the gross produce of the property was Rs. 187, out of which Rs. 108 had to be paid on account of Government revenue and cesses, Rs. 6-3-6 on account of certain other charges, and Rs. 4-8-0 on account of expenses ; in all Rs. 119-2-6. The mortgagee was to utilize the balance of Rs. 68 in lieu of interest and the mortgagor promised to pay Rs. 7 from his pocket on account of deficiency in the interest. It was contemplated that the mortgage would be redeemed in about nine years' time, and there was the condition for foreclosure that if the mortgagor failed to pay the amount at the stipulated time, the mortgage would be foreclosed. It did not provide what was to happen if there was an increase or decrease in the income, nor did it expressly lay down any covenant as to the laibility or otherwise of the mortgagee to maintain accounts or to render them at the time of redemption. The deed was silent as to these matters.

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(2) A. I. R. 1924 All. 591=82 I. C. 25 =46 All. 633.

(3) A. I. R. 1929 Pat. 37 = 114 I. C. 473 = 7 Pat. 44.

It is an admitted fact that about 1291 F. there was a fresh settlement, and the income of the property was considerably increased. It is also an admitted fact that the mortgagors were paying Rs. 7 a year up to that year and then stopped paying any further. It is not disputed that the mortgagee did not insist on the payment of this extra amount and on account of the default did not consider it necessary to sue for foreclosure.

The plaintiffs claimed that the mortgagee's representatives must give credit for the extra income which accrued after the mortgage; while the mortgagee's representatives disputed this and pleaded that the mortgagor's representatives were bound to make good the balance of Rs. 7 a year. The lower appellate Court passed a decree for redemption in favour of the plaintiffs on payment of the principal sum plus Rs. 7 a year from the time when they stopped payment. The plaintiffs appealed to the High Court, and the Division Bench has referred two questions to a Full Bench for answers.

The Division Bench interpreted the mortgage deed in dispute as containing no contract as to what was to happen if there was an increase or decrease in the income. The learned Judges thought that the contingency that there might be an increase or decrease in the income never occurred to the parties, and they never thought about it, so they did not provide for this contingency, that is to say, it was purely a case of omission and there was no contract against the liability of the mortgagee to account for any surplus income. We must accept this interpretation as the question of interpretation has not been referred to us.

The mortgage deed in question was executed before the coming into force of the Transfer of Property Act, and at the time of its execution the parties were bound by the equitable principals governing mortgages and not by the strict language of any section of this enactment. Where the parties expressly agree that the entire income, whatever it be, should be set off against the whole of the interest on the amount advanced, there is of course, no necessity for the mortgagee to keep any account. On the other hand where the intention is that the mortgagee should get the interest at an agreed rate, the primary consideration is the payment of the mortgage money with interest at that rate to the mortgagee, even though the income may fluctuate from year to year. It would follow on general equitable principles that where there is a fixed rate of interest there should be a liability on the mortgagee to maintain proper and regular accounts and give credit for all the receipts and claim compensation for deficit or pay for the surplus. The liability of the mortgagee to render accounts was well recognized even before the coming into force of the Transfer of Property Act. Under S. 76 of the Act the liability of the mortgagee in possession to give credit for the receipts, after deducting the expenses and interest, in the account, is absolute. It is significant that although the words "in the absence of a contract to the contrary" occur in Cls. (c) and (d), those words do not occur in the other clauses particularly in Cl. (h), which requires that the receipt from the mortgaged property shall be debited against the mortgagee in reduction of the amount due to him and the surplus if any shall be paid to the mortgagor. It is therefore quite obvious that unless the case comes within the purview of S. 77 of the Act, which in express language excludes the operations of S. 76 (h), the laibility of the mortgagee to give credit for the receipts in the account is absolute and the parties would not be at liberty to contract themselves out of the statutory liability.

Section 77 however cannot apply unless there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of such interest and defined portion of the principal. On the interpretation of the mortgage deed made by the Division Bench there was no such contract in the case before us. S. 77 therefore has no application and the mortgage does not come within the purview of the exception. He was therefore liable under S. 76 (h) to render account and give credit for the surplus income if any.

In this view of the matter it is not necessary to answer the second question. If however the Division Bench are of opinion that they cannot decide the appeal without an answer to that question they may refer it again to us.

Our answer to the first question is that where the mortgage is governed by the Transfer of Property Act the mortgagee cannot contract himself out of the provisions of S. 76 (h) of the Act unless he can bring himself strictly within the exception provided by S. 77.

V.B./R.K. *Reference answered.*

✲✲ A. I. R. 1931 Allahabad 567

Full Bench

SULAIMAN, AG. C. J., MUKERJI AND BOYS, JJ.

Shakir Husain—Applicant.

v.

Chandoo Lal and *others* — Opposite Parties.

Civil Revn. No. 372 of 1930, Decided on 22nd July 1931, against order of Sub-Judge, Moradabad, D/- 30th June 1930.

✲ (a) **Civil P. C. (1908), S. 122 — Effect considered.**

Under S. 122, the High Court has power to annul, alter or add to any of the rules in the first schedule. If a new rule that has been added is to some extent in conflict with the previous existing rule the new rule must by implication be deemed to have annulled or altered that rule. The new rule if not consistent with the old rule must prevail. [P 567 C 2 ; P 568 C 1]

(b) Words—Construction—"Approval" and "permission"—Difference between, enunciated—Civil P. C. (1908), O. 21, Rr. 43 and 122 to 124 (as added.)

Ordinarily the difference between the approval and permission is that in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently obtained may all the same validate the previous act. [P 568 C 1]

(c) Civil P. C. (1908), O. 21, Rr. 122, 123 and 124 (as added)—R. 122 applies to cases of moveables like ornaments only.

Rules 123 and 124 apply to the appointment of watchmen or guards, otherwise known as "sahanas," who are usually appointed to guard standing crops in the fields or crops which have been cut and stacked, and similarly to guard other places where attached goods have been kept. R. 122 (old R. 123) is the only rule which applies to cases where moveables like ornaments are attached and for which some arrangement is necessary for their safe custody. [P 570 C 1]

(d) Civil P. C. (1908), O. 21, Rr. 43, 122 and S. 145—Supurddar becomes officer of Court after approval by Court.

The action of the attaching officer in handing over the property to a surety or supurddar is within his lawful powers under R. 122, and certainly upon his action being approved either expressly or impliedly by the Court, the surety becomes an officer of the Court. But apart altogether from this there is no reason why in suitable circumstances S. 145 should not be applicable: *A.I.R.* 1921 *All.*220, *Foll.* [P 573 C 2]

✲✲ (e) **Civil P. C. (1908), O. 21, Rr. 43 and 122 (as added by Allahabad High Court) —When Court approves of particular custody under R. 122, responsibility of attaching officer ceases** : 48 *All.* 510=*A. I. R.* 1926 *All.* 406=95 *I. C.* 828, *Overruled.*

So far as the question of the responsibility of the attaching officer is concerned there is no necessary conflict between R. 43 and R. 122 as added. Under R. 43 he is responsible for due custody thereof. It is his duty to make the most convenient and economical arrangement, but his legal responsibility will continue till the Court approves of the arrangement. When the Court has approved of it, his responsibility comes to an end, but pending approval it subsists : **48 All. 510=A. I. R. 1926 All. 406=95 I. C. 828, Overruled.** [P 568 C 1]

✲✲ (f) **Civil P. C. (1908), O. 21, Rr. 43, 122 and 123—Supurddar undertaking under R. 122 is responsible under Civil P.C. (1908), S. 145.**

Although a sahana would not be a surety, a supurddar, who has given an undertaking to produce the goods when ordered by the Court is a surety although the undertaking is not given to the Court directly but through the attaching officer, and by such an undertaking he becomes liable under S. 145. [P 571 C 1]

M. H. Faruqi—for Applicant.

Shabd Saran and *Vishwa Mittra*—for Opposite Parties.

Sulaiman, Ag. C. J.—I concur in the conclusion, and would only add a few words because the question is one of general importance. No doubt there is some inconsistency between O. 21, R. 43 and R. 122 added by the High Court. The former requires that the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates. The latter requires that he shall, subject to approval by the Court, make such arrangement as may be most convenient and economic. If the Court approves of it, he can certainly put the property in the custody of some one else other than a subordinate officer.

Under S. 122, Civil P. C., the High Court has power to annul, alter or add to any of the rules in the first schedule. If a new rule that has been added is to some extent in conflict with the previous existing rule, I think the new rule must by implication be deemed to have annulled or altered that rule. The new rule, if not consistent with the old rule must prevail. But so far as the question of the responsibility of the attaching officer is concerned, I do not think that there is necessarily any inconsistency. Under R. 43 he is responsible for the due custody thereof. It is his duty to make the most convenient and economical arrangement, but his legal responsibility will continue till the Court approves of the arrangement. When the Court has approved of it, his responsibility comes to an end ; but pending approval it subsists.

Of course the expression "subject to approval by the Court" implies that the arrangements which are considered by him to be most convenient and economical must be made by him first and approved by the Court subsequently. It is not necessary for him to submit his proposal beforehand and get an approval though such a course is not impossible. The appointment of a custodian or supurddar and the placing of the attached property in his custody and the taking of a security from him are arrangements within the scope of R. 122. But the appointment of a sahana (guard or watchman) putting him in special charge of a property is done under R. 123 and must be with the permission of the Court. Ordinarily the difference between the approval and permission is that in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently obtained may all the same validate the previous act. I also think that although a sahana would not be a surety, a supurddar, who has given an undertaking to produce the goods when ordered by the Court, is a surety although the undertaking is not given to the Court directly but through the attaching officer.

Under S. 145, Civil P. C., where any person has become liable as surety for the restitution of any property taken in execution of a decree, the decree may be executed against him to the extent to which he has rendered himself personally liable. The supurddar by his undertaking becomes liable as a surety for the restitution of the property attached in execution of the decree, and can certainly be proceeded with under this section. This of course does not imply that remedy by a separate suit also does not lie. S. 145 gives the option to proceed against him in execution, but does not compel him to do so as to prohibit a separate suit. Indeed, where by the security a charge has been created on immovable property the remedy to enforce that charge is only by separate suit.

Mukerji, J.—One Chandoo Lal had a simple money decree to execute against Ram Gopal and others, judgment-debtors. In execution of that decree, the amin of the Court, Shakir Husain, attached, by seizure, ornaments worth Rs. 1,280 on 27th June 1929. The warrant issued to him was for attachment of such moveable property as might be pointed out by the decree-holder. The ornaments were attached at the instance of the decree-holder's agent, Nanhe Mal, who pointed out the ornaments to be attached. One Birjnandan Prasad was put forward as the man into whose custody the ornaments might be given for safe custody. The amin's report is to the effect that the decree-holder's man, Nanhe Mal, approved of Birjanandan Prasad as trustworthy. Birjnandan Prasad executed on the same day (27th June 1929) a supurdnama or acknowledgment, having got in his possession the properties, and agreed that he would hand over the goods whenever the Court wanted the same, or in default he would pay the estimated price thereof: see document No. 7-C, execution file 11. The amin sent on his report recorded on the back of the warrant for attachment to the Court. This report purports to bear the signature of Nanhe Mal, where Nanhe Mal describes himself as "nishan dahinda."

The report was received in the office of the executing Court, namely, the Subordinate Judge, Moradabad, prior to 3rd July 1929. On 3rd July, which had been fixed in the case, the following order was passed by the Subordinate Judge :

> "Attachment has been effected according to law. Further (execution) costs have not been paid. It is ordered that the decree-holder should pay in further costs by 10th July 1929."

The execution was stayed by an order of the appellate Court, and an order to that effect was recorded by the Subordinate Judge on 7th August 1929.

On 17th February 1930 the decree-holder made an application to the executing Court to the effect that the appellate Court had dismissed the appeal, that the goods attached were with the judgment-debtor, that the sapurddar or custodian of the attached goods had died and that the goods should be recovered from the judgment-debtor. On this application being received, a notice was issued to Ram Gopal, judgment-debtor, to produce the goods on 11th March 1930. On that date the Court directed the decree-holder to disclose the names of the heirs of the deceased supurddar within a week. After some adjournments, on 12th April 1930, the Court recorded an order to the effect that the supurddar was dead, that the decree-holder was unable to furnish the whereabouts of his heirs, that the judgment-debtor urged that his ornaments of value exceeding the amount of the decree had been attached and so he should not be made to suffer, that the amin had not taken the Court's permission for the appointment of the supurddar, and the Court accordingly directed the amin to appear and to explain his position. The amin appeared on 3rd May 1930, and his statement was recorded. The decree-holder had already been examined on 12th April 1930. On 9th May 1930, by a long judgment, the Subordinate Judge held that the amin was responsible for the loss, and gave him a month's time within which to arrange for the recovery of the goods.

Against this order the amin has filed a petition in revision, and the contention in his behalf is that he is not liable, having done all that was required of him under the law.

The decree-holder unfortunately has not appeared in the case. But two counsels have appeared, one on behalf of Ram Gopal, and the other on behalf of the heir of the deceased supurddar Birjnandan Prasad.

The main ground on which the learned Subordinate Judge has held the amin to be responsible is that the amin was bound, before he handed over the goods to Birjnandan Prasad, to obtain the permission of the Court under R. 123, O. 21, Civil P. C. The learned Subordinate Judge bases his opinion on a ruling of this Court, namely; *Badri Prasad* v. *Chokhe Lal* (1).

One of the questions that we have to determine is whether this case has been rightly decided.

The judgment does not clearly give the facts, and I have looked into the paper book of the case. It appears that certain goods were attached before judgment and were handed over to one Badri Prasad. The suit was dismissed, and the defendant asked for his goods. A pleader of the Court had been appointed "commissioner" to effect the attachment, and the pleader, having made the attachment, handed over the goods to the custody of Badri Prasad. The Court below held that Badri Prasad was liable for the value of the goods, and he filed a revision in this Court. This Court held that it was the commissioner, who effected the attachment, who was really responsible, and accordingly made a decree against him for the value of the goods attached.

The decision was based mainly on R. 43 and R. 123 (it was then numbered as 124), O. 21, Civil P. C. It may be mentioned here that O. 21, Sch. 2, Civil P. C., as originally passed by the legislature, contained 103 rules. Certain rules were added by the High Court at Allahabad, namely Rr. 104 to 140. These rules have undergone a slight change, and therefore it was necessary to re-number them.

Rule 43 lays down that the attachment of moveable property in the possession of the judgment-debtor shall be made by actual seizure, and directs the attaching officer to keep the property in his own custody or in the custody of his subordinates, and holds the attaching officer responsible for the due custody of the property. R. 123, (R. 124 old) says that, with the previous permission of the Court, the attaching officer may place one or two persons in special charge of the attached property. It was held in the case of Badri Prasad that the commissioner (Mr. Mohammad Ibrahim) was responsible for the custody of the goods under R. 43, and that as he had failed to obtain the previous permission of the Court before he handed over the property to Badri Prasad, he was the only person liable to the Court for the value of the goods.

It appears to me that the attention of the learned Judges was not drawn to R. 122 (old R. 123), O. 21. This lays down that for the safe custody of moveable property, other than live stock, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical. The case that was before the learned Judges fell within R. 122 (R. 123 old), and not under R. 123 (old R. 124).

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(1) A. I. R. 1926 All. 406=95 I. C. 828=48 All. 510.

Rule 124 (old R. 125) lays down that where, with the previous permission of the Court, one or more persons are placed in special charge of attached property, the wages of the persons so placed in charge shall not be less than four annas a day or more than six annas a day. This shows that Rr. 123 and 124 apply to the appointment of watchmen or guards, otherwise known as "sahanas" who are usually appointed to guard standing crops in the fields or crops which have been cut and stacked, and similarly to guard other places where attached goods have been kept. R. 122 (old R. 123) is the only rule which applies to cases where moveables like ornaments are attached, and for which some arrangement is necessary for their safe custody. Ornaments cannot very well be left at any place to be watched or guarded by peons getting four to six annas a day.

In the case of Badri Prasad, as in the case before us, the attaching officer was entitled to make suitable arrangements with a view to convenience and economy for the safe custody of the goods, " subject to approval by the Court." Previous permission was not necessary for the purpose.

In the case before us as I have already stated, the amin submitted his report as to the attachment, and distinctly said that goods of the judgment-debtor, pointed out by Nanhe Mal, had been attached and that Nanhe Mal had approved of Birjnandan Prasad as a suitable person to keep in his custody the ornaments.

The Court declared, on the receipt of the amin's report, that the attachment had been legally made, and directed the decree-holder to produce further costs for execution. It follows that the Court approved of the procedure adopted by the amin, as required by R. 122. We must take it that the report of the amin was read by or was read out to the Court and the Court was satisfied with the custody of Brijnandan Prasad. Indeed, there was nothing to take exception to, as Brijnandan Prasad had been approved by Nanhe Mal as a proper custodian. The decree-holder himself must have at once come to know in whose custody the attached goods had been placed, and he never told the Court that the goods had been placed with a wrong man and that these should be recovered from him and kept in some other custody.

It appears to me that, in view of what had happened, the amin was exonerated of all liability and responsibility in respect of the goods. He was no doubt responsible under R. 43 ; but as soon as he complied with R. 122, his responsibility ceased.

It appears to me that there is a little conflict between R. 43 and R. 122, inasmuch as R. 43 directs the attaching officer to keep the attached goods either in his own custody, or in the custody of one of his subordinates. This is, as a matter of fact, an impracticable rule so far as the amins of subordinate civil Courts in the province of Agra are concerned. They are supplied with only one peon, and that is his only " subordinate." The amin is not supplied with any iron safe to keep valuables, and in the course of a month he makes at least seven or eight attachments of moveable property. He would require a very large godown, sufficiently safe to keep valuables and other goods, and a sufficient number of guards for the safety of the goods kept there. R. 122 was made by the High Court under its rule-making powers given by S. 122 of the Code, and therefore R. 122 has the same force of law as R. 43.

As a matter of history, the handing over of attached goods to the custody of supurddars or custodians is a very old practice and is universally followed in the province of Agra. In the circumstances I must hold that R. 122 has preference over so much of R. 43 as requires the attaching officer to keep the goods in his own custody or in the custody of one of his subordinates. The amin's responsibility lay in selecting, to the best of his ability, a right person for keeping the goods in his custody, and in this particular case, when he had the guarantee of the decree-holder's man as to Birjnandan Prasad being a proper person, and when the Court approved of the amin's procedure, the amin was exonerated from further responsibility.

It would no doubt be desirable that the High Court should, under its rule-making powers, amend R. 43 so as to make it consistent with R. 122. But in view of the fact that R. 122 is always followed in the Subordinate Courts, and the rule as to the attaching officer keeping the goods in his own custody or in the custody of one of his subordinates is more honoured in its breach than its observance, besides being impracticable, we cannot hold the applicant before us liable.

In my opinion, the case of *Badri Prasad* v. *Chokhe Lal* (1) was wrongly decided and should be overruled.

The question that next arises is, who is liable for the production of the goods attached? The obvious answer would be Birjnandan Prasad, and, on his death, his estate in the hands of his heir or heirs.

In the case of *Madho Prasad* v. *Peary Lal* (2) a similar question arose. The Court below held that the supurddar was liable under the provision of S. 145, Civil P. C., as the person who had guaranteed that the attached property would be forthcoming when demanded, or at any rate, under the inherent power of the Court, which had a right to demand the property from the man in whose custody it had been placed by an officer of the Court. A learned Judge of this Court, who heard an application in revision against that order, upheld the decision of the Court below on the ground that S. 145 applied. In my opinion, S. 145 (c) does apply. It appears that when a man comes forward of his own free will and accord to take charge of property attached, and undertakes to make a restitution of the same, he is the person liable as if the decree had been made against him. Again, if for any reason which is not clear to me, it should be said that S. 145 is not applicable, I do not see why we should not hold the man who has appeared in the execution proceedings, to take charge of the goods, responsible for the value of the goods. He gets a chance to show cause why he should not hand over the goods or pay their value, and this is all that is needed for his liability.

In any view of the case, the liability of the supurddar seems to be clear.

In this particular case, although the heir of Birjnandan Prasad appeared before us through her counsel, the question of the liability of the heir or the estate of Birjnandan Prasad has not yet been investigated by the Court below, and it would not be fair to make a decree in revision against Birjnandan Prasad's heir, without further investigation. It is clear that Birjnandan Prasad will be estopped from saying that he is not responsible, he having let the amin hand over the goods to him on the representation that he would hand back the goods when called upon to do so. I do not know what defence the heir of Birjnandan Prasad may raise but it is necessary that an opportunity should be given to her to raise any valid objection that may be there.

For the reasons given above, I would set aside the order of the Court below against the applicant and remand the case to the lower Court for an investigation as to the liability of Birjnandan Prasad's heir and estate, if the decree-holder wants to proceed against them. If the decree-holder does not want to proceed against them, it must be taken that his decree has been satisfied; for the judgment-debtor having allowed his property to be attached, and the property being of sufficient value to cover the decree, he should not be held any further liable. These are however points which I would not finally decide but would mention only by way of guidance for the Court below. As the order against the applicant was obtained at the instance of the decree-holder I would make the decree-holder liable to pay the costs of the present application and the costs of the application in the Court below, the costs in this Court including fees on the higher scale.

Boys, J.—This revision arises out of the interpretation of O. 21, R. 43, and Rr. 122 and 123.

Chandoo Lal, the present opposite party, obtained a decree against Ramgopal, Sahu Bisheshar Nath and others. He applied for attachment, and Shakir Husain, the present applicant before us, an amin, went to attach the judgment-debtor's property accompanied by Nanhe Mal, pairokar of the decree-holder.

On 27th June 1929, the amin attached ornaments of the value of Rs. 1,200 and entrusted them to one Birjnandan Prasad as supurddar, a man, and this is important, whose selection was expressly approved by Nanhe Mal, the representative of the decree-holder and a supurdnama was taken from Birjnandan Prasad.

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(2) A. I. R. 1921 All. 220=62 I. C. 719.

On 3rd July 1929, the amin Shakir Husain made his report of these proceedings to the Court filing therewith the supurdnama. He does not appear to have specifically asked for approval by the Court of his proceedings, but it must be held that the Court did approve his proceedings by its order to be found on the order sheet, in which it held that the attachment had been carried out according to law. It is impossible to hold that this order covered only the actual taking possession of the ornaments by the amin and not the handing over of them to the supurddar: it covered the whole proceeding. Brijnandan Prasad at some time after these last events died.

On 17th February 1930 the decree-holder applied to the Subordinate Judge for sale of the ornaments, alleging that they were still with the judgment-debtor and that there had been no real attachment, and that they had never really been handed over to Brijnandan Prasad. Making these allegations, the decree-holder did not ask for any relief against either the amin Shakir Husain or the heirs of the supurdar Brijnandan Prasad.

On 9th April 1930, the Court gave an opportunity to Shakir Husain to produce the ornaments or cause them to be produced. Shakir Husain relied unsuccessfully on the established practice of handing over property in such a case to supurddar; and a decree was passed against him by the Subordinate Judge. Shakir Husain comes here in revision. His case has been presented to us by Dr. Faruqi, and we have also had the advantage of hearing Mr. Shabd Saran on behalf of the heirs of the supurddar, and Mr. Vishwa Mittra on behalf of the judgment-debtor. The decree-holder has not appeared.

The material provision in the Code of Civil Procedure, as it was enacted by the legislature, is to be found in O. 21, R. 43. At a subsequent date this Court transferred from the general rules of the Court, among others, rules which are now to be found in O. 21 as Rr. 122 to 127. Those material for our present purpose are Rr. 122 to 124. It is manifest that these rules are to a very great extent in conflict with O. 21, R. 43, and it is only by inadvertence that when Rr. 122 to 124 were added no provision was made for deleting, so far as this Court is concerned, R. 43.

Rule 43 provided that the attaching officer should keep the property in his own custody or in the custody of one of his subordinates. R. 122 on the other hand authorized him to make such arrangements as may be most convenient and economical. R. 43 again made the attaching officer "responsible for the due custody" of the property; while R. 122 has provided for the Court's approval of the arrangements which he might make: and it is manifest that from the date of such approval his responsibility would cease.

The two rules are therefore in manifest conflict. It is equally obvious that the conflict is due to inadvertence; and by the ordinary rule of interpretation of statutes the later rules must prevail. It is manifestly also a case to which the rule of beneficial interpretation is applicable, in so far as the liability of the amin is concerned; and the beneficial interpretation would clearly lie in the direction of giving effect to Rr. 122 to 124. We proceed therefore to consider these rules.

In my view it is R. 122 which is clearly applicable. Rr. 123 and 124 are applicable to the case of a sahana who is to be in charge of such property as growing crops. In the present case the amin made an arrangement which not only he considered the most convenient and economical, but an arrangement which on the findings of fact was approved and even suggested by the decree-holder's representative. It is, in our view, immaterial whether the sipurddar thus approved by the decree-holders own representative actually took the property into his own custody or whether he chose to trust the judgment-debtor. That was a personal matter between him and the judgment-debtor and would affect in no way whatever the liability which he undertook to the decree-holder. The next step was the report of what he had done by the amin to the Court and, as I have found, the approval of what he had done by the Court by its order endorsed on the order sheet. If the Court had not approved the arrangement by the amin his liability would have remained, but once his action was approved by the Court his responsibility ceased unless, of course, some question of fraud or collusion between him and the judgment-debtor or the supurddar might be established. But of such there is no question in the present case. With this review of the circumstances and expression of opinion in regard to these legal aspects this judgment might have concluded, but there are two matters which in the particular circumstances of the case call for further consideration.

The first is that we have been pressed with the decision in *Badri Prasad* v. *Chokhe Lal* (1). In that case cloth was attached and handed over to the custody of one Badri Prasad. The commissioner made a report to the Court stating that he had made over the property to Badri Prasad and had completed the performance of the task allotted to him. It was found by the learned Judges, and this was largely the basis of their eventual decision, that the commissioner i. e. the attaching officer, did not ask for or obtain any "permission." At a later date Badri Prasad appears to have endeavoured to hand over his responsibilities to another person who is at p. 563 of the report referrred to as the custodian and who died. But the Courts below naturally would not recognize Badri Prasad's right to so hand over his responsibilities, and he was treated as the person to whom the property had been entrusted. Eventually the suit in which the attachment was made was dismissed, but the attaching officer failed to secure the return of the property. Badri Prasad objected that he was not responsible to the Court as he was not an officer of the Court; but a decree was passed against him. Badri Prasad then came to this Court in civil revision making Chokhe Lal, the decree-holder, the opposite party. The Court considered that the attaching officer should also be a party, and after having so made him a party eventually set aside the decree passed against Badri Prasad and substituted therefor a decree making the attaching officer liable for the loss. We are not told in the report how the property came to be lost.

Now it is clear that the learned Judges in arriving at that decision treated the case as if it was one falling under R. 123, for they say:

> "In the present case the attaching officer presumably acted under R. 124 (the present R. 123) when he placed Badri Prasad in special charge of the property, and to make Badri Prasad liable to the jurisdiction of the Court, it was necessary for the commisssioner to obtain the permission of the Court. No such permission was obtained . . . . The permission ought to have been obtained at the proper time before or immediately after the custodian is appointed . . ., No permission having been obtained Badri Prasad was not an officer of the Court and the Court had no jurisdiction to direct him to refund the price."

The Court went on then to hold that the attaching officer was the only person liable. I am unable to assent to the correctness of this decision either as to the immunity conferred upon the surety or as to the liability imposed upon the attaching officer. The rule really applicable was R. 122. The permission of the Court required by R. 123 is permission to appoint a sahana or sahanas. Neither in the case of *Badri Prasad* v. *Chokhe Lal*, nor in the present case, is there any question of the appointment of a sahana. I think therefore that both in that case and in the present case the attaching officer was free from responsibility the moment his actions when reported to the Court had been approved, and I do not think that it is necessary that such approval should be expressed by the use of particular words. It is sufficient if it can be properly deduced from any order passed by or other action of the Court.

I turn now to the question of the liability of the surety. The facts have not been determined, and it is not therefore for us to pass any final order, but we have been referred to the decision in *Madho Prasad* v. *Piare Lal* (2). With the view expressed in that case I am in agreement. The action of the attaching officer in handing over the property to a surety or supurddar is within his lawful powers under R. 122, and certainly upon his action being approved either expressly or impliedly by the Court, the surety becomes an officer of the Court. But apart altogether from this there is no reason why in suitable circumstances S. 145, Civil P. C., should not be applicable. I would therefore allow the revision and set aside the decree of the lower Court against Shakir Husain with costs against the decree-holder Chandu Lal, and return the case to the lower Court for its consideration of the liability of the heirs of Brijnandan Prasad in regard to such assets of Brijnandan Prasad as there may be in their hands.

V.B./R.K. *Petition accepted.*

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* * A. I. R. 1931 Allahabad 574

Full Bench

SULAIMAN, AG. C. J., AND MUKERJEE AND BOYS, JJ.

Bhagwati Pande—Defendant—Applicant.

v.

Badri Pande and *another*—Plaintiffs—Opposite Party.

Civil Revn. No. 162 of 1930, Decided on 10th July 1931, against order of Addl. Sub-Judge, Basti, D/- 6th February 1930.

(a) Civil P. C. (1908), S. 24—Transfer under S. 24 is from one Court of Small Causes to another.

If a case is transferred or withdrawn under S. 24 from a Court of Small Causes then under S. 24 (4) the Court to which it is transferred for trial shall, for the purposes of such suit be deemed to be a Court of Small Causes and would dispose of the suit as a Court of Small Causes and no appeal would lie from its decree. [P 576 C 2]

*** * (b) Civil P. C. (1908), S. 24—Transfer of Judge with Small Cause powers pending suit—Order of Additional District Judge to successor without those powers—Order held to be under Provincial Small Cause Courts Act (1887), S. 35.**

While the suit was pending, the Munsif, exercising the power of a Judge, Small Cause Court, was transferred. He was succeeded by a gentleman who was not invested with the powers of a Judge, Small Cause Court, at the date. On the transfer the Additional District Judge gave certain directions in respect of the cases pending in the Court. So far as the Small Cause Court cases were concerned, his order was as follows : "The Small Cause Court cases pending in the Court of the Munsif of Bansi will be tried by the present incumbent of the office as regular suits, as he has not got the Small Cause Court powers. The attention of the said learned Munsif be drawn to S. 35, Small Cause Courts Act, and these cases should be dealt with as provided by the Small Cause Courts Act." In pursuance of this order or direction, the Munsif took cognizance of the case and tried it as a regular suit. He decreed the claim of the plaintiffs, and the defendant filed an appeal before the Additional District Judge, at Basti. He transferred it to the Court of the Subordinate Judge at Basti, and that learned Subordinate Judge declined to entertain the appeal on the ground that no appeal lay.

Held: that this order was not an order of transfer within the meaning of S. 24, Civil P. C., but was merely drawing the attention of the Munsif to the fact that there was a provision in the Small Cause Courts Act in S. 35 to the effect that the successor of the Judge, Small Cause Court, should try the suit. [P 577 C 1, 2; P 578 C 1]

*** * (c) Civil P. C. (1908), S. 24—Decree—Appealability—Provincial Small Court Court Act (1887), S. 35:** 13 *All.* 324, *Overruled*

When an officer without possessing Small Cause Court jurisdiction hears a case which was pending before his predecessor-in-office exercising Small Cause Court jurisdiction, and makes a decree, the decree is appealable: 38 *All.* 425, *Appr.*; **13 All. 324, Overruled.** [P 578 C 1]

(d) Provincial Small Cause Courts Act (1887), Ss. 35 and 27—Effect of, considered.

The fact that no appeal is permitted from a decree made by a Judge, Small Cause Court, is due to the provision of S. 27. That rule does not apply when a case is decided by a successor of a Judge of a Court of Small Causes under S. 35 of the Act. [P 578 C 1, 2]

(e) Civil P. C. (1908), S. 24—Scope of, explained.

Section 24 contemplates the transfer of a case from one existing Court to another existing Court. If therefore a Court of Small Causes has ceased to exist or the officer invested with Small Cause Court powers has been transferred from the district and there is no other officer possessing such powers, there would be no Court from which the District Court can under S. 24, transfer the case to an ordinary civil Court. The contingency where no Court or officer invested with Small Cause Court powers exists is provided for in S. 35, Provincial Small Cause Courts Act. [P 579 C 1]

(f) Provincial Small Cause Courts Act (1887), S. 35—Applicability considered — Civil P. C. (1908), S. 24.

Section 35, Provincial Small Cause Courts Act, is subject to the provisions of the Civil Procedure Code and would not be applicable where there is any special provision in the Code. Prima facie S. 35 deals with a case where either a Court of Small Causes or a Court invested with such jurisdiction has ceased to have such jurisdiction. It provides that any proceeding which would have been taken in the Court which has now ceased to have jurisdiction "may be had" in the Court in which if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try it. It follows that if the Court of Small Causes has ceased to exist or the officer invested with such powers has been transferred, then the proceeding would be had in the new Court which would have jurisdiction to try the suit if it were filed on that date afresh. Accordingly if there is in the district any other Court or officer invested with power to try the Small Cause Court suits in that area, it is that Court or officer who would have jurisdiction to take cognizance of the suit and continue the proceeding. In such a case the successor of the officer recently transferred who himself does not possess the powers of a Small Cause Court, would not be entitled under S. 35, Provincial Small Cause Courts Act, to take it up suo motu and can only act if the case were transferred to him under S. 24. On the other hand if no such Court or officer remains in the district then the suit if filed would have to be filed in the ordinary civil Court and the proceeding accordingly would be cognizable by such Court. [P 579 C 1, 2]

(g) Provincial Small Cause Courts Act (1887), S. 35—Scope of, enunciated.

Where a Munsif has been transferred and there is in the district a Subordinate Judge invested with the powers of a Small Cause Court for the area within the jurisdiction of the Munsif, under S. 35, Provincial Small Cause Courts Act, it would be such a Subordinate Judge who would have authority to entertain the proceeding. A new Munsif who comes to take the place of the Munsif transferred but who does not possess the Small Cause Court powers would have no jurisdiction himself to transfer the case from the Small Cause Court side of his predecessor to his own regular side. The case would go automatically to the Subordinate Judge who is invested with Small Cause Court powers. If there is such a Subordinate Judge, it would be open to the District Judge to transfer the case from the Court of the Subordinate Judge with Small Cause Court powers to that of the new Munsif without such powers. If there is no such Subordinate Judge with Small Cause Court powers the Munsif will under S. 35, Provincial Small Cause Courts Act, have to try it on the original side, and the District Judge would have no power at all to act under S. 24 so as to transfer the case to the new Munsif and make him a Court of Small Causes. He can, of course, transfer the case from the Munsif's file to any other Court, but the suit would cease to be a Small Cause Court suit. An appeal in such cases would lie to the District Judge. [P 579 C 2 ; P 580 C 1]

Harnandan Prasad—for Applicant.

Shiva Prasad Sinha — for Opposite Parties.

Order of Reference

Sulaiman, Ag. C. J.—This case has been referred to a Division Bench by a learned Judge of this Court in view of the importance of the subject and a certain amount of conflict of opinion.

The plaintiffs instituted a suit for recovery of Rs. 182, principal and interest in the Court of the Munsif of Bansi who was invested with Small Cause Court powers. After he was transferred from the district another Munsif took over charge who was not invested with such powers. There was an additional Subordinate Judge at Bansi at that time who was invested with Small Cause Court powers. The additional District Judge on 1st July 1928 directed the new Munsif to transfer all the cases pending on the Small Cause Court side of the Munsif's Court to the regular side. His order was in the following terms:

> "The Small Cause Court cases pending in the Court of the Munsif of Bansi will be tried by the present incumbent of the office as regular suits as he has not got the Small Cause Court powers. The attention of the said learned Munsif be drawn to S. 35, Small Cause Courts Act and these cases should be dealt with as provided by the Small Cause Courts Act."

In pursuance of this order the Munsif transferred this particular case from the Small Cause Court side to the regular side and decreed the claim. An appeal was preferred to the District Judge by the defendants, but he transferred the appeal to the Subordinate Judge for disposal. The learned Subordinate Judge declined to entertain the appeal on the ground that no appeal lay to him.

The defendants have come up in revision and urge that an appeal lay to the lower appellate Court and it has wrongly refused to exercise jurisdiction. If the appeal did lie then undoubtedly it would be a fit case for interference under S. 115, Civil P. C.

A large number of cases of this High Court leaving aside cases of the other High Courts have been cited before us. It must be conceded that there is to some extent a conflict of opinion on the true interpretations of S. 35, Provincial Small Cause Courts Act and S. 24, Civil P. C. In the case of *Mangal Sen* v. *Rup Chand* (1) the learned Judges seemed inclined to think no matter whether S. 35, Provincial Small Cause Courts Act, applied or S. 24, Civil P. C. applied, there would be no appeal from the decree. This case was dissented from in the case of *Sarju Prasad* v. *Mahadeo Pande* (2) but appears to have been followed in the case of *Sukha* v. *Raghunath Das* (3).

Although the facts of each case are somewhat different it may be broadly stated that in the cases of *Sarju Prasad* v. *Mahadeo Pande* (2), *Zamirul Hasan Khan* v. *Imdad Ali Khan* (4), *Allah Baksh* v. *Karim Bakhsh* (5) and *Fakir Ullah* v. *Hikmat Ullah* (6), S. 35, Provincial Small Cause Courts Act was applied and it was considered that an appeal lay from the first Court's decree. On the other hand in the cases of *Udho Singh* v. *Mul Chand* (7), *Chhotey Lal* v. *Lakshmi Chand Magan Lal* (8), *Sukha* v. *Raghunath Das* (3), *Chaturi Singh* v. *Mt. Rania* (9), *Ram Charan Banwari Lal* v.

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(1) [1891] 13 All. 324=(1891) A. W. N. 96.

(2) [1915] 37 All. 450=29 I. C. 996.

(3) [1917] 39 All. 214=37 I. C. 809.

(4) A.I.R. 1922 All. 161=64 I. C. 573=44 All. 59.

(5) A.I.R. 1927 All. 95=98 I. C. 512=48 All. 818.

(6) A.I.R. 1925 All. 569=88 I. C. 661=47 All. 925.

(7) [1916] 36 I. C. 317.

(8) [1916] 38 All. 425=34 I. C. 113.

(9) [1918] 40 All. 525=46 I. C. 893.

Kishore Lal Ram Sarup (10) and *Jai Narain Misra* v. *Sarda Pershad* (11), S. 24, Civil P. C. was considered to be applicable and the trial Court's decree was considered to be final. Of course most of these cases are either reconcilable with or distinguishable from each other.

There is however one aspect of the question which does not appear to have been considered in these cases. No doubt Ss. 4, 32 and 33, Provincial Small Cause Courts Act, make it clear that the same officer if invested with Small Cause Court powers is to be deemed to be different Courts, viz., a Court of Small Causes and an ordinary civil Court.

Section 35, Provincial Small Cause Courts Act, is subject to the provisions of the Code of Civil Procedure, and would not be applicable where there is any special provision in the Code. Prima facie S. 35 deals with a case where either a Court of Small Causes or a Court invested with such jurisdiction has ceased to have jurisdiction. It provides that any proceeding which would have been taken in the Court which has now ceased to have jurisdiction "may be had" in the Court in which if the suit out of which the proceeding has arisen were about to be instituted would have jurisdiction to try it. It would seem to follow that if the Court of Small Causes has ceased to exist or the officer invested with such powers has been transferred then the proceeding would be had in the new Court which would have jurisdiction to try the suit if it were filed on that date afresh. Accordingly if there is in the district any other Court or officer invested with powers to try the Small Cause Court suits in that area it is that Court or officer who would have jurisdiction to continue the proceeding. On the other hand, if no such Court or officer remains in the district, then the suit if filed would have to be filed in the ordinary civil Court and the proceeding accordingly would be cognizable by such Court.

The use of the word "may" might indicate that all the cases pending in the Court of Small Causes or officer who has ceased to have jurisdiction need not automatically go over to the new Court, but that, pending any order by a superior Court, a party may take any proceedings in the Court indicated by the section.

It would also seem that the new Court, unless it were a Court of Small Causes or a Court invested with such jurisdiction, would not necessarily be deemed to be a Court of Small Causes so as to make its decree non-appealable under S. 27, Provincial Small Cause Courts Act.

Section 24, Civil P. C., gives power to the High Court or the District Judge to transfer a case pending in one subordinate Court from that Court itself or to another subordinate Court, and sub-S. (4) provides that a Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes. It follows that the Court to which the suit has been transferred under S. 24, being a Court of Small Causes would dispose of the suit as such and no appeal would lie from its decree.

Section 150, Civil P. C., also lays down that the Court to which the business is transferred shall have the same powers and shall perform the same duties as those of the Court from which the business was so transferred. S. 17, Bengal, N. W. P. and Assam Civil Courts Act confers jurisdiction on the Court to which the business has been transferred.

It may not necessarily follow that the Court to which such business has been transferred and which has the same powers and duties as the former Court necessarily itself becomes a Court of Small Causes so as to make its decree final.

One would be inclined to think that S. 24 contemplates the transfer of a case from one existing Court to another existing Court. But if a Court of Small Causes or an officer invested with Small Cause Court powers does not exist in the district it would be difficult to imagine that there is any Court of Small Causes in existence from which a suit can be transferred to an ordinary civil Court. When such a contingency arises S. 35 would empower the Court which for the time being would have entertained the suit, if freshly filed, to deal with the case. At the same time it would also appear that if a Court of Small Causes or another officer invested with such powers is already available in the district who can take cognizance of the suit or proceeding, then the successor of the officer recently transferred, who himself does not possess the powers of Small Cause Courts, would not be entitled under S. 35, Provincial Small Cause Courts Act, to take it up suo motu. An order of the District Judge would be required to transfer the case to his file.

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(10) A.I.R. 1929 All. 50=115 I. C. 127=50 All. 810.

(11) A.I.R. 1928 All. 609=110 I. C. 493.

In many cases where a Munsif or Subordinate Judge has been transferred there is in the district some other officer invested with the powers of Small Cause Courts for the particular area concerned. Under S. 35 it would be such officer who would have authority to entertain the proceeding. It would therefore seem to follow that in such a case the new Munsif cannot try the case by merely himself transferring it from the original side of his predecessor to his own regular side. In such cases an order by the District Judge under S. 24, Civil P. C., would be indispensable before the new Munsif can proceed with the suit.

The order of the District Judge quoted above, which affects numerous cases, is capable of two interpretations. If it was not an order under S. 24, then there is undoubtedly a conflict of opinion as to the legal position. Even if that interpretation be not accepted, there would be the question whether an order of his must be deemed to be an order under S. 24, Civil P. C. although it expressly refers to S. 35, Provincial Small Cause Courts Act, when the latter section was not at all applicable. We think that this case raises substantial questions of law for reference to a Full Bench.

We accordingly direct that this case be laid before the Chief Justice for the constitution of a Full Bench.

Opinions

Mukerji, J.—This is an application in revision by the defendant in a suit instituted in the Court of the Munsif of Bansi exercising the powers of a Judge, Small Cause Court.

While the suit was pending, the Munsif exercising the powers of a Judge, Small Cause Court, namely, Mr. Shyam Behari Lal, was transferred. He was succeeded by a gentleman who was not invested with the powers of a Judge, Small Cause Court. This was Mr. Jamil Ahmad. At the date already mentioned, namely, 16th June 1928, the Subordinate Judge of Basti sitting at Basti was invested with the powers of a Judge, Small Cause Court, up to the pecuniary jurisdiction of Rs. 500, and his local jurisdiction extended up to Bansi.

On the transfer of Mr. Shyam Behari Lal, the Additional District Judge of Gorakhpur, sitting at Basti, gave certain directions in respect of the cases pending in the Court of Mr. Shyam Behari Lal. So far as the Small Cause Court cases were concerned his order was as follows:

> "The Small Cause Court cases pending in the Court of the Munsif of Bansi will be tried by the present incumbent of the office as regular suits, as he has not got Small Cause Court powers. The attention of the said learned Munsif be drawn to S. 35, Small Cause Court Act, and these cases should be dealt with as provided by the Small Cause Courts Act."

In pursuance of this order of direction, the Munsif, Mr. Jamil Ahmad, took cognizance of the case and tried it as a regular suit. He decreed the claim of the plaintiffs, and the defendant filed an appeal before the Additional District Judge at Basti. He transferred it to the Court of the Subordinate Judge at Basti, and that learned Subordinate Judge declined to entertain the appeal on the ground that no appeal lay.

The defendant has come up in revision, and several points of law have arisen out of this application.

The first question to be considered is whether the order of the Additional District Judge at Basti was an order of transfer within the meaning of S. 24, Civil P. C. The reason for this inquiry is that where a Small Cause Court case is transferred from a Court exercising that jurisdiction to a Court not exercising Small Cause Court jurisdiction, the Court trying the suit is to be treated as a Small Cause Court for purposes of that suit. It follows that no appeal is maintainable. On the other hand, if S. 24 does not apply, there is a difference of opinion as to whether an appeal is maintainable from the ultimate decree that may be passed in the suit.

We have already read the order that was passed by the learned Additional District Judge, and we are of opinion that this order was not an order of transfer within the meaning of S. 24, Civil P. C., but was merely drawing the attention of the Munsif to the fact that there was a provision in the Small Cause Court Act in S. 35 to the effect that the successors of the Judge, Small Cause Court, should try the suit.

Such being our opinion, we need not consider the fact whether the Additional District Judge at Basti had or had not jurisdiction to order a transfer of a case from one Court to another. Nor is it necessary to consider whether it is possible under the law to order the transfer of a case from a Court which no longer exists to another Court. These questions do not any longer arise for determination.

The next question that we have to consider is whether the decree of the learned Munsif, Mr. Jamil Ahmad, was appealable under the law.

We have already mentioned that at the date 16th June 1928, the Subordinate Judge of Basti was exercising jurisdiction as a Judge, Small Cause Court, up to Rs. 500. That being so, under S. 35, Small Cause Court Act, the suit under consideration should have gone to the file of the said Subordinate Judge exercising Small Cause Court jurisdiction. In this view the learned Munsif should not have tried the suit. The suit having been tried without jurisdiction, an appeal would lie, and therefore the learned Subordinate Judge was in error in holding that an appeal was not competent.

The next question is whether, when an officer without possessing Small Cause Court jurisdiction hears a case which was pending before his predecessor in office exercising Small Cause Court jurisdiction, and makes a decree, the decree is appealable? On this point there is some difference of opinion. In this Court in *Mangal Sen* v. *Rup Chand* (1) the view was taken that the decree would be unappealable, being a decree of a Court of a Small Cause Court jurisdiction. This view was dissented from in *Chhotey Lal* v. *Lakhmi Chand Magan Lal* (8). It is necessary to consider this point, in view of the fact that the learned Munsif decided the case.

We are of opinion that the decision in *Chhotey Lal* v. *Lakhmi Chand Magan Lal* (8) laid down the better law. The fact that no appeal is permitted from a decree made by a Judge, Small Cause Court, is due to the provision of S. 27, Small Cause Courts Act. That rule does not apply when a case is decided by a successor of a Judge of a Court of Small Causes under S. 35 of the Act. S. 35 comes after S. 27, which reads as follows:

> "Save as provided by this Act, a decree or order made under the foregoing provisions of this Act by a Court of Small Causes shall be final."

Section 27 not being applicable, and the officer actually making the decree not being invested with the powers of a Judge, Small Cause Court, we fail to see why a finality should attach to a decree made by him. We accordingly hold that the case of *Chhotey Lal* v. *Lakhmi Chand Magan Lal* (8) lays down the better law.

We have ascertained that the present Munsif at Bansi exercises Small Cause Court jurisdiction up to the amount of Rs. 100 only. The present suit therefore will not be cognizable by him. We have also ascertained that the jurisdiction of the Subordinate Judge at Basti exercising Small Cause Court powers has been limited to Basti Munsifi, and does not extend to Bansi Munsifi. We have now to decide where we should send the case back for retrial, for there must be retrial because the trial was by an officer who had no jurisdiction to hear the case.

Applying S. 35, Small Cause Courts Act, that Court should have jurisdiction to hear the case now, which would have jurisdiction to hear the suit in case it were now instituted. It should follow that the Munsif of Bansi should hear the case as a regular suit, the decree in which would be appealable.

As a matter of precaution, however we having set aside the order of the Subordinate Judge of Basti declining jurisdiction to hear the appeal, remand the case to the Court of the Additional District Judge at Basti. He will cause the suit to be transferred to the Court of the Munsif of Bansi or such other Court as may have jurisdiction over the subject-matter, having regard to the principle laid down above.

We are not aware of the jurisdiction that the learned Additional District Judge at Basti has, in the matter of ordering transfers of suits and appeals. The jurisdiction that is vested under S. 24 is vested in the District Court, which according to the definition given in the Civil Procedure Code, is the principal Court of original civil jurisdiction. There can be only one principal Court of original civil jurisdiction in a judgeship, and that must be the Court of the District Judge of Gorakhpur. If the learned Additional District Judge at Basti finds that having regard to the provisions of S. 24 he has no jurisdiction to transfer the case, he will obtain an order from the District Judge at Gorakhpur for the transfer of the case to the proper Court.

As none of the parties are to blame for what has happened, we direct that the costs here and hitherto shall abide the result.

Sulaiman, Ag. C. J.—I concur in the order proposed. Where S. 24, Civil P. C. can apply, the District Court would have power to transfer a case pending in one Subordinate Court to another Subordinate Court. If the case is transferred or withdrawn from a Court of Small Causes, then under sub-S. (4) the Court to which it is transferred for trial shall, for the purposes of such suit, be deemed to be a Court of Small Causes. It follows that the Court to which the suit has been transferred under S. 24 would dispose of the suit as a Court of Small Causes, and no appeal would lie from its decree. This result would not follow where there is no transfer under S. 24, Civil P. C.

Obviously S. 24 contemplates the transfer of a case from one existing Court to another existing Court. If therefore a Court of Small Causes has ceased to exist or the officer invested with Small Cause Court powers has been transferred from the district and there is no other officer possessing such powers, there would be no Court from which the District Court can under S. 24, Civil P. C. transfer the case to an ordinary civil Court. The contingency where no Court or officer invested with Small Cause Court powers exists is provided for in S. 35, Provincial Small Cause Courts Act.

Section 35, Provincial Small Cause Courts Act, is subject to the provisions of the Civil Procedure Code and would not be applicable where there is any special provision in the Code. Prima facie S. 35 deals with a case where either a Court of Small Causes or a Court invested with such jurisdiction has ceased to have such jurisdiction. It provides that any proceeding which would have been taken in the Court which has now ceased to have jurisdiction "may be had" in the Court in which if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try it. It follows that if the Court of Small Causes has ceased to exist or the officer invested with such powers has been transferred, then the proceeding would be had in the new Court which would have jurisdiction to try the suit if it were filed on that date afresh. Accordingly if there is in the district any other Court or officer invested with powers to try the Small Cause Court suits in that area, it is that Court or officer who would have jurisdiction to take cognizance of the suit and continue the proceeding. In such a case the successor of the officer recently transferred, who himself does not possess the powers of a Small Cause Court, would not be entitled under S. 35, Provincial Small Cause Courts Act, to take it up suo motu and can only act if the case were transferred to him under S. 24. On the other hand, if no such Court or officer remains in the district then the suit if filed would have to be filed in the ordinary civil Court and the proceeding accordingly would be cognizable by such Court.

In many cases where a Munsif has been transferred and there is in the district a Subordinate Judge invested with the powers of a Small Cause Court for the area within the jurisdiction of the Munsif. Under S. 35, Provincial Small Cause Courts Act it would be such a Subordinate Judge who would have authority to entertain the proceeding. A new Munsif who comes to take the place of the Munsif transferred, but who does not possess the Small Cause Court powers would have no jurisdiction himself to transfer the case from the Small Cause Court side of his predecessor to his own regular side. The case would go automatically to the Subordinate Judge who is invested with Small Cause Court powers. If there is such a Subordinate Judge, it would be open to the District Judge to transfer the case from the Court of the Subordinate Judge with Small Cause Court powers to that of the new Munsif without such powers. If there is no such Subordinate Judge with Small Cause Court powers the Munsif will under S. 35, Provincial Small Cause Courts Act, have to try it on the original side, and the District Judge would have no power at all to act under S. 24 so as to transfer the case to the new Munsif and make him a Court of Small Causes. He can, of course, transfer the case from the Munsif's file to any other Court, but the suit would cease to be a Small Cause Court suit. An appeal in such cases would lie to the District Judge.

Boys, J.—I concur in the judgment of and order proposed by Mukerji, J.

V.B./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 580

Special Bench

BOYS, BANERJI AND NIAMATULLAH, JJ.

Shankar Lal, In the matter of.

Misc. Case No. 40 of 1930, Decided on 5th February 1931.

Legal Practitioners Act, S. 12—Professional misconduct—Inquiry into, not without grave and reasonable cause—Ill considered proceedings may cause permanent harm—Bar Councils Act (1926), S. 10 (2).

It is right and proper that all judicial officers, high or low, should keep a vigilant eye on the conduct of legal practitioners, of whatever status, who are all ministers of the Court and should in proper cases institute inquiries under the Legal Practitioners Act or make complaints under the Bar Councils Act according to the status of the legal practitioner concerned, but legal practitioners are one and all, of whatever status, entitled also to the protection of the Court, and inquiries should not be instituted or complaints made without having given very grave consideration to the reasonable probability of the case against the legal practitioner being well founded. As much injustice may be done to a legal practitioner by ill-conceived proceedings against him as may be done to the public interest and to the general body of legal practitioners by failure to keep a vigilant eye upon and take proper strong action against cases of misconduct, it is manifest that permanent and undeserved harm may be caused to the reputation of any legal practitioner against whom ill-considered proceedings are taken. [P 581 C 2]

Boys, J.—This case came up before us on 7th March 1930, for consideration as to what action, if any, should be taken by this Court under S. 10 (2), Bar Councils Act, 38 of 1926, in reference to a complaint forwarded by a Magistrate of the first class, Mr. Waliullah, charging Pt. Shankar Lal, an advocate practising at Fatehpur, with gross misconduct, in that he instigated a false complaint against Sub-Inspector, Mukhtar Ahmad. The complaint against Mukhtar Ahmad was filed by one Sheodarshan who alleged that having come to Court for the purposes of giving evidence in a case, he was taken by Sub-Inspector Mukhtar Ahmad from the verandah of the Court to a little distance away under a tress and was there told that he must give evidence identifying a particular accused in another case. Sheodarshan, according to his own account then given, had refused and was threatened by the Sub-Inspector that he would be challaned under S. 110, Criminal P. C., and upon his persisting in his refusal he was slapped once or twice by the Sub-Inspector. On hearing the commotion two or three of the vakils, according to Sheodarshan, arrived, and the Sub-Inspector went away. Sheodarshan says that he went straight to the Court of Mr. Ganga Ram, Subdivisional Officer of Khaga, and complained that he had been beaten by the Sub-Inspector. The Subdivisional Officer, Mr. Ganga Ram in his evidence corroborates Sheodarshan on this point and apparently sent for the Sub-Inspector and the Sub-Inspector came and the latter alleged that Sheodarshan was to have been a witness in the case and had been got at by the other side and refused to give evidence. Apparently Mr. Ganga Ram took no further action, and one can only assume that he let the matter slide. Sheodarshan then about 5 o' clock in the evening—the incident having taken place between 1 and 2 o' clock—filed a complaint against Sub-Inspector Mukhtar Ahmad. This all took place on 19th April 1928, nearly three years ago.

On 11th June 1929 after many delays (we do not suggest that the Magistrate was wholly responsible) the Magistrate Mr. Waliullah acquitted the accused Sub-Inspector Mukhtar Ahmad, writing a very lengthy judgment criticising the witnesses for the prosecution, the great bulk of those criticizms having, in our view no value whatever.

On 17th October 1929, Mr. Waliullah forwarded his judgment to the District Judge with the present complaint of gross misconduct against Pt. Shankar Lal advocate, alleging that he had instigated the false complaint made by Sheodarshan against Sub-Inspector Mukhtar Ahmad. This complaint was based on the statements of defence witnesses in the criminal case that Pt. Shankar Lal and another legal practitioner, a pleader, Mr. Hashmat Ali, had instigated Sheodarshan to make a false complaint against Sub-Inspector Mukhtar Ahmad.

Similar proceedings but under the Legal Practitioners Act were instituted against Mr. Hashmat Ali a pleader and on 7th March 1930, when this matter first came before us, we were of opinion that we should not pass any orders until the result of the proceedings against Mr. Hashmat Ali under the Legal Practitioner's. Act were known. We have now received the report of Mr. Waliullah dealing with the case of Mr. Hasmat Ali. We have been unable to discover that there is any substantial difference between the case against Pt. Shankar Lal and the case against Mr. Hashmat Ali. In the former case however Mr. Waliullah's report is unfavourable to Pt. Shankar Lal, while in the latter case he has found that the main charge against Mr. Hashmat Ali has not been proved. In the former case he proceeded merely upon his findings in the case against Mukhtar Ahmad. In the latter case he has held his separate inquiry. The difference in the procedure adopted is due to the fact that Pt. Shankar Lal was an advocate of this Court and proceedings against him are governed by the Bar Councils Act, while Mr. Hashmat Ali is a pleader only and action against him is governed by the Legal Practitioners Act. The result is that the complaint against Pt. Shankar Lal was forwarded to this Court without any notice to him or any opportunity being given to him of showing cause.

Before we had had the advantage of seeing the result of the inquiry into the conduct of Mr. Hashmat Ali we were disposed on reading the judgment in the case Sheodarshan *v.* Sub-Inspector Mukhtar Ahmad, to hold (a) that there was reason for believing that the complaint made by Sheodarshan against Sub-Inspector Mukhtar Ahmad was at the very least very probably a true complaint; (b) that there was certainly not sufficient material on the record for issuing any notice to Pt. Shankar Lal calling upon him to explain his conduct or directing the District Judge to make any inquiry.

That opinion of ours even so held has been amply strengthened by the report in the case of Mr. Hashmat Ali. We hold that there is no ground for directing any inquiry into the conduct of Pt. Shankar Lal, and we summarily reject the complaint.

We cannot however leave the matter at that without putting on record our view that the Magistrate was unduly hasty in making that complaint. It is right and proper that all judicial officers high or low should keep a vigilant eye on the conduct of legal practitioners, of whatever status, who are all ministers of the Court and should in proper cases institute inquiries under the Legal Practitioners Act or make complaints under the Bar Councils Act according to the status of the legal practitioner concerned; but legal practitioners are one and all, of whatever status, entitled also to the protection of the Court, and inquiries should not be instituted or complaints made without having given very grave consideration to the reasonable probability of the case against the legal practitioner being well founded. As much injustice may be done to a legal practitioner by ill-conceived proceedings against him as may be done to the public interest and to the general body of legal practitioners by failure to keep a vigilant eye upon and take proper strong action against cases of misconduct. It is manifest that permanent and underserved harm may be caused to the reputation of any legal practitioner against whom ill-considered proceedings are taken.

We say advisedly "ill-considered" proceedings. It is equally the bounden duty of every judicial officer to initiate proceedings where he has upon grave consideration reason to believe there has been misconduct as it is to refrain from ill-considered proceedings and vice versa. In the present case the Magistrate could at least and should have refrained from initiating proceedings against Pt. Shankar Lal until he made inquiry into the proceedings which he was initiating against Mr. Hashmat Ali. Even though there may have been no suggestion that Pt. Shankar Lal and Hashmat Ali were acting in concert a failure to establish the case against the latter would have suggested doubts as to the truth of the case against the former. We hold that in this case no complaint should have been filed and the proceedings have disclosed nothing whatever to the discredit of Pt. Shankar Lal, and on the other hand it is more than probable that such action as he took was properly taken.

The complaint is rejected.

A copy of the order in the Miscellneous case No. 102 against Mr. Hashmat Ali will be attached to this order. Copies of these orders will be sent free of cost to Pt. Shankar Lal.

K.N./R.K. *Complaint rejected.*

A. I. R. 1931 Allahabad 582

SULAIMAN, AG. C. J. AND SMITH, J.

Ram Jatan and *others* — Plaintiffs — Applicants.

v.

Bishunath and *others* — Defendants— Opposite Parties.

Civil Revn. No. 333 of 1930, Decided on 23rd April 1931, against order of Asst. Collector, First Class, Jaunpur, D/- 24th April 1930.

Agra Tenancy Act (1901), S. 253—Suit for declaration of title to certain occupancy holdings and in alternative for possession—Plaintiff failing to amend plaint as required —Plaint rejected — Application filed with plaint stating suit to be under S. 121 — No appeal lay to District Judge and so revision to High Court was incompetent.

A suit was brought in the revenue Court for declaration of title to certain occupancy holdings and in the alternative for possession alleging that the defendants were mortgagees of the same and were denying plaintiff's title. The Court required the plaintiff to amend the plaint and on their failure to do so rejected it. The application filed with the plaint stated that the suit was under S. 121, but it was contended in argument that the suit could be brought under S. 99.

Held: that in neither case appeal lay to District Judge as required by S. 253 if the suit had been disposed of and consequently High Court had no jurisdiction to interfere in revision. [P 582 C 2]

L. M. Roy—for Applicants.

N. C. Sen—for Opposite Parties.

Sulaiman, Ag. C. J. — A preliminary objection is taken to the hearing of this revision. The copy of the order is misleading inasmuch as it suggests that the order was passed by the District Judge of Jaunpur. The plaint was filed in the civil Court for declaration of title to certain occupancy holdings and in the alternative for possession, alleging that the defendants were mortgagees of the same and were denying the plaintiff's title. Objection was taken as to the jurisdiction of the civil Court, and the plaint was returned for presentation to the proper Court. The plaint was then filed in the Court of the Assistant Collector of Jaunpur, who apparently came to the conclusion that the plaint ought to be amended and gave time to the plaintiffs to do so. They failed to amend it. The Assistant Collector then ordered the plaint to be rejected.

A revision has been filed from the order of the Assistant Collector. and a preliminary objection is taken that no revision lies.

Under S. 253, Agra Tenancy Act, the High Court can exercise its power of revision where a case has been decided by any subordinate revenue Court, in which an appeal lies to the District Judge, but no appeal lies to the High Court.

The learned advocate for the respondents contends that this was a case in which no appeal lay to the District Judge at all, and that therefore this High Court has no jurisdiction to interfere in revision. The plaint as filed in the revenue Court was for declaration and in the alternative for possession. In the application which was filed along with the plaint it was expressly recited that the suit was one under S. 121, Tenancy Act. If that be the fact, then according to the table given in Sch. 4 an appeal in such a suit lies to the Commissioner and not to the District Judge. S. 253 therefore would not be applicable.

Even assuming in favour of the plaintiffs that their suit could be brought as claimed under S. 99, Tenancy Act, an appeal would still lie to the Commissioner and not to the District Judge. It follows that in either view of the case this was not a suit in which an appeal would have lain to the District Judge if the suit had been disposed of. It is therefore quite clear that the High Court has no jurisdiction to interfere in revision under S. 253.

It is unnecessary for us to say whether the plaintiffs have any remedy by way of revision to the Board of Revenue, or whether it would have been more appropriate to have recourse to the provisions of S. 267, Tenancy Act, for reference to the High Court. The application is accordingly dismissed with costs.

P.N./R.K. *Revision dismissed.*

A. I. R. 1931 Allahabad 583

SEN AND NIAMATULLAH, JJ.

Sital Prasad—Appellant.

v.

Ranjit Singh and *others*—Respondents.

Second Appeal No. 2256 of 1927 (connected with Nos. 2242 and 2257 of 1927), Decided on 25th June 1930, against decision of Sub-Judge, Muzaffarnagar, D/-30th June 1927.

(a) Contract Act (1872), S. 107 — Provisions of S. 107 as to notice are mandatory — But trade usage can be pleaded in conflict with provisions of Contract Act.

It is open to a party to plead a trade usage in conflict with the provisions of the Act. If a party relies upon a trade usage, its incidents and details ought to be indicated with clearness and precision. Provisions of S. 107 as to giving of notice are mandatory and a seller under that section cannot be allowed to resell the goods without giving notice to buyer unless he establishes a trade usage at variance with its provisions. [P 583 C 2; P 584 C 1,2]

(b) Practice—Appellate Court—Finding of lower Court on trade usage will not be ordinarily set aside by High Court — Civil P. C. (1908), S. 100.

Where there is evidence legally sufficient to support a finding as to the existence of a usage, High Court cannot set aside that finding on the ground that the quantum of evidence is meagre and scanty. But where the usage has not been pleaded with precision and the evidence adduced is vague and inconsistent, a finding may be overset by the High Court on the grounds that it was not justified by the pleadings and was not supported by evidence of a relevant character. [P 584 C 2]

P. L. Banerji and *K. N. Laghate*—for Appellant.

N. P. Asthana—for Respondents.

Sen, J.—This and the connected appeal arise out of a suit for damages, consequent upon a breach of contract relating to the purchase of two grain pits, situate in Mauzas Sambhalka and Bhuniyori respectively. The plaintiffs claimed Rs. 948-12-3 for principal and interest up to the date of suit as also pendente lite and future interest.

Plaintiffs alleged and the defendants did not dispute that the latter had agreed to purchase the two grain pits at certain rates detailed in the plaint, and that earnest money had been duly paid but that the defendants had failed to pay the balance of the price and take delivery. The balance was payable up to Chait Badi 15th and delivery ought to have been taken up to Chait Sudi 2nd corresponding to 17th March 1923.

Plaintiffs averred that there was a trade usage in the grain market of Shamli, that where the buyer failed in his obligation as to payment and delivery on due dates, the seller was entitled to resell the grain pits according to the market rate and that in pursuance of this usage the plaintiffs resold the grain pit in Sambhalka. This resulted in a loss to the plaintiffs of Rs. 587-1-3. They claimed this sum together with Rupees 138-5-0 interest up to the date of the suit. This grain pit belonged to the plaintiffs.

No resale was held of the second grain pit which was alleged to have been purchased from Kallu Mal Kedar Nath. Plaintiffs alleged that they had to pay to Kallu Mal Kedar Nath Rs. 141-3-0 for this grain pit. They claim for recovery of this sum and Rs. 41-12-0 as interest.

The suit was contested on the ground that the contract between the parties was really of the nature of a wager, that a claim for damages for its breach was not legally maintainable, and that the plaintiffs were not competent to sell the grain pit at Sambhalka without complying with the provisions of S. 107, Contract Act.

The Court of first instance found that the plaintiffs had not, as a matter of fact, purchased the second grain pit from Kallu Mal Kedar Nath and were not in a position to sell the grain pit to the defendants on 25th June 1922 when the bargain was struck relating to this grain pit, and held that the claim regarding this was untenable. It decreed the plaintiffs' claim for Rs. 587-1-3 principal and Rs. 138-5-0 interest as to the other grain pit.

Both the parties appealed. The lower appellate Court allowed the plaintiffs' appeal and dismissed the cross-appeal. The result was that the plaintiffs' claim stood decreed in its entirety.

The defendants in their appeal to this Court contend that the plaintiffs were not entitled to resell the grain pit situate in Mauza Sambhalka without complying with the conditions laid down in S. 107, Contract Act. In answer, the plaintiffs set up a trade usage under which it was not necessary for them to serve a notice upon the defendants as a condition precedent to their selling the grain pit.

It is open to a party to plead a trade usage in conflict with the provisions of the Contract Act. If a party relies upon a trade usage, its incidents and details ought to be indicated with clearness and precision; and where there is an issue between the parties as to the existence of such a usage, the onus of proof lies upon the party propounding the same.

The defendants denied that the plaintiffs had resold the grain pit in Sambhalka. On this point there is no clear finding by either of the Courts below. In the view we are about to take, it is not necessary to call for a finding as to whether there was a resale or not. Their main intention was that in no case could damages be assessed on the basis of the difference between the contract price and the price fetched on a resale, since no notice of the projected sale was given to the defendants under the imperative provision of S. 107, Contract Act.

Plaintiffs do not aver that they ever gave any notice to the defendants of the contemplated sale.

Where the property in the goods had passed to the defendants, but the latter were in default and refused either to pay the balance of the price or to take delivery of the goods on the due dates, two remedies were available to the plaintiffs: (1) to claim compensation on the basis of the difference between the contract price and the market price on the date of the breach; or (2) to resell the property under S. 107 and recover the difference, if any, between the contract price and the price realized by the resale. The present suit is not to enforce the first remedy, nor is it a suit to recover losses sustained by a resale held under S. 107, Contract Act. A trade usage has been set up by the plaintiffs the details of which have been given in para. 3 of the plaint. It has not been pleaded that by force of this usage the plaintiffs were competent to sell the grain pits belonging to the defendants without any notice to them of the projected sale. The Court of first instance neither framed nor tried an issue as to the existence or the incidents of the usage as alleged by the plaintiffs.

The lower appellate Court deals with the question subsidiarily in its treatment of S. 107, Contract Act. It held that the provision of S. 107 was not mandatory but was optional, a view with which we entirely disagree. The claim for recovery of loss caused by a resale may be an optional remedy. But the plaintiffs cannot be permitted to resell the goods in defiance of the conditions imposed by S. 107, Contract Act, unless they establish a trade usage at variance with its provisions. We have already observed that the plaintiffs have not pleaded that under the usage prevailing in the grain market of Shamli it was not necessary to give the defendants a notice of the contemplated sale where the latter are guilty of a breach of the obligations under the contract. The lower appellate Court holds that the usage is proved, but its finding rests upon the statements of two witnesses, Gokul Chand and Kishori Lal, which have not only no bearing upon the question of notice, but are vague and nebulous to a degree. The following is the summary of their statements as given in the judgment of the lower appellate Court:

> "Gokul Chand has given up the custom when he comes to say that the vendor has to wait till Chait Sudi 1st, when he will inform "itala dekar" the vendee, if his shop subsists (i. e., if the vendee is to be found), and then the grain pit can be resold by the vendor. Kishori Lal, plaintiff, has said that a vendor could resell it without any enquiry from the vendee."

The statement of Gokul Chand does not support the usage and is open to the construction that it is necessary to give a notice to the purchaser. Kishori Lal does not say a word about notice but speaks of the necessity of an inquiry from the vendee. Upon the data accepted by the lower appellate Court, the inference, in affirmance of the usage as now set up before us, was wholly unwarranted. Where there is evidence legally sufficient to support a finding as to the existence of a usage, this Court cannot set aside that finding on the ground that the quantum of evidence is meagre and scanty. But where the usage has not been pleaded with precision and the evidence adduced is vague and inconsistent, a finding may be overset by this Court on the grounds that it was not justified by the pleadings and was not supported by evidence of a relevant character. We therefore hold that the plaintiffs have failed to prove a trade usage entitling them to sell the grain pit without notice to the defendants.

The plaintiffs' claim however cannot be permitted to rest here. We are clearly of opinion that a breach of contract on the part of the defendants having been established, the plaintiffs are entitled to claim damages on the basis of the difference between the contract price and the market price on the date of the breach.

Before we can finally dispose of this appeal we think it desirable to have a finding from the Court below on the following issue:

> "What was the difference between the contract price and the market price of wheat in Shamli on 17th March 1923?

Parties shall be at liberty to produce further evidence. The lower appellate Court is directed to submit its finding within two months of the receipt of the record. Upon return of the finding ten days' time will be allowed for objections.

We are of opinion that the plaintiffs were entitled to interest for the period pendente lite and future right up to the date of realization. The contention about interest is therefore overruled. No reason has been assigned why interest for the period between the institution of the suit up to the date of realization should be refused.

P.N./R.K. *Case remanded.*

A. I. R. 1931 Allahabad 585

PULLAN AND NIAMATULLAH, JJ.

Banwari Singh and *others* — Appellants.

v.

Sakhraj Singh and *others* — Respondents.

Second Appeal No. 1598 of 1929, Decided on 17th March 1931, against decision of Second Addl. Sub-Judge, Azamgarh, D/- 16th May 1929.

(a) Limitation Act (1908), S. 22—Redemption suit — Minor defendants subsequently added beyond period of limitation — All defendants forming joint Hindu family — Addition of minors held not addition of new defendants.

If parties are effectively represented through those whose actions bind them, so that a decree passed against them, is binding on such parties, a specific mention of the names of such parties subsequently in the title of the suit cannot be regarded as addition of a new defendant for the purposes of limitation. [P 586 C 1]

A redemption suit was instituted within limitation of 60 years but after expiry of that period two more minor defendants were added. The fathers of these minors were already defendants in the suit. All the defendants were members of a joint Hindu family and the mortgage was a joint family concern.

Held: that it would be erroneous to say that "new defendants had been added." Hence the suit could not be dismissed against the minors: 33 *All.* 272 (*P.C.*), *Appl.*; *A. I. R.* 1914 *P. C.* 136 and 34 *All.* 549, *Rel. on.* [P 586 C 1]

(b) Mortgagor and Mortgagee—Mortgagee agreeing to pay to mortgagor every year certain sum—That sum can be set off against mortgage debt for whole mortgage period even beyond 12 years.

Where the mortgage deed mentions that the mortgagee should pay every year to the mortgagor a certain sum, that sum for the whole mortgage period (even beyond 12 years) should be set off against the mortgage debt, for the principal secured by the mortgage deed should be considered to have been reduced by that much sum every year: 4 *A. L. J.* 176, *Rel. on.* [P 587 C 1]

A. P. Pandey—for Appellants.

Ram Nama Prasad—for Respondents.

Niamatullah, J. — This is a defendants' appeal arising out of a suit for redemption brought by the plaintiff-respondent in respect of a mortgage deed dated 28th June 1864, executed by the predecessor-in-title of the plaintiff in favour of Ram Din Singh and Basraj Singh, ancestors of the defendants. The suit, as originally instituted against defendants other than defendants 10 to 12, was admittedly within limitation. Defendants 10 to 12 were subsequently impleaded after the expiry of 60 years from the date of the mortgage. Under ordinary circumstances the suit against them would be barred by limitation. It has been found by the lower appellate Court that all the defendants form a joint Hindu family and that their interest in the mortgaged property is part of the joint family property. Defendants 10 to 12 are minors, and their respective fathers were impleaded as defendants 7, 8 and 9 in the plaint when first presented.

Defendants 10 to 12 pleaded limitation when they were made parties to the suit; but both the Courts below have overruled their plea and decreed the suit. Hence this second appeal. It was originally heard by a learned single Judge of this Court, who referred it to a Division Bench in view of the importance of the question involved. One of the questions argued before us is that of limitation. Having regard to the finding of the lower appellate Court already referred to that all the defendants constitute a joint Hindu family and that the mortgage in question was a joint family concern, we entertain no doubt, on that finding that defendants 10 to 12 were represented by their fathers in the suit as instituted. It was held by a Full Bench of this Court in *Hori Lal* v. *Mun-*

man Kunwar (1) that the managing members of a joint Hindu family, who in that capacity had purchased the mortgaged property, sufficiently represented the entire family in a suit brought by them for enforcement of that mortgage. Similarly, their Lordships of the Privy Council held in *Sheo Shankar Ram* v. *Jaddo Kunwar* (2) that:

> "There were occasions, including foreclosure actions, when the managers of a Hindu joint family so effectively represented all the other members that the family as a whole was bound, and we are of opinion that it was clear, on the facts of this case and on the findings of the Court upon them, that it was a case where that principle ought to be applied."

As already stated, the subject matter of the present litigation is clearly one as to which the managing members of the family, as defendants 7, 8 and 9 are, can effectively represent the whole family and, at any rate, their minor sons, defendants 10 to 12. In this view, the latter must be considered to have been made party to the suit in its inception through their fathers; and if they had not been subsequently impleaded, a decree for redemption passed in favour of the plaintiff would have entitled him to possession on payment of the mortgage money against the whole family. The subsequent addition of defendants 10 to 12 in the array of parties cannot alter their position in this respect. It was, in our opinion, quite superfluous for the plaintiff respondent to have impleaded them at a later stage.

Section 22, Lim. Act, which is relied on in support of the plea of limitation, provides that:

> "Where after the institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party."

In the circumstances already referred to and in view of the legal position of defendants 10 to 12, it is erroneous to say that a "new defendant" has been "added." If parties are effectively represented through those whose actions bind them, so that a decree passed against them is binding on such parties, a specific mention of the name of such party subsequently made in the title of the suit cannot be regarded as the addition of a new defendant for the purposes of limitation. In *Kishan Prasad* v. *Har Narain Singh* (3), the facts were similar with the difference that junior members of the family had been added as plaintiffs in the array of parties after the period of limitation had expired. The contention was that the suit, so far as their interest was concerned, was barred by limitation and no relief could be granted to the remaining plaintiffs who could not represent the entire family. The Court of first instance decreed the suit, but the plea of bar prevailed in the High Court. Their Lordships of the Privy Council repelled the aforesaid contention and decreed the suit. In doing so, their Lordships observed that:

> "the original plaintiffs in this case were entitled, as the sole managers of the family business to make in their own names the contracts which gave rise to the claim, and that they properly sued on such contracts without joining the other members of the family."

It is urged before us that the judgment does not clearly indicate that the decree was passed in favour of the plaintiffs joined after the period of limitation and that it must be deemed to have been passed in favour of the original plaintiffs only. There is nothing to show that the Court of first instance had dismissed the suit so far as the subsequently joined plaintiffs were concerned, or that their Lordships of the Privy Council said something which could have had that effect. They restored the decree of the first Court unconditionally. In substance it is immaterial whether the suit is decreed in favour or against, some members of the family, who are expressly declared to be representing all the members of the family, or in favour of or against all the members of the family mentioned by names, so long as it is clear that the decree is binding on the whole family.

The learned advocate for the appellant earnestly pleaded that though the decree passed against the fathers of defendants 10 to 12 be binding, the plaintiff's suit should be dismissed as against defendants 10 to 12 themselves as barred by limitation, even though such a course may not affect the rights of the parties. We are clearly of opinion that such a course would introduce an element of inconsistency in the decree besides being a fruitful source of future litigation.

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(1) [1912] 34 All. 549=15 I. C. 126 (F.B.).

(2) A. I. R. 1914 P. C. 136 = 24 I. C. 504=41 I. A. 216=36 All. 383 (P.C.).

(3) [1911] 33 All. 272=9 I. C. 739 = 38 I. A. 45 (P.C.).

Another question raised in the appeal has reference to the plaintiff's right to recover a sum of Rs. 15 a year payable by the mortgagees to the mortgagor under the mortgage deed. The Courts below have awarded arrears for more than 12 years by setting them off against the principal sum due under the deed. It is argued that no more than three years' or, at any rate, 12 years' arrears can be allowed, the rest of the claim being barred by limitation. We cannot accede to this contention. On account being taken between the mortgagor and the mortgagee, sums due from one to the other during the continuance of the mortgage should be included. The principle in such cases is that, as money becomes due to the mortgagor at any given time, it should be deemed to have been recovered by the mortgagor by a corresponding decrease in the amount payable to the mortgagee. The sum of Rs. 15 a year, claimed by the plaintiff, is mentioned in the mortgage deed as revenue payable by the mortgagees to the mortgagor. The principal secured by the mortgage deed should be considered to have been reduced by Rs. 15 in every year in which the mortgagee failed to pay it to the mortgagor as agreed. The case of *Muhammad Husain* v. *Sheodarshan Das* (4) seems to be in point. The result is that this appeal fails. It is accordingly dismissed with costs, including fees in this Court on the higher scale.

S.N./R.K. *Appeal dismissed.*

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(4) [1907] A. W. N. 71=4 A. L. J. 176.

A. I. R. 1931 Allahabad 587

PULLAN AND NIAMATULLAH, JJ.

Dhanpat Pandey and *others*—Appellants.

v.

Raja Pasput Pratap Singh and *others*—Respondents.

First Appeal No. 408 of 1927, Decided on 24th March 1931, against decision of Sub-Judge, Basti, D/- 23rd June 1927.

Ferry, Right to—Crown grant—Riparian rights.

The general right of the owner of land on either bank of a river to establish ferry for profit must give way in competition with grantee of Government who has enjoyed monopoly under his grant. [P 588 C 2]

Shiva Prasad Sinha, *L. M. Roy* and *Krishna Bahadur*—for Appellants.

K. N. Katju, *Iqbal Ahmad* and *K. Verma*—for Respondents.

Niamatullah, J.—The suit which has given rise to this appeal was brought by the Rajah of Bansi, plaintiff 1, and two of his lessees, plaintiffs 2 and 3, for a perpetual injunction, against 62 defendants, including the appellants in this Court, restraining them from interfering with the plaintiffs' right of ferry across the river Rapti within the boundary of village Ghai Ghat, pargana Bansi, in the Basti District.

The plaintiffs' case is that plaintiff 1 has the exclusive right of ferry on the river Rapti in the Basti District, that in pargana Bansi within the boundary of village Ajgara he has a ferry at Tharwaria Ghat for passage of bullock carts, horses, cattle, foot-passengers, etc., across the aforesaid river, and that he has another ferry at Barwa Ghat for a similar purpose. The former is leased to plaintiff 2, and the latter is leased to plaintiff 3. The defendants are said to be proprietors of village Gai Ghat, through which the river Rapti passes at a point between Tharwaria Ghat and Berwa Ghat above referred to. It is alleged by the plaintiffs that for the convenience of the agricultural population of village Gai Ghat plaintiff 1 allowed the defendants to cross the river on a small boat free of any toll, a concession which has been enjoyed by the people of Gai Ghat for many a year; but that since October 1925 the defendants have been running a ferry of their own in village Gai Ghat at a place where land on either side of river Rapti belongs to them, which has materially affected the income accruing from the plaintiffs' ferry at Tharwaria Ghat and Berwa Ghat already referred to.

The suit was resisted by the defendants, who alleged that their ferry in village Gai Ghat had been in existence for over 60 years, and that in any case they were entitled to maintain a ferry of their own, the land on either side of the bank where they run their ferry being theirs. They denied the plaintiffs' exclusive right of ferry on the river Rapti wherever it ran in the Basti District. The learned Subordinate Judge of Basti who tried the suit decreed it on the finding that plaintiff 1 was the owner of the ferry at Gai Ghat, namely, that which the defendants claimed to be theirs and which the plaintiffs desired to be discontinued except for the limited purpose they mentioned in their plaint.

He further found that the ferry of Gai Ghat was started by the defendants recently, as alleged by the plaintiffs, and had not been in existence as alleged by the defendants. On the last finding he held that the plaintiffs were entitled to restrain the defendants from maintaining a ferry at Gai Ghat. Though the decree passed by the learned Subordinate Judge is justified by the evidence he has not, in our opinion, approached the case from a correct standpoint. The plaintiffs did not claim that they had a ferry at Gai Ghat, and properly no question arose as to whether the ferry which the defendants claimed for themselves is "owned" by the plaintiffs. On the other hand, the plaintiffs' case was that there was no such ferry and that the defendants had encroached on the right of plaintiff 1 to have ferries on the river Rapti to the exclusion of everybody else. In other words, the plaintiffs claim a monopoly in that respect.

To clear the ground, we may briefly state the nature of a ferry as known to the law:

> "The right is wholly unconnected with the ownership or occupation of land, and it is not necessary that a ferry owner should have any property in the soil of the river over which he has a right of ferry. Nor, again, is it necessary that he should be the owner of the landing places of the ferry, it being sufficient that they are in a public highway or that otherwise he has a right to land upon them. The ferry owner does not occupy the highway over the river, but has merely a right to make a special use of it: Halsbury's Laws of England, Vol. 14, p. 556."
>
> "A ferry is created by a royal grant, or in modern days by acts of Parliament, or exists by prescription, which implies a royal grant."
>
> "If there be already an existing ferry between two towns in the hands of any person, the grant of another ferry between the said grounds is void."
>
> "A grant of a ferry may be in more or less extensive terms. A grant of "all our ferriages and passages" over a certain river applies to existing ferries, and does not confer on the grantee a right to create new ferries over the same river: *Ibid*, p. 557."

There is no statute law in India defining the mode of acquisition of ferry right and the conditions under which it can be exercised. Where there is no conflict of interest between the claimant to a ferry and the holder of a franchise from the Government in that respect

> "it is recognized law in India that a man may set up a ferry on his own property, and take toll from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others: *Lachmeswar Singh* v. *Manowar Hossein* (1)" at p. 262.

The sovereign authority can however confer a right of ferry exercisable in a given local area. Accordingly an owner of a ferry, granted under a Government settlement, who plied it on hire, could restrain by suit another from running his ferry over the same spot, though that other levied no tolls on his ferry, if he did not use it exclusively for the convenience of his own servants and ryots: *Luchmessur Singh* v. *Leelanund Singh* (2). The general right of the owner of the land on either bank of a river to establish a ferry for profit must give way if it comes in competition with the grantee of the Government who has previously enjoyed a monopoly under his grant. (The judgment then discussed evidence and proceeded): Considering the oral and documentary evidence adduced by the parties, we are in agreement with the learned Subordinate Judge that apart from a small boat which the zamindars of Gai Ghat were allowed to use for the convenience of themselves and of their tenants there was no regular ferry at Gai Ghat till a year or so before the institution of the present suit. We are clearly of opinion that Gai Ghat which is situate between Tharwaria and Berwa ferries belonging to plaintiff 1 has had a ferry for some time before this litigation during which it must have materially reduced the plaintiffs' income from Tharwaria and Berwa ferries. The documentary evidence also leads to the conclusion that plaintiff 1 has, at any rate in pargana Bansi, the franchise of ferries derived from the Government under a settlement in respect of Jalkar Mahal.

The case of *Nitya Hari Roy* v. *Dunne* (3) seems to cover the points which arise in the case before us. It was held by a Division Bench of the Calcutta High Court that

> "the franchise of a ferry is not necessarily an appurtenant to land, but when a right of ferry was claimed as appurtenant to certain villages, the grant of such right by the Crown would not be destroyed by mere non-user without waiver, nor by the running of an opposition ferry. The franchise would continue as long as the grant continues, and until the person who sets up an opposition ferry could show a Crown grant or give evidence from which a Crown grant should be presumed, the cause of action would remain."

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(1) [1892] 19 Cal. 253=19 I. A. 48=6 Sar. 133 (P.C.).

(2) [1879] 4 Cal. 599=3 C. L. R. 427.

(3) [1891] 18 Cal. 652.

The defendants do not allege any Crown grant and rely solely on their ownership of landing places. In the view of the case we take, the decree passed by the learned Subordinate Judge must stand. This appeal is accordingly dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 589 (1)

MUKERJI AND BENNET, JJ.

Dharam Dass—Plaintiff—Appellant.

v.

Shankar Ahir—Defendant—Respondent.

Second Appeal No. 554 of 1928, Decided on 10th January 1931, against decision of Dist. Judge, Allahabad, D/- 6th January 1928.

Civil P. C. O. 41, R. 11—Judgment under R. 11 should also comply with R. 31.

Order mentioned in R. 11 should be governed by the provisions of R. 31.

The judgment of the appellate Court ran as follows: "The facts are laid out in the judgment of the lower Court. The decision is a reasonable one, and as a Court of appeal I am not justified in going against it. Rejected summarily." It was contended that it was sufficient for the purpose of dismissal of the appeal summarily.

Held : that the Judge should have set forth the points for determination, the decision thereon and the reasons ior that decision. He had altogether failed to comply with this direction of law : *A. I. R.* 1924 *All.* 100; *A. I. R.* 1926 *Rang.* 129, *Ref.*; 30 *All.* 319, *Dist.*

[P 589 C 2]

Haribans Sahai—for Appellant.

P. L. Banerji and *Des Narain Singh*—for Respondent.

Bennet, J.—This is a second appeal in which the point which has been raised before us on behalf of the appellant-plaintiff is that the judgment of the lower appellate Court dismissing the appeal of the plaintiff is not a judgment according to law. The judgment is as follows:

> The facts are laid out in the judgment of the lower Court. The decision is a reasonable one and as a Court of appeal I am not justified in going against it. Rejected summarily.
>
> Sd/- A. H. De B. Hamilton.

On behalf of the respondent it was argued that this judgment was sufficient for the purpose of dismissal of an appeal summarily under O. 41, R. 11. That rules states that, "the Court may make an order that the appeal be dismissed."

But we consider that such an order should be governed by the provisions of O. 41, R. 31 which states:

> The judgment of the appellate Court shall be in writing and shall state: (a) the points for determination; (b) the decision thereon; (c) the reasons for the decision; and (d) where the decree appealed from is reversed or varied the relief to which the appellant is entitled.

In the present case the learned District Judge should have set forth the points for determination, the decision thereon and the reasons, for the decision. He has altogether failed to comply with this direction of law. The view of law which we take has been followed in *Gupta Nand* v. *Bihari Lal* (1) and *Ma Saw* v. *Ma Bwin Byu* (2). For the respondent attention was invited to *Samin Hasan* v. *Piran* (3), but that case is different, because in that case the judgment in question did give brief reasons. In the judgment before us of the lower appellate Court no reasons whatever are given. Accordingly we allow this appeal, set aside the decree of the lower appellate Court and direct that that Court do admit this appeal and dispose of it according to law. Costs hitherto incurred will be costs in the case.

K.N./R.K. *Appeal allowed.*

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(1) A. I. R. 1924 All. 100=74 I. C. 827.

(2) A. I. R. 1926 Rang. 129=95 I. C. 881=4 Rang. 66.

(3) [1908] 30 All. 319=(1908) A. W. N. 115=5 A. L. J. 300.

A. I. R. 1931 Allahabad 589 (2)

SULAIMAN AND KENDALL, JJ.

Mahadeo Prasad Singh and *others* — Defendants—Appellants.

v.

Mathura Chaudhari—Plaintiff — Respondent.

First Appeal No. 548 of 1926, Decided on 8th April 1930, from decree of Sub-Judge, Basti, D/- 1st May 1926.

(a) Contract Act (1872), Ss. 26, 58 and 62 —Agreement to transfer spes successionis or present share in property in substituted contract — Effect of such substitution considered in relation to particular deed of agreement — Transfer of Property Act, S. 6.

L executed a mortgage deed dated 18th March 1918 in favour of *M*. On 25th December 1920 the sons of the deceased mortgagor *L* executed a sale deed in lieu of the major portion of the amount due and entered into an agreement of which the relevant paragraphs were to the following effect: In para. 2 the heirs of the mortgagor, the executants first party, held themselves out as the reversioners to the estate of a Hindu widow, *Mt. R*, although admittedly an uncle of theirs who was a nearer reversioner was then alive. Apparently both this widow and the uncle were of advanced ages and it was expected that the executants first party would survive both of them. They stinulated that if

Mt. R died or executed a deed of relinquishment in their favour and in that way they became the owners of certain shares in her property, they would execute a sale deed of 6 pies shares in the property in favour of *M* executant second party, in full discharge of the outstanding amount. In para. 3 it was provided that if, they were for any reason unable to obtain proprietary possession of the shares in the three villages within a year after the death of the lady or in spite of obtaining proprietary possession, they did not execute a sale deed relating to those properties and deliver possession within a year after her death or relinquishment by her, they would within 15 days after the expiry of one year execute in favour of *M* a sale deed in respect of one anna and 2½ pie, share, which had on partition become 4 annas share in *T*. Para. 4 provided that if they did not get the shares in the three villages after the death or relinquishment of *Mt. R*, and some other heir got the estate, then it would not be obligatory on *M* to wait for one year after her death, but could send a registered notice for executing the sale deed relating to *T*, and if within a month of the date of the notice the first party failed to execute the sale deed, the mortgagee would have right to refuse to take the sale deed, and in that event he would not be bound by the terms of this agreement. Para. 5 provided that the price would be the entire amount due on the mortgage money up to date. In para. 6 an independent condition was laid down that in the event of the date for bringing the suit on the basis of the mortgage deed coming too close at hand before the death or relinquishment of *Mt. R* the executant first party would, six months before the date of the expiry of the limitation, execute a fresh deed and *M* would be bound to desist from bringing a suit, but if the executants first party did not execute a fresh document, *M* would have a right to seek any remedy he deemed proper. It was further clearly stated that *M* would be bound by all the conditions of the said agreement and would have the sale deed executed if the executants first party did not do any act in contravention of the terms of the agreement.

Held: on construction of the document:

That although the reversionary interest of the executants first party in the estate held by *M* was a mere spes successionis contingent upon the succession opening to them on her death which chance of succession is altogether void under S. 6; and although this part of the consideration for the agreement being of such a nature that if permitted it would defeat the provisions of any law, was unlawful within the meaning of S. 23, Contract Act; the agreement was a case of substituted contract governed by S. 62, and being entered into by both the parties for mutual consideration either to transfer 6 pies share in three villages after death or relinquishment by *Mt. R* and in the event of default to sell the share in *T* besides being a part and parcel of the same transaction under which certain properties were sold to *M* was enforceable under S. 58: *A. I. R.* 1923 *P. C.* 189; 39 *Mad.* 554 and *A. I. R.* 1922 *P. C.* 403, *Ref.*; *A.I.R.* 1917 *P.C.* 61, *Foll.* [P 591 C 2;P 592 C 2]

(b) Contract Act (1872), S. 63 — No fresh consideration necessary and if time not of essence extension can be granted after expiry of period of performance of promise.

In a case falling under S. 63 no fresh consideration is necessary and provided time is not of the essence of the contract, extension can be granted after the date for the performance of the promise has expired: *A. I. R.* 1927 *All.* 451; *A. I. R.* 1928 *P. C.* 99, *Ref.* and 23 *Bom.* 348, *Dist.* [P 592 C 1]

K. N. Katju—for Appellants.
K. Verma—for Respondent.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for sale on the basis of a mortgage deed dated 18th March 1918, executed by Lal Bahadur Singh in favour of Mathura Chaudhari for Rs. 15,925. The defendants were the sons of the deceased mortgagor. The main ground on which they contested the claim was that in view of an agreement between the parties dated 25th December 1920 the plaintiff's suit was premature and was not maintainable. The learned Subordinate Judge has come to the conclusion that the agreement in question was void and wholly inoperative and was therefore no bar to the present claim.

On 25th December 1920 Rs. 19,459-14-0 in all were due on the previous mortgage of 1918. On that date a sale deed was executed of certain property by the heirs of the mortgagor in lieu of Rupees 11,500, and for the balance of Rupees 7,949-14-0 the parties entered into an agreement which is printed on p. 19. The execution of the sale-deed in lieu of Rs. 11,500 is referred to in the agreement itself. The stamp paper of this document had been purchased on 23rd December 1920 before the sale deed was executed and registered, and there can be no doubt that the two were part and parcel of the same transaction which was entered between the parties. As the terms of this agreement have to be examined at length it would be convenient to give their substance paragraph by paragraph.

In para. 2 the heirs of the mortgagor, the executants first party, held themselves out as the reversioners to the estate of a Hindu widow, Mt. Ram Dei Kumari, although admittedly an uncle of theirs who was a nearer reversioner was then alive. Apparently both this widow and the uncle were of advanced ages and it was expected that the executants first party would survive both of them. They stipulated that if Mt.

Ram Dei died or executed a deed of relinquishment in their favour and in that way they became the owners of certain shares in three villages, Dubaulia, Kowa and Lodhapur, they would execute a sale deed of 6 pies shares in these three villages in favour of Mathura Chaudhari executant, second party, in full discharge of the outstanding amount.

In para. 3 it was provided that if they were for any reason unable to obtain proprietary possession of the shares in the three villages within a year after the death of the lady, or in spite of obtaining proprietary possession they did not execute a sale deed relating to those properties and deliver possession within a year after her death or relinquishment by her, they would within 15 days after the expiry of one year execute in favour of Mathura Chaudhari a sale deed in respect of one anna and one and half pie share, which had on partition become a 4 annas share, in Teknar.

Paragraph 4 provided that if they did not get the shares in the three villages after the death or relinquishment of Mt. Ram Dei Kumari and some other heir got the estate then it would not be obligatory on Mathura Chaudhari to wait for one year after her death, but he could send a registered notice for executing the sale-deed relating to Teknar, and if within a month of the date of the notice the first party failed to execute the sale deed the mortgagee would have a right to refuse to take the sale-deed, and in that event he would not be bound by the terms of this agreement.

In Paragraph 5 provided that the price would be the entire amount due on the mortgage money up to date.

In para. 6 an independent condition was laid down that in the event of the date for bringing a suit on the basis of the mortgage deed coming too close at hand before the death or relinquishment of Mt. Ram Dei, the executants first party would, six months before the date of the expiry of the limitation, execute a fresh deed, and Mathura Chaudhari would be bound to desist from bringing a suit; but if the executants first party did not execute a fresh document Mathura Chaudhari would have a right to seek any remedy he deemed proper.

In para. 7 it was clearly stated that Mathura Chaudhari would be bound by all the conditions of the said agreement and would have the sale deeds executed if the executants first party did not do any act in contravention of the terms of the agreement.

There cannot be the least doubt that the reversionary interest of the executants first party in the estate held by Mt. Ram Dei was a mere spes successionis contingent upon the succession opening to them on her death. A sale of such a chance of succession is altogether void under S. 6, T. P. Act, and it has been now clearly laid down by their Lordships of the Privy Council in the case of *Ananda Mohan Roy* v. *Gour Mohan Mullick* (1) that an agreement by a Hindu to sell immovable property to which he is a reversionary heir, even if the nearest, expectant upon the death of a widow in possession, and to transfer it upon possession accruing to him is void, as it is not a performable contract until the realisation of the expectation occurs. Such a transfer although not expressly prohibited is certainly not permitted, and is declared to be void by S. 6, T. P. Act. The extract quoted by their Lordships from the judgment of Tyabji, J., in *Sri Jagannada Raju* v. *Sri Rajahprasada Rao* (2) at p. 559 shows that their Lordships considered that such an agreement if permitted would defeat the provisions of that section. This re-affirms the view expressed by their Lordships in *Harnath Kunwar* v. *Indar Bahadur Singh* (3).

It follows that the consideration, being of such a nature that, if permitted, it would defeat the provisions of any law, is unlawful within the meaning of S. 23, Contract Act and is void.

The learned advocate for the appellants has first contended before us that the agreement in substance amounted to an extension of time fixed for payment and therefore did not require any consideration passing from the promisee under S. 63, Contract Act. That in a case falling under S. 63 no fresh consideration is necessary is now well settled: *Jugal Kishore* v. *Chari & Co.* (4), *Chunna Mal Ram Nath* v. *Mool Chand Ram*

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(1) A.I.R. 1923 P.C. 189=74 I.C. 499=50 I.A. 239=50 Cal. 929 (P.C.).

(2) [1916] 39 Mad. 554.

(3) A.I.R. 1922 P.C. 403=71 I.C. 629=45 All. 179 (P.C.).

(4) A.I.R. 1927 All. 451=101 I.C. 643=49 All. 599.

Bhagat (5). In reply, the learned advocate for the respondent contends in the first place that the extension of time can be made only before that time has expired. He relies on the case of *Trimbak Gangadhar* v. *Bhagwandas Mulchand* (6), in support of his view. The facts of that case are distinguishable as the promise merely was to postpone an auction sale for four days. But if the learned Judges intended to lay down that before S. 63 can be applicable the extension of time must have been given before the time fixed expired, we would be unable to agree with that view. There seems to be no reason why the scope of S. 63 should be limited in that way. That section also requires dispensing with or remitting wholly or in part the performance of the promise made to him, and there is no ground for supposing that such dispensing or remission cannot be made after the time has once expired. The performance of the promise does not necessarily include the performance within the time originally fixed, for if the time is not of the essence of the contract performance can be made even after it has expired (S. 55). Illus. (e), S. 63, deals with the case of a composition of creditors, which need not be before the expiry of the time for payment of the various debts due. We therefore see no reason why a creditor may not extend the time within which the performance had to be made and why such an extension would not be governed by S. 63. The Indian law on this point is contained in that section and is apparently different from that prevailing in England.

We however think that the second argument urged on behalf of the respondent must prevail. S. 63 would be applicable only if it were merely a case of an extension of time. This in our opinion is not the case here. The mortgagee did not merely give further time to the mortgagor's heirs to pay the mortgage money, but there was a new contract for the transfer of property in payment of the outstanding mortgage debt. Again he did not agree to give a mere extension of time, in case no sale deed was executed within one year after the death of or relinquishment by Mt. Ram Dei, to execute such a sale-deed afterwards; but that promise was to be substituted by a new promise to execute a sale deed of the share in Teknar within 15 days following. Similarly in para. 4 a new promise for substitution of the previous promise was to be carried out in case of default of the performance of the first promise. Reading all the terms of the agreement we are of opinion that this was a case of a substituted contract. The case therefore is governed by S. 62 and not S. 63, Contract Act. The agreement would therefore not be binding on Mathura Chaudhari if it were not supported by valid consideration.

That there was consideration passing from the heirs of the mortgagor is apparent. The ruling in *Sahu Ram Chandra* v. *Bhup Singh* (7) was then in full force, and it would have been open to the heirs of Lal Bahadur to challenge the mortgage on the ground of want of legal necessity. Not only have we the fact that this agreement was a part and parcel of the same transaction under which certain properties were sold to Mathura Chaudhari for Rs. 11,500 but there was undoubtedly a promise to transfer 6 pie shares in the three villages after the death of or relinquishment by Mt. Ram Dei Kumari and in the event of default to sell the share in Teknar. The agreement was entered into by both the parties and there was mutual consideration.

The learned advocate for the respondent next contends that part of the consideration, viz.: the promise to execute a sale deed of the reversionary right when it accrued was not only void but unlawful, and therefore by virtue of S. 24, Contract Act, the whole agreement was void. Under that section if any part of a single consideration for one or more objects, or any part of any one of several considerations for a single object is unlawful, the agreement is void. We however think that that section has no application to promises which are offered in the alternative. Such a case is expressly provided for in S. 58 of the same Act, under which in the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced. The illustration to that section shows that if *A* and *B* agree that *A* shall pay *B* Rupees

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(5) A.I.R. 1928 P.C. 99=108 I.C. 678=55 I.A. 154=9 Lah. 510 (P.C.).

(6) [1899] 23 Bom. 348.

(7) A.I.R. 1917 P.C. 61=39 I.C. 280=44 I.A. 126=39 All. 437 (P.C.).

1,000 for which *B* shall afterwards deliver to *A* either rice or smuggled opium, this is a valid contract to deliver rice and a void agreement as to the opium. It therefore follows that if there are alternative promises, only one of which is unlawful, the consideration is good.

We have already set forth the substance of the agreement and we have no doubt in our minds that there were alternative promises. The executants first party hoped to succeed to the estate of Mt. Ram Debi in the event of her death or relinquishment by her, and they agreed that if they did succeed to the estate they would execute a sale deed of their inheritance within one year, and in the event of their failing to do so they would within the following 15 days execute a sale deed of the share in Teknar which they owned at the time. There were thus alternative promises. Similarly in the event of their not succeeding to the estate at all and somebody else becoming the heir they undertook to execute a sale deed of Teknar within one month of the date of a notice from Mathura Chaudhari. It is thus obvious that under the terms of the agreement Mathura Chaudhari was bound to wait during the lifetime of Mt. Ram Debi. If after her death it became apparent that the executants first party succeeded to her estate he had to wait still for a part of one year and then for another period of 15 days. If on the other hand on her death it became apparent that the said executants did not succeed at all, he need not wait for one year, but could give them one month's notice to transfer their share in Teknar. But so far as Mathura Chaudhuri is concerned, he had under the agreement not an absolute right to enforce the contract for the transfer of the inheritance. An option was given to the executants first party either to transfer the inheritance or to transfer their share in Teknar. The case is therefore directly covered by the illustration to S. 58. The promise to transfer Teknar, in any event, and no matter what contingency occurred, was a perfectly good and enforceable promise.

In this connexion we may also point out that under S. 15, Specific Relief Act, where a part of a contract which can be specifically performed stands on a separate and independent footing from another part which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part. It is therefore clear to us that there was a good consideration for the promise of Mathura Chaudhari to wait during the lifetime of Mt. Ram Debi before seeking to recover his mortgage money. Admittedly he brought his suit while Mt. Ram Dei was still alive. We must therefore hold that the suit was premature and was in breach of the contract entered into by him. The agreement estops him from seeking remedy which was not allowed to him under the circumstances.

The next contention on behalf of the plaintiff was that he was entitled to sue by virtue of the right conferred upon him under para. 6 of the agreement. It is suggested that the ordinary period for enforcing a personal covenant to pay the mortgage money is six years, and that inasmuch as six years had expired after the expiry of one year fixed in the mortgage deed, he was entitled to ignore the agreement and sue for his mortgage money. This argument cannot be accepted. The ordinary period for enforcing a claim on a mortgage deed is 12 years under Art. 132, Limitation Act. That period would have expired on 18th March 1931, whereas the suit was instituted on 23rd March 1925. That the enforcement of any personal liability was not in contemplation of the parties can be inferred from the circumstance that the original executant was dead and his heirs entered into this agreement. They were not personally bound to pay that debt although any assets in their hands would have been so liable. It is also clear that the possibility of a money decree under O. 34, R. 6, was not in contemplation. As a matter of fact the present suit was instituted more than six years after the expiry of the one year fixed in the mortgage deed, and but for the acknowledgment contained in the agreement of 25th December 1920, the personal remedy on it would have been barred by time. If the acknowledgment is taken into account then the personal remedy also could be enforced up to 25th December 1926. So it is quite clear that it is not a fact that this suit was instituted because less than six months remained before the date of the expiry of the limitation. So the plaintiff cannot take advantage of para. 6 of the agreement.

S. N. Das
Advocate High Court
Jammu & Kashmir

We are therefore of opinion that the plaintiff was bound by the terms of the said agreement and his suit was premature. We accordingly allow this appeal and setting aside the decree of the Court below dismiss the suit with costs in both Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 594

SULAIMAN, AG. C. J. AND BAJPAI, J.

Dwarka Das Babu Ram—Plaintiff—Applicant.

v.

Vaish Flour Mill—Defendant—Opposite Party.

Civil Revn. Case No. 116 of 1930, Decided on 11th March 1931, against order of Sub-Judge, Agra, D/- 21st December 1929.

(a) Civil P. C. (1908), O. 9 and S. 151—Application—O. 9 does not apply to application under Civil P. C., O. 21, R. 90.

Order 9 cannot be applied to the dismissal of an application under O. 21, R. 90, but there is an inherent jurisdiction in the Court under S. 151 to restore such application if a good case is made out: 17 *All.* 106 and *A. I. R.* 1926 *All.* 773, *Rel. on.* [P 594 C 2; P 595 C 1]

(b) Civil P. C. (1908), S. 115—Application for restoration of application under O. 21, R. 90, not considered on merits but dismissed as unentertainable—Lower Court does not exercise jurisdiction vested.

Where the lower Court does not consider an application for restoration of an application under O. 21, R. 90, on merits but merely dismisses it thinking that it is not entertainable it fails to exercise jurisdiction vested in it by law: *A. I. R.* 1926 *All.* 773, *Ref.* [P 595 C 1]

Damodar Das—for Applicant.

Panna Lal—for Opposite Party.

Sulaiman, Ag. C. J.—This is a revision from an order of the Subordinate Judge of Agra dismissing an application for the restoration of a previous application under O. 21, R. 90, Civil P. C.

After the sale had taken place the applicant applied to have it set aside on the ground of material irregularities and fraud as well as substantial loss. On three occasions he took steps to get service effected on the opposite party but each time the summons was returned with the report that he could not be found. On the fourth occasion the Court ordered him to deposit the necessary costs, but he failed to do so on the date fixed and no one appeared on his behalf. The application was accordingly dismissed on 3rd August 1929.

The applicant then applied to have the dismissal set aside on the ground that he had been ill and could not attend the Court. He subsequently filed an affidavit in support of his application. The application did not expressly mention that it was made under O. 9, Civil P. C.

The learned Subordinate Judge by a summary order has dismissed the application on the ground that the objection admittedly was an execution proceeding and that O. 9 did not apply to such proceedings.

It is contended on behalf of the applicant that O. 9 read with S. 141, Civil P. C. applied to the case. While the old Code was in force it was held by their Lordships of the Privy Council in the case of *Thakur Prasad* v. *Fakir Ullah* (1), at p. 111, that inasmuch as Chap. 19 of the Code, consisting of 121 sections, is devoted to the procedure in executions, it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suits should be followed as far as applicable. O. 21, R. 90, had a corresponding section in Chap. 19 of the old Code and the remarks of their Lordships apply with an equal force to this procedure. It is therefore very difficult to hold that merely because of the general provision contained in S. 141 the procedure provided in this Code for suits shall, as far as it can be made applicable, be followed in all proceedings under O. 21, so as to make O. 9 applicable to the application for setting aside a sale.

This was the view expressed by one of us in the case of *Ganesh Prasad* v. *Bhagelu Ram* (2) where it was remarked that it was difficult to accept the view that O. 9 would in terms be applicable to such miscellaneous proceedings. It was further pointed out that the proper remedy was by applying to the Court to invoke its inherent jurisdiction under S. 151, Civil P. C., Daniels, J., however relying on certain Oudh cases took a contrary view on the question of the applicability of O. 9, Civil P. C., but agreed that S. 151 would certainly apply. Since that case the Calcutta High Court has agreed that the correct view to take is that O. 9 is not applicable, but that there is an inherent jurisdiction in the Court to restore an application if a good case is made out. We think that O. 9, Civil P. C. cannot be applied to the dismissal of the application under O. 21, R. 90. As pointed out in *Ganes Prasad's* case (2) the applicability of O. 9 might involve a further difficulty of allowing appeals from such orders. We therefore think that the learned Subordinate Judge was correct in his view when he remarked that O. 9 did not apply to these proceedings, although he was wrong in thinking that it was in the nature of an execution proceeding.

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(1) [1895] 17 All. 106=22 I. A. 44=6 Sar. 526 (P. C.).

(2) A. I. R. 1926 All. 773=89 I. C. 350=47 All. 878.

We have already pointed out that the application was not limited to O. 9, Civil P. C. The learned Judge has not at all considered the question that he had inherent jurisdiction to intervene if a good case was made out. This point is not expressly taken in the grounds of revision before us, but we think that as the learned Judge has not considered the application on the merits, but has merely dismissed it thinking that it is not entertainable, he has failed to exercise jurisdiction which was vested in him.

We accordingly allow this revision and setting aside the order of the learned Subordinate Judge send the case back to his Court for disposal of the application on the merits. He need only interfere if he is satisfied that good cause was shown.

In the circumstances we direct that the parties should bear their own costs of this revision and that the costs in the Court below should abide the event.

R.M./R.K. *Case remanded.*

A. I. R. 1931 Allahabad 595

BOYS AND NIAMATULLAH, JJ.

Hukum Kandoo—Appellant.

v.

Babu Jaintri Govind Rai and *others*—Plaintiffs—Respondents.

Second Appeal No. 951 of 1928, Decided on 2nd March 1931, against decision of Second Addl. Sub-Judge, Gorakhpur, D/- 21st February 1928.

Provincial Small Cause Courts Act (1887), Art. 35 (ii)—Cognizance depends upon allegations in plaint.

In all cases where it is suggested that the suit is one for damages or loss due to an offence punishable under Chap. 17, I. P. C., the decision whether the suit is cognizable by the Small Cause Court or not must vary according to the particular circumstances set out, and the various allegations made in the plaint and also the circumstances in the past history which may help the interpretation of the plaint.

There was an allegation that one tree had been cut three years ago, followed by criminal proceedings in which the defendants were acquitted. Two or three years later further trees were cut. The plaintiff made no effort whatever in the meantime to establish his title.

Held: that the suit was of the Small Cause Court nature. [P 595 C 2]

D. P. Malaviya—for Appellant.

R. K. Malaviya—for Respondents.

Boys, J.—A preliminary objection is taken that no second appeal lies on the ground that the case was one of Small Cause Court nature. We think the objection is sound. In all these cases where it is suggested that the suit is one for damages or loss due to an offence punishable under Chap. 17, I. P. C., the decision must vary according to the particular circumstances set out, and the various allegations made, in the plaint. It is manifest that in some instances there would be a plain unambiguous accusation of an offence, and in some cases there will be nothing whatever to suggest that a civil wrong had been committed. Between the two there must be an infinite variety of cases until those two which are one on each side of the border line are very very approximate in their facts. Each case must be considered on its own allegations in the plaint. There may also be circumstances, of course, in the past history which may help the interpretation of the plaint. For instance, in this case there was an allegation that one tree had been cut three years ago, followed by criminal proceedings in which the defendants were acquitted. Two or three years later further trees were cut. The plaintiff made no effort whatever in the meantime to establish his title. Had he done so successfully, there might have been no room for doubt as to the dishonest intention of the defendants; but he made no attempt to establish his title in the interval. We only mention this as illustrating how one single fact among the varying circumstances of particular cases may alter the whole effect of the allegations made in the plaint. We think that in this case the suit was of the Small Cause Court nature, and no second appeal lies. We dismiss it with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 596

MUKERJI AND BENNET, JJ.

Mrs. T. C. Paul — Defendant—Appellant.

v.

Nathaniel Gopal Nath —Plaintiff—Respondent.

First Appeal No. 362 of 1927, Decided on 11th February 1931, against decision of Sub-Judge, Mirzapur, D/- 30th June 1927.

(a) Advancement —Presumption of—Property purchased in wife's name or deposit made in her name—No presumption of advancement arises.

The principle of English law that when a property is purchased in the name of a wife or a deposit is made in the wife's name, it would be presumed that the purchase or deposit was intended for her advancement, does not hold good in India : *A. I. R.* 1925 *P. C.* 181, *Foll.* [P 597 C 2]

(b) Transfer of Property Act (1882), S. 123 —Deposit by Mr. Hope stood " Mr. and Mrs. Hope payable to either or survivor "—Deposit certificates and bank receipts kept by Mr. Hope—There is no gift in favour of Mrs. Hope and she could not will away same.

Mr. Hope before his death deposited certain amounts in the bank and the deposits were in the following terms: " Mr. and Mrs. Hope payable to either or survivor." Mr. Hope kept with himself the deposit certificates and bank receipts and they had not been handed over to Mrs. Hope.

Held : that there was no gift in favour of Mrs. Hope and she could not will away the same. [P 597 C 1]

U. S. Bajpai—for Appellant.

P. L. Banerji and *Balmakunda*—for Respondent.

Mukerji, J.—This is the defendant's appeal arising out of a suit for a declaration and injunction instituted under the following circumstances : One Mr. G. J. Hope, who resided before his death at Mirzapur, deposited with the Imperial Bank of India three sums of money as shown at p. 67 of the printed paper book. He died on 24th March 1926. About 22 days before his death he executed a will and appointed the respondent and another the executors. The fixed deposits were in the following terms :

Mr. G. J. Hope and Mrs. Clara Hope repayable to either or survivor."

On the death of Mr. Hope, his wife withdrew two sums of money, namely, Rs. 7,000 and Rs. 1,000 as they fell due, leaving a fixed deposit of Rs. 5,000 untouched. Mrs. Hope died, approximately, in August 1926. Before her death, she also executed a will and by it left all her property to the defendant appellant. When the respondent applied for a probate of the will of Mr. Hope, a contest was raised, presumably at the instance of the appellant, that the sum of Rs. 5,000 left in fixed deposit by Mrs. Hope was the property of the defendant. The learned District Judge, by his order dated 4th February 1927, left the matter open and suggested that the question of title should be decided by a separate suit. It was according to that suggestion that the suit out of which this appeal has arisen was brought by one of the executors of the will of Mr. Hope. The plaintiff asked for a declaration that the money in deposit with the Imperial Bank at the testator's death, was the property of the testator and asked for an injunction.

The contention of the defendant-appellant was that Mr. Hope had virtually given away the entire money in deposit with the Imperial Bank of India to his wife and therefore the wife was competent to dispose of the same by her own will. Another point was raised, but it was not decided and it was not necessary to decide in these proceedings. We will also not decide the point for the same reason. The point was this. The learned District Judge in granting probate to the plaintiff-respondent remarked that the gift to charity of a portion of the money left by Mr. Hope was void for uncertainty and this money should go to the heir of Mr. Hope as if he died intestate. On the strength of this remark the defendant contended that Mrs. Hope was the heir of Mr. Hope so far as there was an intestacy, that the money in question, namely, Rs. 5,000, or the major portion of it represented such intestacy and that therefore under the will of Mrs. Hope the defendant was entitled to this money. As we have said, we shall not decide anything on this point and if the defendant's contention be correct, it will be for the plaintiff to hand over to her such money as she may be entitled to.

There are only two points that we have to decide in this case. The first is whether there was a gift of the money in deposit in the Imperial Bank of India in favour of Mrs. Hope, and secondly whether the Court below was right in making the defendant pay the entire costs of the suit.

The learned counsel has argued on the strength of English law that where a deposit is made in the joint names of husband and wife, a gift is to be presumed to be in favour of the wife the gift being defeasible on the death of the wife in the lifetime of the husband. He quotes for his authority two statements of law contained in Lord Halsbury's Laws of England, Vol. 15, p. 414, para. 823, and Vol. 16, p. 394, para. 793. He also relies on an English case reported in *Dummer* v. *Pitcher* (1). We need not consider the English law because that law is not applicable to India at all. The deceased was domiciled in India and was governed by the Indian law. The Transfer of Property Act is the law that would govern this case and S. 123 of that Act will be our guide to determine whether there was a gift of the money in favour of the wife. S. 123 says :

> "For the purpose of making a gift of moveable property the transfer may be effected either by a registered instrument signed as aforesaid or by delivery."

Now in this case we find that there was no delivery of the goods, as the deposit stood in the following terms : "Mr. and Mrs. Hope payable to either or survivor." It was clear that Mr. Hope had the full authority to withdraw the money when the fixed deposits fell due without any concurrence on the part of his wife. Further, we have it in evidence of Mr. J. M. Christian that Mr. Hope kept with himself the deposit certificates and bank receipts and that they had not been handed over to Mrs. Hope. We have further in evidence that Mr. and Mrs. Hope were not on the best of terms and at one stage of their life shortly before the death of Mr. Hope, Mrs. Hope had to take recourse to the criminal Court for a maintenance allowance. The defendant-appellant herself admitted that she got hold of the deposit certificates from one of the executors of Mr. Hope. We hold therefore on evidence and in view of the circumstances that there was no gift in favour of Mrs. Hope. We may further point out that the law has been declared by their Lordships of the Privy Council in the case of *Sura Lakshmiah* v. *Kothandarama* (2). Their Lordships definitely ruled that in India the principle of English law that when a property is purchased in the name of a wife or a deposit is made in the wife's name, it would be presumed that the purchase or deposit was intended for her advancement, does not hold good in India. This being so, we hold that Mrs. Hope was not entitled to take more than one half of the money deposited with the bank at the title of Mr. Hope's death. She has already withdrawn more than one half of the amount and the remaining amount must be available to the executors for carrying out the wishes of the deceased gentleman.

The second question is as to costs. The order of Mr. Hunter printed at p. 51 shows that the title of the executors to the money was contested by the defendant. Even in the present litigation the defendant claimed the money. In the circumstances, there is no reason why the costs of this litigation should come out of the estate of the deceased person. In the result, we dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

✲✲ A. I. R. 1931 Allahabad 597

Full Bench

SULAIMAN, AG. C. J., MUKERJI AND BOYS, JJ.

Durga Thathera — Plaintiff — Appellant.

v.

Narain Thathera and *another*—Defendants—Respondents.

Second Appeal No. 1314 of 1929, Decided on 14th July 1931, from decision of Second Addl. Dist. Judge, Gorakhpur, D/- 11th July 1929.

✲✲ **(a) Civil P. C. (1908), O. 41, Rr. 11 and 31—Judgment on appeal under O. 41, R. 11—Compliance with provisions of O. 41, R. 31, is necessary—Substantial compliance is sufficient :** 30 *All.* 319, *Overruled.*

In a judgment delivered on hearing an appeal under O. 41, R. 11 by a Court subordinate to the High Court, compliance with the provisions of R. 31, O. 41 is necessary. The question whether in a particular case there has been a substantial compliance with the provisions of R. 31 is a different one depending on the nature of the judgment delivered in each case. A non-compliance with the strict provisions of this rule may not vitiate the judgment and make it wholly void, and the irregularity may be ignored if there has been a substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the lower appellate Court : **30 All. 319, Overruled.** [P 600 C 1]

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(1) [1833] 2 My. & K. 262.

(2) A. I. R. 1925 P. C. 181 = 88 I. C. 327 =52 I. A. 286=48 Mad. 605 (P. C.).

(b) Interpretation of Statutes — Headings in enactment do not control provisions of sections when latter are clear and unequivocal.

Per *Sulaiman, Ag.C.J.*—Although the headings in the body of an Act are of some help in clearing up obscurities when there is an ambiguity, they cannot control the provisions of sections when they are unequivocal and clear. The headings are like preambles which supply a key to the mind of the legislature but do not control the substantive sections of the enactment. [P 599 C 2]

Shiva Prasad Saha—for Appellant.
Sankar Saran—for Respondents.

Order of Reference

Mukerji, J.—This appeal, the valuation of which is rather small, being only Rs. 49 and therefore cognizable by a single Judge, came for admission before Niamatullah, J., and he ordered that it should be put up before a Bench of two Judges for hearing. We are of opinion that it should be heard by a larger Bench, so that the question raised may be definitely decided so far as this Court is concerned.

This appeal arises out of a suit for redemption. The suit was dismissed by the learned Munsif, after he had written a judgment, covering 12 pages of the manuscript copy, which has been filed by the appellant. The learned Additional District Judge before whom the plaintiff's appeal came for hearing, dismissed the appeal under O. 41, R. 11 by writing a judgment which covers seven typed lines. The judgment is simply to the effect that the learned Judge is satisfied, on reading the judgment and hearing the counsel for the appellant, that the case has been properly decided, that the mortgage alleged by the plaintiff has not been satisfactorily proved and that it was not established that the "site of the house in dispute was formerly covered by his father's house."

Sitting in second appeal we are not in a position to know from the judgment of the lower appellate Court what were the points for determination, and how the learned Judge came to the conclusions at which he arrived.

As already stated, this was a suit relating to property, and was complicated. The alleged mortgage is said to have been made about 32 years prior to the institution of the suit.

The point taken by the plaintiff-appellant is that as the judgment is not in accordance with law, the Court below should be called upon to give a proper judgment.

Findings of fact are binding on second appeal, provided the findings are arrived at without any contravention of any rule of law; for example, the rule as to burden of proof, admission of evidence, and so on and so forth. In order to enable the High Court to see that a finding of fact has been properly arrived at, there should be a properly written judgment before it. This advantage is denied to us by the judgment complained of.

It has been held by a Bench of this High Court in *Samin Hasan* v. *Piran* (1) that the rules laid down in S. 574 of the old Civil Procedure Code did not apply to an appeal which was heard under S. 551 of the old Code. O. 41, R. 31 has now taken the place of the old S. 574 and O. 41, R. 11 has taken the place of the old S. 551. The change in the law is not material, and the question is whether the decision in *Samin Hasan* v. *Piran* (1) is good law.

With all respect, we doubt the correctness of this decision, and find it desirable that the case should go before a larger Bench, so that the point of law involved may be settled once and for all so far as this Court is concerned.

There is a conflict of decisions among several High Courts on this point, and some of these cases have been noted by Chari, J., in *Ma Saw* v. *Ma Bwin Byu* (2). The learned Judge agreed with some decisions and dissented from others, and held that a judgment pronounced after hearing under O. 41, R. 11 must comply with the requirements of O. 41, R. 31.

The argument in favour of the proposition that a decision given after a hearing under O. 41, R. 11 may be a summary one, and it is not necessary to comply with the requirements of O. 41, R. 31, is very often based on the headings to be found in O. 41, Sch. 1, Civil P. C.; for example, over the R. 16 we find the heading "Procedure on hearing." Over the R. 9, similarly, we find the heading "Procedure on admission of appeal" again over the R. 30 we find the heading "Judgment in appeal." It has been sometimes argued on the basis of these headings that R. 31 applies only when there is a contested appeal in which both the parties are represented.

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(1) [1908] 30 All. 319=5 A. L. J. 300=(1908) A. W. N. 115.

(2) A. I. R. 1926 Rang. 129=95 I. C. 881=4 Rang. 66.

These headings are no part of the enactment. They are on the same lines as the marginal notes to the sections or rules. They are never put to the vote in the legislature, and they are meant merely as guides for the person trying to find out a particular rule of law in a particular Code. That these headings are very faulty and have been prepared without much consideration will be apparent from the fact that the heading "Procedure on hearing" comes between Rr. 15 and 16. The heading would imply that previous to the stage to which R. 16 is applicable there is no "hearing" at all of the appeal. But if we look at R. 11, we see that it distinctly requires that the appellate Court shall "hear" the appellant or his pleader. Surely, then, there was a hearing at the stage for which R. 16 is meant.

It is not necessary to discuss the point at length, because we are of opinion that the question is of such importance as requires the decision of a larger Bench. We direct that the record be laid before the Hon'ble the Chief Justice for the formation of a Full Bench for the decision of the following point, namely :

"Whether in a judgment delivered on hearing an appeal under O. 41, R. 11, Civil P. C., by a Court Subordinate to the High Court, compliance with the provisions of R. 31, O. 41 is necessary."

Opinion

Sulaiman, Ag. C. J.—The question referred to the Full Bench is :

"Whether in a judgment delivered on hearing an appeal under O. 41, R. 11, Civil P. C. by a Court Subordinate to the High Court, compliance with the provision of R. 31, O. 41, is necessary."

The question which we have to answer is whether R. 31, O. 41 requiring that the judgment of the appellate Court shall be in writing and shall state the points for determination, the decision thereon, the reasons for the decision and, where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated, applies to a dismissal of an appeal under O. 41, R. 11.

The answer will depend on the question whether, when an appeal is dismissed summarily under O. 41, R. 11, there is a judgment delivered and R. 31 applies to such a judgment.

There can be no question that in dismissing an appeal under O. 41, R. 11 the appellate Court delivers a judgment, in accordance with which the decree is prepared. Such a judgment is treated as a judgment from which a Letters Patent Appeal could be entertained, and a certified copy of it is required under the law when a second appeal is to be filed. It is unthinkable that there could be a decree passed dismissing the appeal, without there having previously been a judgment. If a judgment has to be delivered by the appellate Court, there seems to be no reason why R. 31, which applies to judgments of appellate Courts, should not be applicable. Our attention has been drawn to the case of *Samin Hasan* v. *Piran* (1), and some cases of other High Courts where the view has been taken that S. 574 of the old Code corresponding to this rule was not applicable in its entirety. On the other hand, there are a larger number of cases which have held the other view.

The learned Judges, who have taken a view in conformity with the view taken in *Samin Hasan's* case (1), have relied mainly on the effect of the headings which precede the groupings of the rules in this order. No doubt headings in the body of an Act are of some help in clearing up obscurities when there is an ambiguity, but they cannot control the provisions of the sections when they are unequivocal and clear. The headings are like preambles which supply a key to the mind of the legislature, but do not control the substantive sections of the enactment. As has been pointed out by the learned Judges referring this case, the groupings of the sections under various headings in this order are not at all happy and cannot be relied upon in order to control the effect of the provisions.

If R. 31 were not to apply to judgments delivered under O. 41, R. 11, the necessary result would be that there would be no provision of law which would require such judgments to be in writing or to be signed and dated by the Judge. A judgment under O. 41, R. 11 could then be pronounced orally. This could not possibly have been intended by the legislature.

Furthermore, a second appeal is allowed from such decrees under O. 42, Civil P. C., and before the appellate Court in second appeal can make up its mind as to whether there are grounds for interference under S. 100, Civil P. C., it must know the points which were for determination and the decision of the lower appellate Court on each of those points in order to decide whether the decree can be affirmed or not. If the appellate Court were simply to dismiss the appeal summarily without pointing out what its decisions are, the result would be that it would be impossible to know what findings of fact are binding upon the second appellate Court and what questions of law have been decided and how.

The question whether in a particular case there has been a substantial compliance with the provisions of R. 31 is a different one depending on the nature of the judgment delivered in each case. A non-compliance with the strict provisions of this rule may not vitiate the judgment and make it wholly void, and the irregularity may be ignored if there has been a substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the lower appellate Court. Our attention has not been drawn to any reported case of this Court after the passing of the new Code, in which the case of *Samin Hasan* (1) has been followed. Our answer to the question referred to us is in the affirmative.

R.M./R.K. *Answer accordingly.*

A. I. R. 1931 Allahabad 600

SEN AND NIAMATULLAH, JJ.

Gauri Shankar Sharma and *others*—Defendants—Appellants.

v.

Thakur Mewa Ram — Plaintiff—Respondent.

Second Appeal No. 1951 of 1927, Decided on 2nd May 1930, against decree of Dist. Judge, Agra, D/- 10th August 1927.

(a) Practice—Pleaders while arguing must confine themselves to documents produced and exhibited—Legal practitioner.

Legal practitioners in arguing their case must confine themselves to such documents as are produced by them and exhibited in the case. [P 602 C 2]

(b) Hindu Law—Debts—Legal necessity—Doctrine that existence of legal necessity may be assumed from representation to and inquiry by money lender should not be unduly extended.

The doctrine that existence of legal necessity may be assumed from a representation to, and inquiry made by, the money-lender who acted in good faith in lending money to the father, should not though it works fairly in practice, be unduly extended so as to warrant an assumption that if inquiry had been made, the money lender could have discovered just those facts which would have convinced him of the existence of the necessity and could not have discovered some others which would not have shown otherwise. [P 604 C 2]

N. P. Asthana—for Appellants.

L. P. Banerji and *G. Agarwala*—for Respondent.

Niamatullah, J.—This is an appeal by defendants 2 to 6, sons and a grandson of Peshi Ram, from the decree of the learned District Judge of Agra upholding a decree of the Subordinate Judge of that district in a suit brought by Thakur Mewa Ram, the plaintiff-respondent, for recovery of Rs. 2,450, being one-third of the amount due under a mortgage deed, dated 8th August 1913, executed by the aforesaid Peshi Ram and his two brothers, Mitthu Lal and Shambhu Nath. The deed in suit was executed by the three brothers for Rs. 7,500 of which Rs. 1,500 left for payment to certain prior mortgages was admittedly not paid by the mortgagees. The deed must therefore be assumed to be for a consideration of Rs. 6,000. The plaintiff gives credit for a payment of Rs. 3,237 made towards part satisfaction of the deed by the mortgagors. Mitthu Lal and Shambhu Nath have executed other deeds in favour of the plaintiff in respect of two-thirds of the amount due under the mortgage deed in suit. The remaining one-third of what remained due under it is claimed by the plaintiff-respondent against the sons and grandson of Peshi Ram, who died shortly after the institution of the suit.

It was pleaded in defence that Peshi Ram and defendants 2 to 6 were members of a joint Hindu family to which the hypothecated property belonged, that there was no legal necessity for the loan alleged to have been contracted by Peshi Ram and that the family property was not liable to be sold in enforcement of the mortgage deed in suit. The contesting defendants went further and denied the passing of any consideration under the deed. Two issues were set down for trial by the Court of first instance, viz., whether the deed in suit was for consideration and the mortgaged property was ancestral and, if so, whether Peshi Ram justified in hypothecating the same. It has been found by both the Courts below that the deed in suit was for consideration, and this finding has not been challenged before us. Both the Courts below have likewise found that Peshi Ram had, under the circumstances in which the loan was contracted, authority to contract it so far as to bind the joint family property belonging to himself and the contesting defendants. As will presently appear, the grounds on which the two lower Courts have proceeded are somewhat different. Both of them have however concurred in decreeing the plaintiff's claim in full. Hence the present appeal.

The principal question raised by the pleadings was whether there was legal necessity for the loan evidenced by the mortgage deed in suit and whether in any case, the plaintiff mortgagee was satisfied, on representations being made to him and after due inquiry, that there was legal necessity for the loan, though none in fact existed. It cannot be disputed that, if either of the two questions involved in the issue stated above is answered in the affirmative, the plaintiff-respondent's suit must succeed.

The judgment of the learned District Judge appears to proceed on the finding that there was in fact legal necessity for the entire sum of Rs. 6,000, advanced under the deed. Prima facie the finding of the learned Judge would have been conclusive in second appeal, were it not for the reason that a new case has been made out thereby which is not warranted by the pleadings and which took the defendants-appellants by surprise. We proceed to explain our view by carefully analyzing the findings of the learned District Judge in the light of the pleadings in the case.

The consideration of Rs. 6,000 claimed under the deed in suit, consists of five items as follows:

(1) Rs. 2,100 paid to Bhagwan Das and Pearey Lal, who held a decree obtained by them in Suit No. 35 of 1921 against Shambhu Nath alone.

(2) Rs. 3,200 paid to Sham Lal, who had obtained a decree in Suit No. 118 of 1912 in reality against Shambhu Nath alone, though the decree erroneously mentioned the names of Mitthu Lal and Peshi Ram among the judgment-debtors.

(3) Rs. 500 paid in satisfaction of a mortgage executed by Raja Ram, the father of Peshi Ram and grandfather of the appellants. It is not disputed before us that this part of the consideration is recoverable from the appellants, having been taken for payment of an ancestral debt binding on them.

(4) Rs. 80 paid to the executant in cash before the execution of the deed in suit.

(5) Rs. 120 paid in cash before the Sub-Registrar at the time of the registration of the deed in suit.

Except as regards item 3 of Rs. 500, the appellants disputed their liability with regard to the entire consideration.

As regards item 2, which has been considered first of all by the learned District Judge, he observes that:

> "Peshi Ram was a railway servant and lived at different places, and his two brothers remained in the village and had a family shop called by the name of Raja Ram-Shambhu Nath and had the landed property. Shambhu Nath as elder brother managed the property. Suit No. 118 of 1912 was on a "hundi" executed by Shambhu Nath for money used to be given out as loans from the joint money-lending shop. A suit on a "hundi" does not need to be brought against all the members of a joint Hindu family. The fact that Shambhu Nath, who alone executed the "hundi," was the only brother sued does not prove that the liability was a separate one."

The view taken by the learned District Judge, whether right or wrong, proceeds on the assumption that the three brothers, Peshi Ram, Shambhu Nath and Mitthu Lal, formed a joint Hindu family which possessed a shop managed by Shambhu Nath, who executed a "hundi" for purposes of the family business, and that the decree in Suit No. 118 of 1912 was passed on foot of such "hundi." A reference to the plaint shows that the plaintiff-respondent did not allege, nor intended to allege, the case which is involved in the finding of the learned District Judge quoted above. The only reference to the case of joint Hindu family is to be found in para. 6 of the plaint, in which it is alleged that defendants 2 to 6

> "have connexion with the property mortgaged. The debt in question was contracted for valid necessity."

In the succeeding paragraph it is alleged that

> "Pandit Peshi Ram, the principal executant, is dead. Defendants 2 to 5 his sons and defendant 6, his grandson, are the heirs in possession of the property mortgaged."

It is quite clear that defendants 2 to 6 were sued not as members of a joint Hindu family with their deceased father

Peshi Ram, but as heirs. A passing reference to valid necessity probably made to anticipate a possible case to be set up in defence, is not, in our opinion, enough to make the plaint one in a suit for enforcement of a liability incurred by the manager of a joint Hindu family consisting of all the descendants of Raja Ram. At best, the reference can be considered to be to a joint Hindu family consisting of Peshi Ram and his own descendants. The written statement set up a joint family of this description. Peshi Ram, his sons and grandson are stated to be members of a joint Hindu family to which the property now owned by defendants 2 to 6 belonged. Accordingly, it was pleaded that Peshi Ram, the father and head of such joint family, could not contract a loan in the absence of legal necessity. There is no trace in the plaint or anywhere else of the allegation that Peshi Ram with his descendants formed a joint Hindu family with his brothers Shambhu Nath and Mitthu Lal and their descendants. If such an allegation had been made in the plaint originally or any time subsequently, the defendants would in all probability, have set up a complete saparation between Peshi Bam and his brothers. Indeed the plaint itself affords sufficient indication of such being the case. Shambhu Nath and Mitthu Lal are alleged in para. 5 of the plaint to have undertaken the payment of two-thirds of the debt by executing separate deeds in favour of the plaintiff, leaving Peshi Ram to pay his one-third which is in suit and which was in fact due from Shambhu Nath. It is important to note that he executed a deed of security or indemnity in favour of Peshi Ram against any loss resulting to him from joining with Shambhu Nath in executing the deed in suit. We have tried to ascertain from the counsel as to whether such a case was set up by the plaintiff-respondent in the trial Court. They failed to enlighten us on the question. We have tried to ascertain it for ourselves from the record and have been equally unsuccessful. Under these circumstances, we are clearly of opinion that the learned District Judge was not justified in decreeing the plaintiff's claim on a footing wholly unwarranted by the pleadings of the parties.

We are also unable to discover anything in the evidence of the plaintiff and his witnesses to warrant the supposition that there was a family shop, that a "hundi" was executed by Shambhu Nath in course of the management of such shop and that the decree in Suit No. 118 of 1912 was obtained on foot thereof. The hundi being the foundation of Suit No. 118 of 1912 and having been executed by Shambhu Nath as the manager of the shop, might have been obtained from the record of that case which happened to be before him for some reason or other. It is not infrequently that we come across cases in which extraneous matter is relied on in deciding important questions arising between the parties. The legal practitioners in the mufassil are to understand clearly that in arguing their case they must confine themselves to such documents as were produced by them and exhibited in the case. If the record of another case happens to be before the Court for a specific purpose, e. g., where the genuinenesss of a document on the record of another case, of which a certified copy is produced in the case, is denied and the record of that other case has to be summoned to formally produce the original and prove its genuineness, such record as a whole and its contents cannot be treated as evidence in the case for any purpose other than the one for which it has been summoned. Sham Lal, who holds the decree in Suit No. 118 of 1912, to which item 2 relates, was examined as a witness and stated that he could not say if Shambhu Nath, Mitthu Lal and Peshi Ram lived jointly and that Shambhu Nath alone had executed the hundi in his favour on foot of which he obtained the aforesaid decree. He proceeded to say that he did not know whether the business of the three brothers was joint. The learned Judge does not refer to the evidence on which he based his conclusion. We have not been able to find any evidence bearing on that question other than that of Sham Lal, already referred to, which, on the face of it, does not support the finding of the learned Judge. The Court of first instance held positively that "Peshi Ram and his sons had nothing to do with" item 2 and that "their property cannot be liable for it." Under these circumstances, we are of opinion that the assumption on which the conclusions of the learned Judge as regards item 2 are based was not open to the plaintiff-respondent in disregard of the pleadings and that, in any case, there is no evidence which warrants those circumstances.

With regard to item 1 of Rs. 2,100 paid towards the satisfaction of the decree in favour of Bhagwan Das and Pearey Lal obtained in Suit No. 35 of 1912, the circumstances are peculiar. The aforesaid creditors instituted the suit against all the three brothers. An objection was taken by Peshi Ram to his brother Mitthu Lal and himself being made liable. The plaintiffs' pleader appearing in that case expressly exempted both of them. The decree when it was formally drawn up, erroneously showed the names of all the three brothers as judgment-debtors. By a petition, dated 8th July 1913, apparently after the expiry of limitation for appeal, they protested against their names being included in the decree and maintained that the decree-holder was "liable for perjury." In spite of this, attachment was made of the property in which all the three brothers were interested on 1st August 1913, and they contracted the loan in question and executed the deed in suit on 8th August 1913 taking an indemnity bond from Shambhu Nath. The decree was satisfied on the following day. The learned District Judge says that

> "even if Suit No. 35 of 1912 is considered to be against Shambhu Nath alone, a similar argument will apply. i. e.,"

Shambhu Nath being the head of the family, contracted the loan for family purposes. We have already given our reasons for not accepting this view. Referring to the evidence of P. W. 4, Dal Chand, through whom the loan was contracted from the plaintiff, the learned Judge observes that

> "this witness says that Shambhu Nath said that Raja Ram's property had been put up for sale and asked him to get the money, and he took them to plaintiff."

Apparently the learned Judge thinks that a representation was made to the plaintiff as regards the necessity of the loan. If this is so, he seems to have affirmed the view of the trial Court. The following is the relevant portion of the latter's judgment on the point:

> "The facts that remained are that there was a decree (No. 35 of 1912) against Peshi Ram and Mitthu Lal and their property had been attached in execution of it, and they borrowed Rs. 2,100 to save the property from sale and got it paid by the plaintiff to the decree-holder. This is proved by the evidence of Dal Chand, attesting witness of the deed in suit, as well as by documentary evidence referred to above. In the face of the decree and attachment in execution of it, and representation of the necessity by Peshi Ram and his brothers there was no need or occasion for the plaintiff to go behind the decree and make any inquiries into the legality or validity of the decree. Instead of questioning the decree and attachment Peshi Ram and Mitthu Lal themselves went with Shambhu Nath, borrowed money, executed the deed in suit, mortgaging their property jointly and got the decretal money paid to the decree-holder by the plaintiff. It was sufficient for the plaintiff to see that there was a decree against all the brothers, in execution of which their property had been attached. An analogy for it might be found in the case in which the money borrowed might not be spent on any valid necessity but about which the creditor has satisfied himself by making inquiries. If a creditor does so, the mortgage in his favour will be binding on the sons of the mortgagor. Even the real existence of an alleged sufficient and reasonable credited necessity is not a condition precedent of the validity of a charge."

So far as the proposition of law implied in the observations of the learned Subordinate Judge quoted above is concerned, it is unexceptionable. We have said so in an earlier part of the judgment. The learned Subordinate Judge is obviously not prepared to find as a fact that the appellants' father, Peshi Ram, was justified in contracting the loan by any actual legal necessity. But he seems to proceed on the well-known ground that if on a representation made to the creditor who makes inquiries into the necessity of the loan and being satisfied with the existence thereof he lends money to the father in a joint Hindu family, believing in good faith that the necessity for the loan existed, though in fact it did not, the sons and grandsons are bound to pay the debt thus advanced by him (the creditor). The only two witnesses referred to by the learned Subordinate Judge as regards the representation made to, and inquiries made by, the plaintiff are Dal Chand and the plaintiff himself. We have carefully read the evidence of both these witnesses and are struck by the remarkable absence of all reference to any representation having been made to the plaintiff or to any inquiry of any kind having been made by him on the subject. If there had been any evidence of such representation and inquiry however meagre we would not have interfered with the finding of fact in second appeal; but we are constrained to find that there is a total absence of it. The whole of the plaintiff's evidence in examination-in-chief is quoted below:

> "Peshi Ram, Mitthu Lal and Shambhu Nath executed a deed for Rs. 7,500. I paid Rs. 80 to them of expenses of execution before registration and Rs. 120 before the Sub-Registrar, I paid Rs. 2,100 on account of the decree of Pearey Lal and Bhagwan Das, and Rs. 3,200 to Sham Lal decree-holder. Out of Rs. 2,000 left with me for Sobha Ram and Mewa Ram I paid Rs. 500 to them. The executant lived jointly at the time. Shambhu Nath was the eldest member and manager. A/89 shown to me was executed by Sham Lal, A/90 by Bhagwan Das and Pearey Lal, A/91 by Sobha Ram and Mewa Ram and these receipts bear the executants' signatures."

Nothing has been elicited in cross-examination to add to his evidence. It will appear from the quotation made above that the plaintiff is silent as regards any representation having been made to him or as to any inquiry made by him. He merely deposes to having advanced certain sums either to the executants or towards the satisfaction of decrees and prior debts, for which he obtained receipts.

P. W. Dal Chand, the only other witness relied on by the learned Subordinate Judge, stated as follows:

> "Peshi Ram, Mitthu Lal and Shambhu Nath executed the deed to the plaintiff. I witnessed Sham Lal's receipt. Rs. 2,100 was paid to Bhagwan Das and Pearey Lal in my presence. Rupees 500 was paid to Sobha Ram and Mewa Ram and Mul Chand in my presence. I witnessed the receipts A/89, A/90 and A/91 shown to me. Peshi Ram Shambhu Nath and Mitthu Lal lived jointly when the deed in suit was executed. I am pattidar of Shambhu Nath. Shambhu Nath had told (me) that Raja Ram's property had been put up for sale, and asked me to get him money. I took Mitthu Lal and Peshi Ram to the plaintiff and asked him for the money. The plaintiff paid out and got the property mortgaged. Money was borrowed from the plaintiff to save the property from sale."

The above is the whole of his evidence in examination-in-chief. The cross-examination, which is meagre does not in any way add to the value of the evidence in chief. As in case of the plaintiff, this witness is also silent on the qusstion of representations having been made to the plaintiff or inquiries made by him. It may be that Shambhu Nath said something to the witness himself and sought his intervention. As to whether Shambhu Nath, much less Peshi Ram, the appellant's predecessor, made any representation to the plaintiff or whether the plaintiff himself made any inquiry and discovered that the family property belonging to Peshi Ram and his sons had been attached in execution of a decree to which ex facie Peshi Ram was a party and as to whether the plaintiff was or was not aware of the fact that Peshi Ram and Mitthu Lal had been exempted, the decree erroneously showing their names, are facts as to which there is no evidence. The doctrine that the existence of legal necessity may be assumed from a representation to, and inquiry made by, the money-lender, who acted in good faith in lending money to the father works fairly in practice, having regard to the difficulties which a money-lender has, in many cases, in ascertaining the truth as to the existence or otherwise of legal necessity; but it should not be unduly extended so as to warrant an assumption that, if an inquiry had been made, the money-lender could have discovered just those facts which would have convinced him of the existence of the necessity and could not have discovered some others which would have shown otherwise. We cannot assume that, if the plaintiff had made inquiries, he would have discovered that a decree prima facie against all the three brothers existed and that the property belonging to them was under attachment; but that he would not have been able to discover that Peshi Ram and Mitthu Lal had been exempted from liability and that by a palpable error in the decree Peshi Ram and Mitthu Lal were shown among the judgment-debtors, an error which, if due to a similar error in the judgment or order of the Court could be easily rectified at any time under S. 152, Civil P. C. If the plaintiff had stated that a representation of necessity was made to him, that he made inquiries and found that there was a decree and attachment but that, in spite of reasonable inquiries, he failed to discover that Mitthu Lal and Peshi Ram had been exempted, matters would have stood differently. As already stated we cannot assume this in the absence of evidence, particularly that of the plaintiff himself who gave his evidence but refrained from making any statement on the point. For these reasons we hold that the validity of such part of the consideration as is represented by item 1 has not been made out.

As regards items 4 and 5, i. e., cash payments before and at the time of registration, there is likewise no relevant evidence. All that the plaintiff and Dal Chand say about them is that they were borrowed for certain purposes. As to whether they were in fact borrowed for those purposes or that there was a reasonably credited necessity for those sums on representation made to any inquiry made by the plaintiff, there is no evidence whatever.

The result is that the mortgage-deed in suit is not binding on the appellants, except to the extent of one-third of Rs. 500. Accordingly we allow this appeal and modify the decrees passed by the Courts below so as to limit them to one-third of Rs. 500 with interest at the contractual rate. Let a fresh decree be prepared, under O. 34, R. 5, Civil P. C. Interest after the date fixed for payment shall run at the rate of 6 per cent per annum till realization. Parties shall receive and pay costs in all the Courts in proportion to success and failure. Costs in this Court will include counsel's fees on the higher scale.

R.M./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 605

SULAIMAN, AG. C. J. AND SEN, J.

Badam Singh and *others*—Objectors—Appellants.

v.

Mt. Kasturi Kunwar—Decree-holder—Respondent.

First Appeal No. 99 of 1930, Decided on 10th March 1931, against order of Addl. Dist. Judge, Bulandshahr, D/- 28th March 1930.

(a) Agra Tenancy Act (1926), Sch. 2—No revision from District Judge's disposal of revenue appeal.

Under the new Tenancy Act no revision lies from an order of the District Judge disposing of a revenue appeal: *A. I. R.* 1929 *All.* 735 (*F. B.*), *Foll.* [P 605 C 2]

(b) Agra Tenancy Act (1926), Ss. 249, 247 and 248—No appeal lies to High Court against District Judge's order allowing appeal from revenue Court's order granting review in ejectment proceedings.

Where a District Judge entertains and allows an appeal from an order passed by a revenue Court granting an application for review of judgment in ejectment proceedings under the Tenancy Act, no appeal lies to the High Court from the order of the District Judge. [P 607 C 1]

(c) Civil P. C. (1908), O. 47, R. 2—Review application based merely on ground of hardship cannot be entertained by successor-in-office.

The successor-in-office of a Judge cannot entertain an application for review where it is not based on discovery of a new and important matter but merely on the ground of hardship. [P 606 C 2]

(d) Agra Tenancy Act (1926), S. 3 (14)—Order granting review is not decree.

The order granting a review of judgment cannot be treated as a decree. [P 607 C 2]

Panna Lal—for Appellants.

Gopi Nath Kunzru—for Respondent.

Sulaiman, Ag.C.J.—This is an appeal by the judgment debtor-objectors arising out of a suit in the revenue Court for arrears of rent. Part of the amount of the decree had remained unpaid, and the Assistant Collector on 25th June 1928 ordered the ejectment of the objectors. On 6th August 1928 they applied for a review of the order, but the application was not based on the discovery of any new and important matter, but merely on the ground of hardship; and the application was also made not to the Assistant Collector who had previously ordered their ejectment but to his successor-in-office. This application was finally allowed and the previous order for ejectment was set aside. By the same order the new Assistant Collector directed that the applicants would pay interest for the period of the execution together with costs. The decree-holder filed an appeal before the District Judge who overruled the objection that no appeal lay to him and set aside the order of the new Assistant Collector granting the review.

A first appeal from order has been preferred from the order of the District Judge. A preliminary objection is taken on behalf of the respondent that no appeal lies. The learned advocate for the applicants replies that, if no appeal lies, their appeal may be treated as a revision and the order of the District Judge be set aside on the ground of want of jurisdiction. It was held by a Bench of which I was a member in *Jagdeo Singh* v. *Kesho Prasad Singh* (1) that under the new Tenancy Act no revision lies from an order of the District Judge disposing of a revenue appeal. The result may be very unfortunate inasmuch as the District Judge may in some cases act without jurisdiction; nevertheless the High Court would be powerless and would be unable to interfere. This was the view held by a Full Bench of this Court under the old Tenancy Act. The position has become clearer in view of the fact that S. 115, Civil P. C., has been expressly excluded under Sch. 2 attached to the new Tenancy Act. This however is a matter for the legislature to consider.

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(1) A. I. R. 1929 All. 735=118 I. C. 227=51 All. 1020.

It is also quite clear that, if the order passed by the Assistant Collector was an appealable order, there would be no further appeal to the High Court from the order passed in appeal by the District Judge. S. 249 expressly provides that no appeal shall lie from an order passed in appeal. It is therefore obvious that, if the order of the new Assistant Collector was an order granting a review under O. 47 read with O. 43, R. 1 (w), then an appeal certainly lay under S. 248, sub-Cl. (3). Such appeal would lie to the Court having jurisdiction under S. 242 to hear an appeal from the decree in the suit. As the valuation of the suit for arrears of rent was above Rs. 200, the appeal would have ordinarily lain to the District Judge (Sch. 4. group A, serial No. 1). There is a further difficulty in the way of the objectors, viz., that there would be no appeal from the order passed by the District Judge on appeal.

It has however been urged that the order passed by the Assistant Collector was an order under S. 47, Civil P. C. and was therefore in the nature of a decree, and the order passed in appeal by the District Judge was also a decree with the result that a second appeal lies to this High Court. It is prayed that the description of the appeal may be altered and it may be treated as an execution second appeal. The word "decree" has been defined in S. 3, sub-S.(14), Tenancy Act, as meaning any order which, so far as a revenue Court is concerned, finally disposes of a suit. The words are not identical with the definition of "decree" in the Civil Procedure Code, but it cannot by any stretch of the language be made applicable to an order of review.

No doubt the latter portion of the order of the District Judge directing the applicant to pay interest with costs might be said to be a distinct order, separate from and independent of the order setting aside the previous order for ejectment. Treating it in that light it is possible to contend that that portion of the order was one under S. 47. But even if that be so, an appeal undoubtedly lay to the District Judge as provided in S. 248 sub-S. (3). The Judge had therefore jurisdiction to entertain it.

Even if an execution second appeal would lie to the High Court in these circumstances, the view of the District Judge on the merits was perfectly correct. It not being a case of a discovery of a new and important matter, the application made to the successor-in-office should not have been entertained by him. His order granting review was in direct contravention of the provisions of O. 47, R. 2 and was rightly set aside by the District Judge. I would therefore dimiss this appeal with costs.

Sen, J.—Badam Singh, Pohap Singh and Anand Singh were the occupancy tenants of certain holdings of which Mt. Kasturi was the landholder. The latter sued the former for arrears of rent and obtained a decree for Rs. 360. The judgment-debtors paid Rs. 150 towards part satisfaction of the decree. The decree-holder took out execution of the decree for the balance and ejected the judgment-debtors on 25th June 1928. On 6th August 1928, the judgment-debtors applied to the Assistant Collector for review of judgment. As has been noticed by the learned Chief Justice the application for review was made not to the Assistant Collector who originally tried the suit but to his successor-in-title, and the sole ground on which the review was sought was that the order was calculated to work hardship upon the judgment-debtors. The application for review was granted on 18th September 1928. The Court not only granted the review but did something more, inasmuch as it not only set aside the order of ejectment dated 25th June 1928, but ordered that the judgment-debtors should pay interest for the period of execution together with costs incurred by the decree-holder in the course of the execution proceedings. An appeal was preferred to the District Judge. A preliminary objection was taken upon the ground that no appeal lay. This objection was overruled. The learned District Judge held that an appeal lay to him. He overset the decision of the trial Court with the result that the order granting the review was set aside. An appeal has been presented to this Court from the order of the District Judge setting aside the order of the Assistant Collector granting review of judgment. It has been argued on behalf of the respondents that no appeal lies to this Court. I am clearly of opinion that this contention is well founded and ought to be sustained.

Under O. 43, Cl. (w), Civil P. C., an order granting a review passed by a Court of civil jurisdiction in a civil suit is open to appeal within the limits imposed by O. 47, R. 7, Civil P. C. S. 248, Cl. (3), Agra Tenancy Act (Act 3 of 1926) provides that

> "An appeal shall lie from the following orders of an Assistant Collector of the first class or of a Collector, namely, orders mentioned in Ss. 47 and 104 and in O. 43, R. 1, Civil P. C., 1908. . . . . . . Such appeal shall lie to the Court, if any, having jurisdiction under S. 242 of this Act to hear an appeal from the decree in the suit or in the case of applications for execution, the Court having jurisdiction to hear an appeal from the decree which is being executed."

Under S. 264, Act 3 of 1926, only certain provisions of the Civil Procedure Code are made applicable to suits and proceedings under the Agra Tenancy Act. For instance, provisions which have been set out in list 1, Sch. 2 are not applicable. Similarly it has been provided that provisions inconsistent with anything in this Act so far as the inconsistency extends are not applicable to suits and proceedings under the Act. O. 43, R. 1, Cl. (w), has not been incorporated or adopted in the Agra Tenancy Act, except within the limits recognized by S. 248, Cl. (3). Only certain orders are appealable under the Act. These orders have been referred to in Ss. 247 and 248 and embrace only such orders as are passed by a subordinate revenue Court and are appealable to a revenue Court of a higher jurisdiction. Ss. 240 and 249 are restrictive. S. 240 provides that no appeal shall lie from any decree or order passed by any Court under this Act except as provided in this Act. S. 249 provides that no appeal shall lie from any order passed in appeal. It is clear therefore that the order passed by the learned District Judge in appeal is clearly not open to appeal under the provisions and the general scheme of the Agra Tenancy Act. Where therefore a District Judge entertains and allows an appeal from an order passed by a revenue Court granting an application for review of judgment in certain ejectment proceedings under the Tenancy Act, no appeal lies to this Court, from the order of the District Judge, under the Agra Tenancy Act (Act 3 of 1926).

It has been next contended that the order of the District Judge is open to revision under S. 253, Tenancy Act, and the appeal should be treated as an application for revision. S. 253 is clearly inapplicable. It is not the order of a subordinate revenue Court which is sought to be challenged in revision on any of the grounds enumerated in S. 253, but it is the order of the District Judge. The District Judge is not a subordinate Court within the meaning of this section and no revision has been prescribed from his order. This Court therefore cannot interfere in revision. The language of the section as it stands may create serious anomalies but the remedy lies with the legislature and not with this Court.

The applicants next contend that the order of the Assistant Collector dated 18th September 1928 must be taken to be an order passed in the course of the execution proceedings under S. 47, Civil P. C., and as such amounts to a decree. The term "decree" has been defined in S. 3, Cl. (14) of the Act, and means any order which so far as the revenue Court is concerned finally disposes of a suit. The order granting a review of judgment does not come under this definition and cannot be treated as a decree. It may be permissible to argue that the second part of the order which imposes certain terms upon the judgment-debtors may amount to a decree. The point is not entirely free from doubt or difficulty, and I express no opinion on the point. But conceding that this amounts to a decree, this does not benefit the applicant for the simple reason that the order setting aside the decree passed by the trial Court cannot be treated as a decree. I am clearly of opinion that no second appeal lies. I would therefore dismiss this appeal.

S.N./R.K. *Appeal dismissed.*

⁕ A. I. R. 1931 Allahabad 608

SULAIMAN, AG. C. J. AND BAJPAI, J.

Mt. Basanti Devi—Objector — Applicant.

v.

Chotte Lal-Durga Prasad and *others*—Opposite Parties.

Civil Revn. No. 199 of 1930, Decided on 16th April 1931, against decree of Munsif, Farrukhabad, D/- 17th February 1930.

⁕ **Civil P. C. (1908), O. 21, R. 58—Attachment ceasing within one year—Claimant need not bring suit for declaration of title.**

Where the attachment ceases to exist within a period of one year it is no longer incumbent upon the claimant to file a suit for declaration of his title to the property.

A claimant failing to institute a suit in such case is not barred from raising the objection again in fresh execution proceeding and Court refusing to inquire into the objection refuses to exercise jurisdiction vested in it: *A. I. R.* 1924 *Cal.* 744; *A. I. R.* 1921 *Bom.* 35 and *A. I. R.* 1925 *Mad.* 113, *Foll.* [P 608 C 1, 2]

Govind Das—for Applicant.

Banke Behari—for Opposite Parties.

Sulaiman, Ag., C. J.—This is an objector's application in revision from an order refusing to inquire into the objection made under O. 21, R. 58, Civil P. C., to an attachment. It appears that while the decree was in execution, certain property was attached by the decree-holder and an objection was preferred by the present applicant under which she claimed the property as her own. This objection was dismissed for default on 12th September 1925. It was for her to sue within one year of that dismissal if she wanted to nullify the order disallowing her objection. It happened however that owing to the nonpayment of the necessary expenses for issuing of a fresh proclamation the decree-holder's application for execution was itself struck off for default. The order of the Court did not clearly specify that the attachment ceased, but it followed as a matter of law under R. 57. This happened on 16th March 1926, long before the period of one year had expired from the dismissal of the objection. There was an application for execution and a fresh attachment followed by a fresh objection. The Court below rejected the objection on the ground that she failed to bring a suit within a year of the dismissal of the previous objection. It seems to us that the Court below has refused to exercise the jurisdiction vested in it to inquire into the objection of the applicant on the wrong view that there was a bar to the hearing of her objection.

Rules 58 and 61 show that the objection preferred is probably against the attachment of the property of the claimant, her principal, object being to get her property released from such attachment. If the objection is disallowed the party against whom an order is made can institute a suit under R. 63 to establish his right to the property, and subject to the result of such suit the order shall be conclusive. The language of R. 63 is somewhat ambiguous and it may have been possible to treat it as implying that it was the duty of the objector whose objection has been dismissed to establish her claim to the property in dispute within one year from the dismissal of the objection. But the Courts in India have interpreted the rule so as to apply it to the order of attachment; it has been held by the High Courts at Calcutta, Bombay and Madras that where the attachment has ceased to exist within the period of one year it is no longer incumbent upon the claimant to file a suit for a declaration of his title to the property: *Najimunnissa Bibi* v. *Nacharuddin Sardar* (1), *Manilal Girdhar* v. *Nathalal Mahasukhram* (2) and *Kumara Goundan* v. *Thevaraya Reddi* (3). There is therefore the probability that the applicant did not think it worth while to institute a suit after the attachment had ceased to exist in view of these rulings. We do not think that it would be proper for us to depart from this course of decision interpreting the rule in this way. Accepting the view expressed in these cases we hold that as soon as the attachment ceased to exist the obligation on the claimant to institute a civil suit also disappeared and she is not prevented from bringing an objection afresh when the property has been re-attached.

The application is allowed, the order of the Court below is set aside and the case is remanded to that Court for disposal on the merits. The applicant will have the costs of the revision from the respondent.

R.M./R.K. *Application allowed.*

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(1) A. I. R. 1924 Cal. 744=83 I. C. 233=51 Cal. 548.

(2) A. I. R. 1921 Bom. 35=59 I. C. 774=45 Bom. 561.

(3) A. I. R. 1925 Mad. 1113=87 I. C. 635.

A. I. R. 1931 Allahabad 609

BOYS AND SEN, JJ.

Patey Singh and *another* —Accused — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 97 of 1931, Decided on 19th March 1931, against order of Sessions Judge, Farrukhabad, D/- 22nd January 1931.

(a) Criminal P. C. (1898), S. 164—Manual of Government Orders, Judicial (Criminal) Department (Allahabad), Vol. 1, S. 6, paras. 852, 853 and 853-A.

In recording a confession it is the business of the Magistrate to direct every effort to satisfy himself that a confession is really voluntarily and truly made and as to why it is made. [P 615 C 1]

(b) Criminal P. C. (1898), S. 164 — Court examining confession produced before it must consider circumstances under which it comes to be made— Criminal trial—Court's duty.

It is the duty of a Magistrate or a Sessions Judge before whom a confession is produced to examine it, particularly directing his attention to the question under what circumstances the confession came to be made and not accept it as a matter of course. [P 615 C 1]

(c) Criminal Trial—Court's duty.

It is not the duty of a Judge to find any and every reason possible and accept any and every argument to whittle away the significance and the defects of the prosecution. [P 616 C 2]

Jwala Prasad Bhargava—for Appellants.

Govt. Advocate—for the Crown.

Boys, J.—Patey Singh and Sarup Singh appeal from their convictions under S. 302, I. P. C., and sentences of death. We are of opinion that the convictions cannot stand. As the circumstances and nature of the evidence and the relations between the parties are unusual, the evidence led for the Crown will require detailed examination.

The story for the prosecution is as follows :

Jhamman Singh is a man of some position as village life goes, living in Baisanpurwa, a hamlet of Juniadpur. We are not informed as to the size of this hamlet but, so far as the evidence goes, it may have consisted of not less than half a dozen or a dozen houses. Jhamman Singh lived with his younger brother Mithu Singh whose wife Mt. Bitoli, is a young woman of twenty. These three persons are Thakurs. In the same house lived Shankar Teli with his wife Mt. Makhano or Makhania. We will refer to her as Mt. Makhano These two persons occupied the position of servants in the house of Jhamman Singh. Next door to Jhamman Singh, in a house which came down to Jhamman Singh from his ancestors lived a woman named Mt. Parbati. She also was a dependent of Jhamman Singh. She had a son Sanwant Singh, who apparently lived sometimes in Jhamman Singh's house and sometimes with his mother, Mt. Parbati. Sanwant Singh was also in the employ of Jhamman Singh. Incidentally there is mention of neighbours of Jhamman Singh, but none of them play any important part in the case.

In Shib Singh Purwa, a neighbouring hamlet also appertaining to Juniadpur, lived Patey Singh and Sarup Singh the appellants. Patey Singh is in no way connected, so far as the evidence goes, with the family of Jhamman Singh. He is said at some time to have had some property, as to how much there is no indication, but at the time of the events with which we are concerned he had lost all that property and is said to have been living as a very humble sweet-seller wandering round the neighbourhood selling his sweets.

Sarup Singh is a distant cousin of Jhamman Singh.

We have not any detailed information as to the distances between the various localities and houses with which we are concerned. But it may be taken that the houses of Jhamman Singh and Mt. Parbati are absolutely adjoining, while Juniadpur, Shib Singh Purwa and Bisanpurwa are all within a circle of a radius of about a furlong. Patey Singh and Sarup Singh have been convicted of murdering Mt. Makhano, and the well in which her body was found was also within a hundred yards or so of Juniadpur and Bisanpurwa. We pause here to note the unsatisfactory nature of the only map which is on the record. It has before this been pointed out by the Court that the police should be at pains to make an informatory map of the locality showing all the important houses and other spots and the distances between them. In the present case it is of importance roughly at any rate to know how many people were sleeping that night within earshot of the place from which Mt. Makhano is said to have been taken away. The map shows us nothing whatever on the point. It shows Mt. Parbati's house, but as to who were the other residents and the situation of their houses it shows nothing at all. It does not even show Jhamman Singh's house or where the deceased lived.

The circumstances under which the murder is alleged to have been committed are as follows: Patey Singh is said to have had an intrigue with Mt. Makhano which was well known to all their little world, and it is said that in supporting her and administering to her wants and wishes Patey Singh squandered all his property, and then six months prior to the murder, that is to say, some day about February 1930, Mt. Makhano abandoned him and became the mistress of Jhamman Singh. All this time she was living with her husband Shankar Teli. This also appears to have been a recognized arrangement. There do not appear to have been any panchayats relating to the cases of either of the paramours; nor do there appear to have been any disputes whatever. It is the case for the Crown that Patey Singh, in revenge for his having been abandoned in favour of Jhamman Singh, joined Sarup Singh in murdering Mt. Makhano, Sarup Singh having his own motives.

Sarup Singh is alleged to have been if not actually carrying on an intrigue, at least behaving in a familiar way with Mt. Bitoli, the young wife of Mithu, younger brother of Jhamman Singh. This familiar behaviour is said to have been noticed by Mt. Makhano who spoke of it to Jhamman Singh and to other villagers. If there be truth in this, it is strange that nothing followed in the nature of a panchayat. It is however said that Jhamman Singh put his veto on the association between Mt. Bitoli and Sarup Singh and that the latter was forbidden the house, and hence bore ill-will to Mt. Makhano who had driven him away.

On the evening of 18th August, Jhamman Singh is said to have been tormented by ring-worm from which he was suffering and to have sent Mt. Makhano to Mt. Parbati next door to get some medicines. Mt. Makhano went and got the medicines and returned to Jhamman Singh. This is said by Mt. Parbati to have occurred about three hours after sunset. The medicines were tried but were found ineffectual, and about a pahar later Jhamman Singh went with Mt. Makhano again to Mt. Parbati to get some dead ashes to apply to the ring-worm. This visit then must have been roughly speaking about 1 o'clock in the middle of the night. They roused Mt. Parbati, got the ashes and Jhamman Singh applied them and returned to his house. Mt. Makhano remained talking and smoking with Mt. Parbati and so remained for about a pahar. This would take us to about 4 o'clock in the morning but even allowing for the loose way in which this term "pahar" is used by villagers and their hazy notions of the duration of an hour, it is not possible to come to any other conclusion but that it must have been at least at 1 or 2 o'clock in the morning that the next incident occurred. Mt. Parbati is the only witness to this. She says that after Mt. Makhano had been sitting with her smoking for about a pahar, Patey Singh and Sarup Singh came in through one door to her house, seized Mt. Makhano, Patey Singh catching her by the neck and Sarup Singh catching her by the feet, and carried her out through the other door. Mt. Parbati remained in her own house. Mt. Parbati says that Mt. Makhano could not cry out, but does not give any indication as to why Mt. Makhano could not cry out. She was not asked by either the Crown or the defence why Mt. Makhano could not cry out. Nor does she say nor was she asked why she did not cry out herself, except that she says that Patey Singh threatened her. This is the only explanation that she gives why she did not herself raise some outcry, or at least go and inform her patron, Jhamman Singh. The fact then remains that according to the story told for the Crown neither of these women uttered a sound when this incident took place.

Jhamman Singh says that later in the night he awoke, missed Mt. Makhano who should have been sleeping near him and went to find her. Mt. Parbati told him nothing of what had occurred, but merely said that she did not know where

Mt. Makhano was and that she had left her house. A search was made by Jhamman Singh and others in the neighbourhood for Mt. Makhano the next morning, and somebody found about 78 paces away from Mt. Parbati's house a large quantity of blood on a boundary between two fields. Later an orhni was found by a well about 200 feet away, and the finder Manna gave information of this and people naturally collected at the well. A body which proved to be that of Mt. Makhano was seen floating in the water and taken out. It was noticed that her private parts had been injured and in the light of the medical evidence it is manifest that the woman had been killed by a lathi or some such thing being thrust up her vagina with great violence into the inside of her body. It was suggested that there was a blue mark on her neck, but it is clear from the medical evidence that there were no marks of ligature or anything else indicating that the woman had been throttled or strangled or choked, or that she had died from or received any other injury than that of a lathi or some such thing thrust up her vagina. It is important to bear in mind the suggestion which was made by Jhamman Singh in his evidence in chief that there was a blue mark on the neck when the body was recovered, important in view of the allegations which we shall have to note as later incorporated in Sarup Singh's confession that Patey Singh throttled Mt. Makhano. It was manifest now that Mt. Makhano had been brutally murdered, and these two hamlets and village Junaidpur must have been buzzing with discussion as to the likelihood of this or that party being guilty unless indeed the truth was already well known.

The next fact that emerges is that Gulzari Mukhia of Junaidpur says that about 9 O'Clock in the morning he saw Patey Singh wandering round with his sweet-meat tray and, calling him up, had a conversation with him. Patey Singh was carrying at the time with him the orhini or sheet which has been produced in Court and which is said to have blood-stains on it. As the result of the conversation Patey Singh is alleged to have admitted to Gulzari that he and Sarup Singh had committed the murder. Gulzari says that he took steps to have Patey Singh secretly kept under observation, but he does not suggest that he took any steps to have Sarup Singh searched for Lal Behari, Gulzari's brother, purports to have been within earshot when the confession was made.

The next incident in point of time that has been disclosed is that Chunni, the chaukidar of Junaidpur, who had been informed that Mt. Makhano was missing and later of the fact of the discovery of her body, made a report at Gur Sahaiganj Police Station 1 1/2 miles distant from Junaidpur at 11 a. m. We shall have to refer this report later, but we may now mention that it referred to Jhamman Singh and Patey Singh having liaisons with Mt. Makhano, to the discovery of blood on the boundary between the fields which we have mentioned and the discovery of the body in the well. This report in view of the time at which it was recorded and the distance away from the police station may suggest that Chunni must have started from Juniadpur about 10-30. It would seem strange then that there is no mention of the confession alleged to have been made by Patey Singh to Gulzari, the Mukhia of Junaidpur about an hour or an hour and a half previously. No final conclusion can be drawn on this point, because of the uncertainty of the times. But it is a matter of common knowledge that people who go to report do not for one reason or another always get their reports recorded immediately on arrival. On the other hand, the present case was one of obvious murder of as serious a nature as it could possibly have been and the timings we have suggested are therefore more probably accurate.

The officer in charge of the police station left the police station at about 12 o'clock, arrived at the well, and held a panchayat in regard to the death. He appears to have learnt of the names of Patey Singh and Sarup Singh and of Mt. Parbati. Patey Singh he found on the spot, i. e., in the proximity of the well, but it does not appear how Patey Singh got there from Junaidpnr if Gulzari the mukhia is telling the truth when he says that he kept him under observation. The investigating officer says that he learnt of the name of Mt. Parbati as knowing something from the statement of Patey Singh. Later the second officer who had been sent for the purpose, brought Patey Singh under arrest. Searches followed and a lathi and sozani a sort of quilt, were recovered from the house of Sarup Singh. The lathi has no blood-stains, but the sozani is said to have had some human blood-stains. There is no suggestion that anything was recovered from Patey Singh's house. The only material exhibit attributed to him is the orhni or the chaddar which he was wearing when he is said to have confessed to Gulzari mukhia. Patey Singh and Sarup Singh are said then to have been arrested, really because they had been implicated by Patey Singh in his confession to the Mukhia Gulzari, and of course there was the statement of Mt. Parbati. There appears to have been nothing else to implicate them than the facts we have mentioned, beyond this, if it is indeed worthy of mention, that one witness, Chandan, says that Patey Singh used to sleep in front of his house, and he found that Patey Singh was not there about a pahar and a half after sunset, that is to say, about half past 11. Sarup Singh was put up before a Magistrate to have his confession recorded the next day, 20th August, but the Magistrate sent him back to jail to consider further over the matter and did not record it till the following day 23rd August. It will be noticed that it was Patey Singh who is said to have confessed in the first place to Gulzari Mukhia, but Sarup Singh who made a confession to the Magistrate. No explanation is before us as to why Patey Singh refused to continue confessing or why Sarup Singh, as it were, took his place.

This is the whole of the case as stated for the Crown. We have now to examine the weight of this evidence. It appeared to us in the first place that the evidence of Mt. Parbati was wholly unreliable, and in fact the Government Advocate found it very difficult to support any other view. Mt. Parbati was in the first place a woman. In the second place she was living in a house adjoining to that of Jhamman Singh and was to all intents and purposes his dependant. Further her son was working as a servant of Jhamman Singh, and finally she tells a story which to our minds is wholly unconvincing. The Government Advocate was constrained to admit, it was impossible for him of course to do otherwise, that her story could not possibly be believed as giving a true account as to how Mt. Makhano was removed from her house. It is not necessary to criticize the evidence about Jhamman Singh's ring-worm and the steps that he took to get it alleviated. The story of how Mt. Makhano was taken out of Mt. Parbati's house is the crucial part of her evidence and, if that cannot be believed, the rest mattered little. Mt. Parbati would have us believe that these two men, the appellants, whom she knew well from a long time past, came into her house in the small hours of the morning while she was talking to Mt. Makhano, apparently said nothing at all as to their intentions, offered no explanation of any sort of their action, simply seized Mt. Makhano, one of them catching her by the throat and the other by her legs, and carried her away through another door. Mt. Parbati makes the statement that Mt. Makhano could not cry out. She was not asked why Mt. Makhano could not cry out. She was not asked either by the Crown or by the defence. In view of the fact that there were only two men, in view of the description of the method by which the woman was taken away, and finally in view of the medical evidence that there was no sign of any injury or bruise or other mark on the woman's neck, it is difficult indeed to understand why she did not cry out. Further one would have expected Mt. Parbati, who knew well of the relations between Mt. Makhano and Jhamman Singh, to have herself raised some outcry.

Her only explanation is that she was threatened by Patey Singh. She did not attempt to say anything to anybody. She did not attempt to obtain any help. She did not even slip across the few feet that were necessary to warn Jhamman Singh of what happened. There is not the slightest reason to suppose that she would be in any terror of Patey Singh or Sarup Singh in view of the fact that she was herself a dependant and protegee of Jhamman Singh. Finally she tells us that Jhamman Singh came later and asked what she knew about Mt. Makhano's whereabouts and and she told him that she knew nothing at all, excepting that Mt. Makhano had left her house shortly after Jhamman Singh himself had returned to his house. Now, the explanation of all this, once assuming that there is any truth in the story that Patey Singh and Sarup Singh had anything to do with Mt. Makhano's removal, might conceivably be that Mt. Parbati knew of the intrigue between Patey Singh and Mt. Makhano, and as a matter of fact did not really much care one way or the other whether the woman went away voluntarily or even involuntarily with Patey Singh, but that afterwards she was afraid to admit to Jhamman Singh that she knew that Mt. Makhano had gone off with his rival Patey Singh. It is suggested by some of the facts of the case, but it is a mere speculation. It is not the case for the Crown nor is there any evidence to support it and beyond a mere mention it may be put aside. Before passing to the next stage of the evidence we note that no serious attempt was made by the Crown to inform the Court, nor did the Sessions Judge by his own inquiries make any attempt to discover it who were the people sleeping that night in the immediate proximity to Mt. Parbati's house. We know that this was only a hamlet, but even so there must have been half a dozen houses at least with occupants of some sort, and being a hamlet, the houses were almost certainly to be found in close proximity to each other.

The only information that we can gather from the record is that Jhamman Singh lived actully next door to Mt. Parbati; that in his house were apparently Sanwant Singh, the son of Mt. Parbati, Mithu Singh, his younger brother, and Mt. Bitoli, his younger brother's wife, and Shankar Teli, the husband of Mt. Makhano. It was in the month of August and these people are not in the least likely to have been sleeping in closed rooms and therefore must instantly have heard anything in the nature of a cry either from Mt. Makhano or from Mt. Parbati. Further, there was a man named Chandan who was admittedly living close, and he states that including his children there are eight members in his family. Incidentally we note that Patey Singh is described as belonging to Shib Singh Purwa. This witness, Chandan, stated that Patey Singh used to sleep at the witness' house in Baisanpurwa. No one took the trouble to ask for any explanation of why Patey Singh should be sleeping at Baisanpurwa at all when his own house or at any rate his own hamlet was Shib Singh Purwa. In view of these facts, it is manifest that it was necessary for it to be the Crown case that neither Mt. Parbati nor Mt. Makhano uttered a cry of any sort. But this latter allegation is inconsistent with the fact that Mt. Makhano's throat was not bruised. The medical testimony shows not the slightest sign of any injury on the throat or neck. We are not forgetting that it is stated that the mouth of Mt. Makhano when her body was found was seen to be stuffed with full of cucumber leaves. Why and when this was done there is no information but it is manifest, if there is a word of truth in Mt. Parbati's testimony, that it was not done in her house and could not have been the cause of the failure of Mt. Makhano to cry out.

Next we were asked by the Crown to rely upon the confession of Sarup Singh, and this requires careful examination. We must trace back the origin of this confession from that alleged to have been made by Patey Singh to the mukhia Gulzari. We have read the latter's evidence with care as also that of his brother Lal Behari, and we can only record our opinion that it is most unconvincing. This much may be said in favour of Gulzari that no adequate reason appears from the record why he should be giving false evidence. But we cannot forget that while he is the Mukhia of Junaidpur, Jhamman Singh is, as we have stated, certainly a person of no small position so far as village life goes. This would be a wholly inadequate reason if it stood alone for distrusting Gulzari's evidence, but, as we have said, his account of how Patey Singh came to make his confession and Lal Behari's own description of the incident are utterly unconvincing. Coming to Sarup Singh's confession alone we note that the Magistrate certainly did ask him the usual formal questions, and then Sarup Singh began his statement. He says:

"Jhamman Singh and Mithu Singh are the sons of my father's elder brother. I had liaison with Mithu Singh's wife for the last two months. Makhani Telin lives in the house of Jhamman Singh. She saw me cutting jokes with Mithu Singh's wife and began to speak ill of me. I ceased to visit Jhamman Singh's house. Patey Singh had liaison with Makhania. He sold all his property."

We stop here to note that this confession purports to disclose (we shall deal with Mt. Bitoli's evidence later) the reason why Sarup Singh bore enmity to Mt. Makhano and was ready to join with Patey Singh in murdering her. The confession then continues : "Then Makhania began to live with Jhamman Singh secretly.' Why this word " secretly?" The whole case for the prosecution as developed by the witnesses is that there was no question of any secrecy whatever as to the liaison between Makhano and Jhamman Singh. That story suggests, from the mouth of two of the witnesses Mt. Parbati and Mt. Bitoli, that Jhamman Singh and Mt. Makhano had been living in open intimacy for six months past. Nor from the mouth of any witness is it suggested that there was anything secret at all. The confession continues :

"Two months ago Patey Singh told me that he would kill sasuri (a term of abuse). Day before yesterday Makhania was sitting at the house of Samant's mother after sunset. Patey Singh came to me and said: "Let us go and kill Makhania." Patey Singh and I went to the house of Samant (no doubt the house of Mt. Parbati, mother of Sanwant or Samant). He pressed Makhania's neck and I caught her feet and both of us carried her outside the village."

Now we note here that, according to the confession, this murder was committed *din munde ke bad* after sunset, and these words in their ordinary meaning only mean within the period from sunset to say an hour or two afterwards. Mt. Parbati's account would suggest that it took place from 2 to 4 o'clock in the morning. We know both from Jhamman Singh's and Parbati's account that Mt. Makhano went to Mt. Parbati's house twice that night. As she was not killed upon her first visit, it is manifest that anybody who about the time of sunset saw her at Parbati's house, would have known that she had left Parbati's house when she returned from her first visit and would have had no reason to expect her to make another. The times and circumstances stated are in hopeless conflict. Next the confession states :

" There she was strangled to death. Patey Singh throttled her. He filled Makania's mouth with cucumber leaves."

The vernacular words *gala dabakar mardala*. *Patey Singh ne gala dabaya* leave beyond doubt what is intended by these words, yet we have occasion to note that there was, according to the medical evidence, no injury of any sort or description on the throat. Sarup Singh continues :

" Thereafter Patey Singh took my lathi and thrust it in Makhania's vulva."

So, according to this, it was Sarup Singh's lathi that was thrust into the vulva and so far up the inside of the woman that it burst her abdomen, so far up that there was a pool of blood at the boundary between the two fields, and yet within a few hours when Sarup Singh's lathi was seized by the police, there was not even a speck of blood human or otherwise to be found on it. That is the Chemical Examiner's report.

This confession then examined with a reasonable care is a long way from carrying conviction, altogether apart from the circumstanees in which it was made. Before leaving it we think it necessary to direct the attention of the Magistrate and that of the Sessions Judge, for the consideration of the former when he is recording a confession, for the consideration of the latter when he is considering the value of a confession, to the Manual of Government Orders, Vol. 1, S. 6, Judicial (Criminal) Department: Paras. 852, 853 and 853-A. We may hope that this volume is available to the Magistrate in the Library of the District Magistrate. In Cl. (c), para 853-A it is laid down:

"It is desirable that the Magistrate should question a confessing prisoner with the view of ascertaining the exact circumstances in which his confession was made and the connexion of the police with it, or in wider form that it should be the endeavour of the Court to record the confession in as much detail as possible with a view of affording material from which its genuineness can be judged, and of testing whether it is freely made or is the outcome of suggestion. Anything like a cross-examination of the accused has been rightly deprecated by the Courts, but it is important that, without any attempt at heckling or endeavour to entrap the accused, a Magistrate should record his statement with as much detail as possible. The more detailed a confession is the greater are the chances of correctly estimating its value, and it is also useful to know precisely how it came to be made, to what extent the police had anything to do with the accused prior to it, and in the confession itself, the fullest possible particulars of the incidents involved. The questions and answers would be recorded and any misuse of the procedure would thus be detected. In no case, if possible, should the police who have been concerned in the investigation or who have arrested the accused be present while the latter is questioned and his statements taken down."

The Government have further, no doubt in view of their knowledge of the frequency with which false confessions are put before the Courts given the direction contained in Cl. (d), S. 853-A that:

> "The Magistrate should add to the certificate required by S. 164, Criminal P. C., a statement in his own hand, of the grounds on which he believes that the confession is genuine, the precautions which he took to remove the accused from the influence of the police and the time, if any, given to him for reflection."

These orders of Government might as well never have been written for all the attention that the Magistrate has paid to them. He has been particularly ordered to direct his attention to the question under what circumstances the confession came to be made. It is a matter of common knowledge that, if nothing but the usual formal questions are put to an accused person, he may be easily instructed in five minutes by any police officer what answers to give to them if he hopes to obtain a pardon or to escape punishment. It is impossible for us to set out in detail the nature of the questions which the Magistrate should ask; since while such questions could easily be indicated, it would only be to invite the police to instruct the confessing prisoner accordingly. Any Magistrate of intelligence should be able to direct his attention to questions about this matter without having such questions actually suggested to him. He has only got to consider what he would do in private life if he had one of his servants produced before him confessing to some fault and desired to ascertain the why and wherefore of the man being willing to confess at all, in order to satisfy himself of the truth of the confession. In what we have said we must not be taken of course to suggest that in every case are the police dishonest. We are sure that that is far from the case. But on the other hand, we cannot for a moment shut our eyes to our experience that in many cases they are dishonest, and it is the business of the Magistrate to direct every effort to satisfy himself that a confession is really voluntarily and truly made and as to why it is made.

It is similarly the duty of the Sessions Judge or any other Magistrate before whom the confession may be produced to examine it from the point of view that we have indicated and not to accept it as a matter of course.

We are therefore unable to accept either the evidence of Mt. Parbati or the confession of Sarup Singh. In view of this, it is really unnecessary to examine the rest of the evidence which is open to much criticism, but there are two points to which we will refer, and we think that, if the learned Magistrate and the learned Sessions Judge had directed their attention at least to the first of them, much more light would have been thrown on the case. It is the intrigue of Patey Singh with Mt. Makhano which is said to have led him to commit the murder. It is admitted that Jhamman Singh had also a liaison with the woman. It was manifestly therefore of the greatest importance to ascertain in as much detail as possible the real facts of those liaisons. From the evidence for the Crown it is impossible to be sure of anything. Jhamman Singh states that Mt. Makhano had been intimate with Patey Singh from a period of four or five years and that five or six months previously Mt. Makhano had abandoned Patey Singh altogether and had been carrying on a liaison with him (Jhamman Singh). On the other hand Mt. Parbati says that Mt. Makhano:

> "Originally had intimacy with Patey Singh. She contracted intimacy afterwards with Jhamman Singh. She had intimacy with Jhamman Singh from six years before her murder. Six months before her murder her intimacy had ceased with Patey Singh."

Mt. Bitoli says:

> "From six years Mt. Makhano was in the keeping of Jhamman Singh."

It is impossible to reconcile these three statements, and yet these are the statements of the three witnesses, who along with Mithu and Shankar Teli, neither of whom were even called, must have known absolutely every detail of the matter. In this connexion it was a part of the case for the Crown that Patey Singh was likely to be suffering under a sense of grave injury, because Mt. Makhano had left him only after he had sold all his property for her and squandered all his substance on her. We cannot find that either Jhamman Singh or Mt. Parbati or Mt. Bitoli, the three principal witnesses, acquainted with the facts, stated this fact at all. We find it only in the evidence of the chaukidar who baldly says:

> "She (Mt. Makhano) had taken all Patey Singh had"

and in the confession of Sarup Singh where he says:

> "He sold all his property. Then Makhania began to live with Jhamman Singh secretly."

Now it is manifest that, if Patey Singh had really sold all his property and spent the proceeds on Mt. Makhano and then she abandoned him, there would certainly have been serious trouble between Patey Singh and Jhamman Singh. Experience of human nature shows that it is not a circumstance under which any man would be prepared to sit quiet, or at any rate prepared to sit quiet for six months and then suddenly take it into his head to murder the woman. The only evidence of trouble at all on this account is that of Jhamman Singh who says:

> "There used to be exchange of abuses between Patey Singh and Mt. Makhania because she had left connexion with him."

This is in our view wholly inadequate to account for Patey Singh suddenly taking it into his head to murder the woman six months after she had left him. If there were no quarrels between Patey Singh and Jhamman Singh, this is our conclusion; if there were quarrels, then Jhamman Singh, Mt. Parbati and Mt. Bitoli have concealed them, and it is not difficult to surmise how far, if the two men were fighting about this woman it is as likely as not, if the truth were known, that Jhamman Singh would be the one to be angered with her as it is as likely that Patey Singh would be angered with her.

We next come to the suggested connexion of Sarup Singh with this murder, and here possibly the story is even more extraordinary. It is not suggested that he was influenced in any way by the relations between Mt. Makhano whatever they were with Jhamman Singh or Patey Singh. He is said to have been caught in what was at any rate a flirtation if not an actually intrigue with Mt. Bitoli, the young Thakur woman of 20 years of age, to have been caught by Mt. Makhano who proceeded to tell Jhamman Singh and the other villagers. Jhamman Singh forbade Sarup Singh from entering into his house. This is supposed to have annoyed him and, according to the confession, to have led him to enlist the services of Patey Singh in helping to get rid of Mt. Makhano. This story is, to one's astonishment supported by this young Thakur woman of 20 years of age Mt. Bitoli. It is unheard of in our experience that a young Thakur woman should come forward and confess in open Court to her perpetual shame and the disgrace of herself and her family that she had been carrying on an intrigue with her distant cousin. If the story be believed by the villagers, it would almost certainly have been followed by a panchayat and the appropriate punishment of the family. There is no hint that any such panchayat followed, though Mt. Makhano is said to have told the other villagers. Mt. Bitoli continued to live with her husband in her husband's house instead of being as almost certainly would have been the case, sent off to her father's house. She was in no position to stand out against anybody. She was a young woman, and Jhamman Singh was her husband's elder brother. On the other hand, if her story is false, if she is giving false evidence at the instance of Jhamman Singh, the whole of the village would know it and we would not expect to find any panchayat or any notice taken of it. This might suggest, though it can do no more than suggest, that Jhamman Singh had some motive for putting her into Court to give false evidence. There can be no question, but that, if Jhamman Singh had chosen to keep her out of Court, his influence would have been sufficient to make it not worth the while of the Crown to put her into the witness-box at all. If one thing is more certain than another, it is that she came into Court with Jhamman Singh's consent, and naturally the question suggests itself—why?

Before concluding we feel that we must comment on the attitude of the learned Officiating Sessions Judge. It is not the duty of a Judge to find any and every reason possible and accept any and every argument to whittle away the significance and the defects of the prosecution, but this is the attitude which the learned Judge would seem from his judgment to have adopted. He has in the first place just recorded the evidence for the prosecution without any attempt to fill up the gaps in important places by getting explanations from the witnesses which the Government Pleader failed to get and the witnesses failed to give.

The following passage occurs in his judgment:

> "In their statements Mt. Bitoli and Mt. Parbati had stated that Jhamman Singh had illegal intimacy with Mt. Makhano from six years and on the basis of these statements of theirs it is contended that Patey Singh, accused, had no reason to grudge her intimacy with Jhamman Singh and think to kill her when during the same period she had intimacy with him. What these women could know about the time of the commencement of illegal intimacy between Jhamman Singh and Mt. Makhano?"

Now if one thing is more manifest than another, it is that these two women were, above all others, the two persons in that hamlet who apart from the principals, were most likely to know the exact facts and every detail of the intimacy of Mt. Makhano with the two men in question. How then can the Judge say in an endeavour to reconcile their statements with the case for the prosecution: "What could the women know?"

Again he records the fact that Mt. Parbati says that Mt. Makhano could not cry out. One can only wonder that it should not have occurred to the learned Judge that this statement called for some explanation. He made no attempt to get it.

Chunni, the chaukidar, according to his own account, knew before he went to report at the police station that the last place where Mt. Makhano had been seen alive talking was Mt. Parbati's house, but he omitted to mention it in his report. It was manifestly a very very important fact. Next to the fact that Mt. Makhano's body had been found and that she had clearly been murdered, it was perhaps the most important fact within the chaukidar's knowledge. It was therefore a very sound criticism that he had failed to mention this at all, and yet the learned Judge whittles it away with the comment that from the chaukidar's point of view the mention of it was not material unless he was questioned.

Similarly he whittles away the importance of the fact that in Lal Behari's statement recorded before the police he never even mentioned that he had heard Patey Singh's confession, and he makes a very unconvincing observation that Lal Behari

> "could not volunteer the statement about the confession of Patey Singh when he was not questioned about it."

Lal Behari has given evidence, and it is the only fact of importance in his evidence at all.

Finally the Sub-Inspector was displaying a most remarkable ignorance of what was happening in Court as regards the taking of Sarup Singh's confession and the proposals that he should be made an approver. The learned Judge accepts this profession of ignorance as if there was nothing strange about it, and suggests that the Prosecuting Sub-Inspector might have taken the steps "for some reason of his own." We find it difficult to believe that a prosecuting Sub-Inspector would take steps to secure the pardon of one of two alleged murderers, which steps could only be taken under the belief that the evidence was inadequate without an approver, without consulting, advising or warning the investigating Sub-Inspector responsible for the case of the course that he felt himself compelled to adopt. For the reasons that we have given, we find it is in our opinion unsafe on the evidence that we have had to consider to maintain the conviction and sentences.

We therefore allowing the appeal, set aside the convictions and sentences and direct that the appellants be released forthwith, unless their detention is lawfully required for some other purpose.

A copy of this judgment will be specially sent to the committing Magistrate who recorded the confession, the Magistrate who inquired into the case, and the Officiating Sessions Judge.

V.B./R.K. *Convictions set aside.*

A. I. R. 1931 Allahabad 617

KENDALL, J.

Emperor

v.

Sooba and *others* — Opposite Parties.

Criminal Revn. No. 101 of 1931, Decided on 17th March 1931, against order of Sess. Judge, Allahabad, D/- 19th January 1931.

(a) Criminal P. C. (1898), Ss. 344 and 173—Remand under S. 344 can be ordered without report under S. 173.

A Magistrate can order a remand under S. 344 even without receiving a report under S. 173. [P 619 C 2]

(b) Criminal P. C. (1898), Ss. 170 and 173 — Accused forwarded under S. 170—Report under S. 173 need not be forwarded at the same time.

It is not necessary when forwarding the accused under S. 170 to forward the report prescribed by S. 173 at the same time. [P 619 C 1]

(c) Criminal P. C. (1898), S. 344—Application.

If S. 344 is really applicable to a case, it is the duty of the Court to apply that section and be guided by considerations laid down therein and by no others. [P 620 C 1]

(d) Criminal P. C. (1898), S. 344—Accused proved to be members of conspiracy—Magistrate can keep them in custody for period that appears to him to be reasonable.

The Magistrate has a wide discretion under S. 344. Where it is proved by an affidavit that there is a conspiracy and it is also proved by sufficient evidence that the accused are members of that conspiracy, the Magistrate is justified in keeping them in custody for a period that appears to him to be reasonable. It is very difficult to set down a definite time limit in such cases. But in considering whether the period is reasonable it is necessary to give due weight to the sworn allegations as to the extent and nature of the conspiracy and the difficulty of assembling evidence. [P 621 C 1]

(e) Criminal P. C. (1898), S. 344—Remand under S. 344 — Considerations that should guide Court stated.

The two considerations that should influence the Court in deciding whether a remand under S. 344 should be granted or not are: (1) Whether sufficient evidence has been obtained to raise a suspicion that the accused may have committed the offence and it appears likely that further evidence may be obtained by remand; and (2) whether the time asked by the police for the remand is in the circumstances of the case reasonable or not.

Where the accused involved in a conspiracy were released on bail because the Court believed that S. 167 applied to the proceedings, and because the accused were in the jail for a period of seven months before the trial.

Held: that the reasons were not judicially sound. [P 621 C 1, 2]

Government Advocate—for the Crown.

A. Sanyal and *M. Mohammad Husain*—for Opposite Parties.

Judgment.—This is an application made on behalf of the Government for the revision of two orders of the learned Sessions Judge of Allahabad dated 23rd December 1930 and 19th January 1931, releasing the opposite parties, who are in all 17 in number, on bail. These persons have been arrested by the police in connexion with alleged offences under Ss. 240, 241, 232, 235 and 120-B, I. P. C., and in the affidavit filed on behalf of the Crown by the Deputy Superintendent of Police, C. I. D., it is stated that an organization extending over several provinces exists for the purpose of counterfeiting coin, and that the accused in the present case are charged with being members of this organization or conspiracy. The offences are not bailable, but I am informed that the Magistrate to whom the accused were sent at first released some of them on bail, but when others made an application to the District Magistrate, he refused bail on the ground that the offences were nonbailable, and in consequence applications were made to the Sessions Judge, on which he passed the orders which I am now asked to cancel. The first order was passed on the applications of Sooba and Mehardin (opposite parties 1 and 2) who had then been in custody for three and two and a half months respectively, and the second application was made by fifteen others, the dates of whose arrests are given in the order of the Sessions Judge. The latest of these dates is 16th November 1930.

The Sessions Judge allowed the applications for bail on the general ground that the applicants had been in jail for a long time, and that by the time the investigation was completed they might easily have been in jail for seven months without being put on their trial, but in dealing with the earlier application he remarked that the only section which appeared to him to be applicable was S. 167, Criminal P. C., as the case had not reached the stage of an "inquiry" as no evidence of any kind had been recorded by the Magistrate.

This question of procedure has been argued at considerable length before me, and it must be admitted that the law, as laid down in the Criminal Procedure Code, is not altogether free from ambiguity. Under S. 61 no police officer may detain in custody a person arrested without warrant for more than 24 hours in the absence of a special order of a Magistrate under S. 167, and under S. 167 a Magistrate to whom an accused person is forwarded by the police on the grounds that it is believed that the accusation or information against him is well founded, may authorize the detention of the accused for a period "not exceeding fifteen days in the whole." This is the section that the learned Sessions Judge considered to be applicable at any rate, in the case of the first application, but it is clear that if it does apply the accused should have been released after fifteen days from their arrest. It is in fact admitted on behalf of the Crown that if this section applies the present application for the revision of the Sessions Judge's order must fail.

In arguing the case for fifteen of the accused persons Mr. Mohammad Husain was at times, I think, inclined to suggest that a police investigation could in no case involve the detention of the accused in custody for more than fifteen days. The learned Government Advocate however relies on S. 344, under which the Court may postpone the commencement of or adjourn, any inquiry for trial for any reasonable cause, and remand the accused to custody, and special attention has been directed to the explanation to this section, which is:

> "if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand."

There is in the section itself a provision that the Magistrate shall not remand an accused person to custody under this section for a term exceeding fifteen days, but no limit is set to the number of such remands that may be ordered by the Magistrate.

Under S. 4, Criminal P. C., an "inquiry" is defined as including every inquiry other than a trial conducted under the Code, by a Magistrate or Court, and an "investigation" as including

> "all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf."

Mr. Mohammad Husain's chief argument on the legal question was that if the police wished to detain the accused in custody after the fifteen days prescribed by S. 167 they could only proceed by forwarding the accused under S. 170 to a Magistrate empowered to take cognizance of the offence in cases where there was sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate; and that in this case they must at the same time, forward a report as prescribed by S. 173. Until this report has been forwarded to the Magistrate empowered to take cognizance of the offence, it is argued, the Magistrate cannot take cognizance of the offence under Cl. (b), S. 190 (1), nor can he remand the accused to custody under S. 344.

This argument at any rate as regards the Magistrate's power to order a remand under S. 344 without receiving a report under S. 173, appears to me to be fallacious. The report under S. 173 is to be forwarded as soon as the "investigation" is completed. If however it has not been completed, what is the position? According to Mr. Mohammad Husain's argument the accused must be released, if the investigation has not been completed, and the report forwarded within 15 days from the date of arrest. What room is there then for the operation of S. 344, under which a Court may postpone the commencement of the Magisterial inquiry in order that further evidence may be obtained by a remand. S. 170, to which reference has already been made, enables an officer in charge of a police station, if there is at least reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, to forward him under custody to a Magistrate empowered to take cognizance of the offence upon a police report. The section does not direct that the report prescribed by S. 173, shall be forwarded at the same time, though it is argued that this implication must be read into S. 170. The meaning of the two sections read together seems to me to be definitely different from this interpretation. S. 170 implies a case where the investigation is not complete, but where there is

> "reasonable ground of suspicion to justify the forwarding of the accused"

to a Magistrate. If the investigation has been completed and the report or chalan, as it is commonly called, has been prepared, the accused is forwarded because the case is ready for the magisterial enquiry or trial, and not because there is merely

> "reasonable ground of suspicion to justify the forwarding of the accused"

to the Magistrate empowered to take cognizance of the offence. If the investigation is not complete and the report is not ready, but the accused may be forwarded on reasonable ground of suspicion, for what purpose is he forwarded? Clearly I think for the purpose set forth in S. 344 that the Court may remand the accused to custody if it considers that there are reasonable grounds for doing so.

A number of decisions were quoted by Mr. Mohammad Husain in support of his argument, and I have examined them, but apart from one or two obiter dicta they contain little or nothing to help him. The most important of these are the cases of *Queen-Empress* v. *Engadu* (1) *In re Krishnaji Pandurang Joglekar* (2) and *Nagendra Nath* v. *Emperor* (3).

It has however been argued that even if the above reasoning is correct and S. 344 might apply yet in the present case the accused were actually forwarded under S. 167. That there is some doubt on this point appears from the earlier order of the Sessions Judge, who held that S. 167 was the only section that was applicable. Mr. Mohammad Husain points out that the Magistrate did originally released the accused on bail, and that the number of remands shows that the police must have been acting under S. 167 and not S. 344.

Whether this be so or not however and whether or no S. 167 has been quoted in some of the papers, I agree with the learned Government Advocate that the matter must be settled on broader grounds than this. If S. 344 is really applicable to the case, then it seems to me that it is the duty of the Magistrate and of the Judge to apply that section, and to be guided by the considerations, laid down therein and by no others.

In his second order, at any rate, the learned Sessions Judge has made it clear that he would have ordered the release of the accused on bail for reasons which would have had force under S. 344, Criminal P. C., namely, that the accused had been detained in custody for some weeks or even months and that the investigation might continue for two months more. Now under S. 344 the Court may

> "postpone or adjourn the inquiry or trial. . . . . for such time as it considers reasonable"

and no limit is set to the total period of a series of orders of remand, provided that no single order shall be for a period exceeding 15 days. The Magistrate has a wide discretion, and provided that he is satisfied that sufficient evidence has been obtained to raise a suspicion that the accused may have committed the offence, and it appears likely that further evidence may be obtained by a remand, he undoubtedly has the power to order one. In the present instance the Magistrate may have considered the individual cases of different accused, but, if so, this has not been shown to me; and the Sessions Judge has dealt with the accused in a body, and released them merely on the general ground that the investigation has continued for a long period and may still go on for some months longer. The Sessions Judge's order carries with it the implication that in no case are accused persons to be detained in custody during a police investigation for as long as seven months. It has however been stated in the affidavit on behalf of the Crown that there is a conspiracy in which 66 people are involved of whom 56 have already been arrested, that the conspiracy extends over four provinces, that witnesses have to be summoned from all of them, many of them from long distances etc., and that there appear therefore to be adequate reasons for a prolonged investigation. In these circumstances it is very difficult for the Court to set down a definite time limit. Mr. Mohammad Husain has referred to the case of *Narendra Lal Khan* v. *Emperor* (4), where the High Court held that there had been unreasonable delay as regards the prisoners who had been in custody for about six weeks, though not in the case of those who had been in jail for three weeks. That appears to have been a case in which the accused were said to belong to a secret society in Calcutta, and the various circumstances that make for the delay in the present case may not have been present. After remarking that an investigation lasting for three weeks or so was not unusual their Lordships remarked

> "in the case of offences under S. 400, I. P. C., which so far as the difficulty of investigation goes, bear some analogy to the present case, which appears to be based to some extent on evidence of association, the period is usually far greater."

It has not been suggested in the present case that the police are purposely delaying proceedings nor has the Sessions Judge come to a finding that the period occupied by the police under investigation is unreasonably long in the circumstances of the case.

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(1) [1888] 11 Mad. 98=2 Weir 142.

(2) [1899] 23 Bom. 32.

(3) A.I.R. 1924 Cal. 476=81 I.C. 220=25 Cr. L.J. 732=51 Cal. 402.

(4) [1909] 36 Cal. 166=9 Cr. L.J. 375=1 I.C. 738.

On the other hand reasons are given in the affidavit for the Crown to show that it would be against the public interest to release the accused on bail. It is said that they will tamper with the prosecution evidence which consists mostly of their employees associates, landlords and friends of the accused ; that the accused are professional criminals and very desperate ; that one of the absconders has recently stabbed four persons to death ; that some who are wanted in the case are absconding, and that others will abscond if they are released. Some of these allegations are of a general nature. The case however is one of conspiracy. It has been proved by an affidavit which must be held to be sufficient for the purpose of the present proceeding, that such a conspiracy exists. If it is also proved by sufficient evidence that there is a suspicion that the accused are members of that conspiracy, then, in my opinion,

> "the Magistrate is justified in keeping them in custody for a period that appears to him to be reasonable.'

There may be distinctions and differences between individual accused, for instance, Mr. Sanyal, who appeared on behalf of two of them, has pointed out that they are Hindus and residents of Allahabad, whereas the majority of the accused are Mahomedans from the Punjab. But in considering whether the period is reasonable, it is necessary to give due weight to the sworn allegations as to the extent and nature of the conspiracy and the difficulty of assembling the evidence.

The last argument that has been adduced on behalf of the accused is that the Sessions Judge had discretion to release the accused on bail, and that this Court should only interfere with that discretion in exceptional circumstances. If the Sessions Judge had, on a consideration of the circumstances of individual accused, found that they ought to be released, this argument would I think have prevailed. What he has done however is to release two of the accused because he believed that S. 167 applied to the proceedings, and others because they had been in jail for a period of several weeks or months. In my opinion these reasons are not judicially sound. The section that ought to be applied to the case is S. 344, and the two considerations that should influence the Court in deciding whether a remand should be granted are :

(1) Whether sufficient evidence has been obtained to raise a suspicion that the accused may have committed the offence and it appears likely that further evidence may be obtained by a remand, and (2) whether the time asked by the police for the remand is, in the circumstances of the case, reasonable or not. The reasons given for releasing the accused on bail are (1) that S. 167, Criminal P. C., applies to the case and (2) that the accused may be in jail for seven months before they are put on their trial. The first of these reasons appears to be wrong ; the second is not really sufficient.

I therefore accept the application made on behalf of the Crown and cancel the order of the learned Sessions Judge. The Magistrate will have to consider, in the light of the above remarks, the cases of the accused individually when and if a further application is made for a further remand.

R.M./R.K. *Application allowed.*

✱ ✱ A. I. R. 1931 Allahabad 621

KING, J.

Lachmi Narain—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 267 of 1931, Decided on 13th July 1931, against order of Sess. Judge, Bareilly, D/- 15th April 1931.

✱ ✱ (a) Criminal P. C. (1898), Ss. 244, 256 and 208—"To take all such evidence as may be produced in support of the prosecution"—Meaning explained.

When a Magistrate has "to take all such evidence as may be produced in support of the prosecution" he has to record not only the examination-in-chief of the prosecution witnesses, but also their cross-examination and re-examination (if any), if no express provision is made for cross-examination. But when express provision for cross-examination is made, as in S. 256 or S. 208 (2), then the phrase mentioned cannot be construed as giving a separate and independent right of cross-examination. [P 623 C 1, 2]

(b) Criminal P. C. (1898), S. 252—Accused has no absolute right of cross-examination before charge.

The accused has no absolute right of cross-examination before the framing of the charge, but Magistrates would generally be exercising a proper discretion if they permit some cross-examination at least at that stage: 8 *C. W. N.* 838; 21 *Cal.* 642 and 5 *Pat. L. J.* 94, *Ref.* [P 624 C 2]

Nanak Chand—for the Applicant.
Assistant Government Advocate—for the Crown.

Judgment.—This is an application in revision against an order passed by the Sessions Judge of Bareilly confirming the order of a Magistrate of the first class refusing to allow the applicant to cross-examine the prosecution witnesses before the charge had been framed.

The complaint was instituted on 26th January 1931 alleging that the accused had committed offences under Ss. 420 and 467, I. P. C. When the complainant had been examined on 1st April 1931 an oral request was made to the Magistrate to permit his cross-examination at once. The Magistrate rejected this request. When the next witness had been examined the defence put in a written request that the Magistrate should permit the witness to be cross-examined before the framing of the charge. This request was rejected by the Magistrate in a written order. The Magistrate took the view that S. 256, Criminal P. C., did not indicate that prosecution witnesses are to be cross-examined twice, and he could not find any justification in the Code or in the Evidence Act for the proposition that the accused has a right to cross-examine prosecution witnesses both before and after the framing of the charge. After the prosecution witnesses had been examined the Magistrate framed a charge under S. 420, I. P. C.

The accused applied to the Sessions Judge of Bareilly asking that the Magistrate's order, refusing to allow cross-examination of prosecution witnesses before the framing of the charge, be set aside. The learned Sessions Judge discussed the point and recorded his opinion that the Magistrate was probably incorrect in his procedure, and that the accused was entitled to cross-examine a witness immediately after he had been examined and before the framing of the charge. Nevertheless, in view of the facts that all the prosecution witnesses had been examined-in-chief and the charge had been framed, and some of the witnesses had already been cross-examined after the charge had been framed, he rejected the application.

The question for determination is whether an accused person is entitled to cross-examine a prosecution witness, in the trial of a warrant case before the charge has been framed. S. 138, Evidence Act, merely lays down the order of the examinations of witnesses, namely, that they should be first examined-in-chief, and then (if the adverse party so desires) cross-examined, and then (if the party calling them so desires) re-examined. This does not indicate a right of cross-examination immediately after the examination-in-chief when express provision has been made for exercising the right of cross-examination at a later stage. It is perfectly clear that, under S. 256, Criminal P. C., the accused has the right of cross-examining a prosecution witness after the charge has been framed. So, S. 138, Evidence Act, does not seem to be of much assistance. It merely lays down that cross-examination shall be allowed at some stage after the examination-in-chief, and S. 256 may well be construed as indicating the proper stage for cross-examination in the trial of warrant cases. S. 138 certainly does not indicate that the adverse party shall be entitled to cross-examine a witness more than once.

Section 252 of the Code is the section under which prosecution witnesses are examined in warrant cases. This lays down that the Magistrate

> "shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution."

It has been argued that the word "evidence" in this phrase must include not merely the examination-in chief of a witness, but also his cross-examination and re-examination, if any. In support of this contention reference has been made to S. 244. This section lays down the procedure in the trial of summons cases, and enacts that the Magistrate

> "shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution. . . . ."

The phraseology in Ss. 244 (1) and 252 (1) is identical. It is argued that under S. 244 when the Magistrate proceeds to "take all such evidence as may be produced in support of the prosecution" he must certainly allow the witnesses to be cross-examined as well as examined-in-chief, and that therefore the word "evidence" in this phrase must include not only the examination in-chief, but also the cross-examination and re-examination, if any. S. 244 does not contain any express provision for cross-examination. Cross-examination must certainly be allowed at some stage, and as no express provision is made for exercising this right in the trial of summons cases, we must hold that the right is exercisable under S. 244.

It is argued that as the phrase cited gives a right of cross-examination under S. 244, therefore the same phrase must be held to give a right of cross-examination under S. 252. There is some force in this argument, but it is far from conclusive. One cannot lose sight of the fact that no express provision for exercising the right of cross-examination has been made in the trial of summons cases, whereas in the trial of warrant cases such express provision is to be found in S. 256.

It must moreover be noted that when the same phrase occurs in S. 208 (1) which lays down the procedure in taking evidence in inquiries into cases triable by the Court of Session, we find it expressly stated in sub-S. (2) that "the accused shall be at liberty to cross-examine the witnesses for the prosecution." Sub-S. (2) enacts that the Magistrate

'shall proceed to hear the complainant (if any) and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution. . . . ."

Once again we find the same phrase. If that phrase is construed as conferring a right of cross-examination, wherever that phrase may occur, then it must be conceded that sub-S. (2) is wholly redundant. But it must be presumed that the legislature does not enact wholly redundant provisions. The inference is that the phrase in question cannot be construed as necessarily conferring or including the right of cross-examination. I conclude that when a Magistrate has "to take all such evidence as may be produce in support of the prosecution" he has to record not only the examination-in-chief of the prosecution witnesses, but also their cross-examination and re-examination (if any), if no express provision is made for cross-examination. But when express provision for cross-examination is made, as in S. 256 or S. 208 (2), then the phrase mentioned cannot be construed as giving a separate and independent right of cross-examination.

The language of S. 256 supports the same conclusion. That section requires the accused to state:

"whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken."

If the legislature had intended to confer an absolute right of cross-examination before the framing of the charge, then we should expect it to lay down explicitly that the accused should be required to state whether he wishes further to cross-examine any of the prosecution witnesses. The omission of the word "further" seems to indicate that the cross-examination is to be deferred, as a matter of right, until after the framing of the charge.

It must also be remembered that under S. 254 the Magistrate can frame a charge as soon as a prima facie case is established against the accused. It is not necessary to record the whole of the prosecution evidence before framing a charge. Hence, although there may be 12 prosecution witnesses, it is frequently possible and even desirable to frame a charge after only one or two witnesses having been examined. In such a case it is clear that all the "remaining witnesses" can only be cross-examined once under S. 256. I doubt whether the legislature intended that witnesses examined before the charge should be cross-examined twice, as a matter of right, while those examined after the charge should only be cross-examined once. S. 257 gives a right of second cross-examination if the Magistrate thinks it necessary in the interests of justice. The interests of the accused therefore are fully protected even if no cross-examination is permitted as a matter of right before the framing of the charge.

Sections 286 (2) and 289 (1) have also been referred to as showing that the examination of witnesses must include cross-examination and re-examination. This is no doubt the correct interpretation of the expression "examination of the witnesses" in S. 289 (1) and of the expression "examine his witnesses" in S. 286 (2), but that is not of much assistance in construing the language of S. 252 which is different. Moreover there is no express provision for the cross-examination of prosecution witnesses in trials before High Courts and Courts of Session.

The only ruling relied upon by the learned advocate for the applicant is the case of *Ashirbad Muchi* v. *Maju Muchini* (1). The judgment was very briefly expressed, but the learned Judges observed that the Magistrate should at once give the accused an opportunity to cross-examine the prosecution witnesses if they should so desire, even though the charge may not be framed.

This ruling does not purport to lay down the proposition that the accused has an absolute right of cross-examination before the charge is framed in the trial of a warrant case. I think the ruling goes on further than laying down that a Magistrate would be well advised to permit cross-examination before the framing of the charge, and does not support the contention that he is bound to permit cross-examination at that stage.

Reference may also be made to the case of *Queen-Empress* v. *Sagal Samba* (2) at 663 in which the learned Judges remarked that S. 256 does not prohibit cross-examination before the charge has been framed. I quite agree. In *Ramyad Singh* v. *Emperor* (3) a single Judge of the Patna High Court observed:

> "The accused have got the right to cross-examine the prosecution witnesses once before the charge is framed, and, secondly, after the charge is framed under S. 256."

This observation certainly supports the applicant's contention, but it is a mere obiter dictum and no reasons are given. There is therefore no clear judicial authority, so far as I am aware, for holding that the accused is entitled, as a matter of right, to cross examine prosecution witnesses in the trial of a warrant case before the framing of a charge, and I am unable to interpret the relevant sections of the Criminal Procedure Code and the Evidence Act as giving the accused such a right.

As a matter of practice or discretion I think that Magistrates would be well advised to permit some cross-examination before framing a charge, otherwise, as pointed out by the learned Sessions Judge, S. 253 would practically become a dead letter. It is unlikely that a Magistrate could discharge an accused person on the strength of the evidence of prosecution witnesses whose credit has not been impeached by cross-examination. Ordinarily the examination-in-chief of prosecution witnesses does not make out a prima facie case against the accused, and it is only after the witnesses have been shown by cross-examination to be untrustworthy that the Court would be justified in discharging the accused.

In my opinion, although the accused has no absolute right of cross-examination before the framing of the charge, I think that Magistrates would generally be exercising a proper discretion if they did permit some cross-examination at least at that stage.

It has been contended that no prima facie case has been made out against the accused, but I agree with the learned Sessions Judge that, on the facts alleged, a criminal offence would be established against the accused. As the Magistrate has not committed any irregularity, in my opinion, in refusing to permit cross-examination before the charge, and at the most might be held to have failed to exercise a proper discretion, I see no grounds for interference at this stage. On the materials before me I cannot express any opinion whether the Magistrate should, in the exercise of his discretion, have permitted cross-examination in this case before framing the charge. The application is rejected.

P.N./R.K. *Revision dismissed.*

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(1) [1904] 8 C. W. N. 838.
(2) [1894] 21 Cal. 642.
(3) [1920] 5 Pat. L. J. 94=58 I. C. 686.

A. I. R. 1931 Allahabad 625

SEN AND NIAMATULLAH, JJ.

Murli Prasad Awasthi and *another* — Plaintiffs—Appellants.

v.

Sheo Dat Prasad and *others*—Defendants—Respondents.

Second Appeal No. 99 of 1928, Decided on 9th July 1930, from decision of Dist. Judge, Gorakhpur, D/- 12th March 1927.

(a) Transfer of Property Act, S. 82—Mortgages—Right of contribution.

It is settled law that where the amount under the prior mortgages exceeds the value of the property comprised therein, the entire burden of the second mortgage falls on the remaining properties in the hands of puisne transferees. 33 *All.* 387, *Ref.* [P 627 C 1]

(b) Mortgage—Effect of sale in execution of prior mortgage—Mortgagee releasing portion of mortgaged property—Effect of.

The effect of a sale in execution of a decree in enforcement of a prior mortgage is twofold: it extinguishes the title of the mortgagor and it wipes off all encumbrances over the same property which are subsequent to the prior mortgage. Where portion of the security is not available, the subsequent mortgagee can proceed against the balance of the security. Where any portion of the mortgaged property has not been absorbed to satisfy the prior lien, it is not open to a mortgagee from either caprice, collusion or negligence to release portions of his mortgaged security and to throw the entire burden upon the remaining property, and it would be unjust to allow the mortgagee to cast the entire burden upon the remaining security where it affects the rights of third parties who by transfers from the mortgagor have acquired interest therein: 6 *I. C.* 842, *Ref.* [P 627 C 2]

(c) Contribution—Joint decree—Propriety.

In a suit for contribution plaintiffs ought to ask for a definement of the respective liabilities of the several defendants. They are not entitled to a decree for a consolidated amount against the defendants jointly. [P 628 C 1]

(d) Contribution—Defective plaint for contribution—Dismissal of the suit is not justified.

One *S* who owned 10 items of property mortgaged them to *T*. Later on he mortgaged two out of ten items to *R*. *R* sued on two mortgages, obtained a decree and in execution thereof purchased the two items comprised in his mortgage. He subsequently sold some share in those two items to plaintiff, and the remaining share to *K*. *T* sued upon his mortgage making *R* a party to the suit. In execution of the decree obtained in this suit the two item a portion which had been purchased by the plaintiffs were sold at auction to a third party. Within 30 days of the auction sale, the plaintiffs deposited in Court the entire decretal amount as also the statutory penalty and got the auction sale set aside. They then brought the present suit for contribution and the claim was sought to be conferred against only five out of the ten items of property. No contribution was claimed by them in respect of four items of property on the ground that *S* had mortgaged them to one *R* who, in execution of his mortgage decree, had these properties sold and that the value of these properties had been completely absorbed in satisfaction of *R's* mortgage debts. Both the Courts below dismissed the plaintiff's suit on the technical ground that he had failed properly to frame his suit and had produced no evidence to enable the Court to apportion the liability of the amount on each of the ten items of the mortgaged property.

Held: that if the plaintiff succeeded in proving that four out of the ten items of mortgaged property had been completely absorbed in satisfaction of *R's* prior mortgage, he was entitled to cast the entire burden upon the remaining properties including those purchased by him and *K* and the remaining properties were liable to contribute according to their respective values at the date of the mortgage. If however the plaintiff failed to prove that some of the properties had been so absorbed, he would be bound to include each and every item of the property in the hotchpot in order to enable the liability of each of the properties to be determined. If the plaintiff voluntarily relinquished his claim for contribution from some of the properties, the burden on the other properties could not be allowed to be enhanced. But the plaintiff's claim for contribution from the other properties should not have been dismissed upon the mere ground that he had improperly released portions of the mortgaged security from his claim. If the materials on record be sufficient to determine the value of the properties in the possession of the defendants and to indicate the extent to which they have been relieved from the common burden the obvious duty of the Court is to decree the claim against the defendants for such amounts as are proved. [P 627 C 2]

U. S. Bajpai and *M. Waliullah*—for Appellants.

Harnandan Prosad, Sankar Saran and *Krishna Murari Lal*—for Respondents.

Sen, J.— This is an appeal by the plaintiffs from the decree of the learned District Judge of Gorakhpur affirming the decision of the learned Subordinate Judge of the same place and arises out of a suit for contribution.

On 18th April 1895, one Sarjoo Prasad, father of defendants-respondents 1, 2 and 3, executed a deed of simple mortgage in favour of Thakur Prasad Naik in respect of ten items of property detained below:

(1) Kaithaulia	...	4 annas
(2) Kona	...	4 annas
(3) Mahwar Kol	...	1 anna 3 pies
(4) Shikargarh	...	8 pies
(5) Dayalgarh	...	4 annas
(6) Barahra	...	4 annas
(7) Sarar	...	4 annas
(8) Rampur Khas	...	6 pies
(9) Teona	...	6 pies
(10) A tiled house in village Kathaulia.		

Later on Sarju Prasad executed a deed of simple mortgage in respect of only two of the properties indicated above, viz. Mahawar Kol and Shikargarh, in favour of one Ram Harakh. The latter sued on his mortgage, obtained a decree and in execution thereof purchased the shares in Mahawar Kol and Shikargarh. On 5th September 1919 plaintiffs purchased from Sital Thakurai and others, who were the heirs of Ram Harakh, the entire 8 pies share of Shikargarh and a 7-1/2 pies share of Mahwar Kol. The remaining 7-1/2 pies share of Mahwar Kol was purchased by one Kalap Nath Rai.

On 13th February 1911 Ganga Prasad Naik and others, who were the heirs of Thakur Prasad Naik, brought a suit in enforcement of the simple mortgage dated 18th April 1895 against Sarjoo Prasad, his sons and his transferees. This was Suit No. 46 of 1911. Ram Harakh was a party to this suit. A decree was duly passed on 31st January 1912. In execution of this decree the two items of property in Mahwar Kol and Shikargarh, which had been purchased by the plaintiffs were sold at auction to a third party on 20th March 1922. Within 30 days of the auction sale, the plaintiffs deposited in Court the entire amount of the decree, i. e., Rs. 2,779-10-0 as also the statutory penalty, Rs. 160 and got the auction sale set aside.

The present suit for contribution was brought on 20th March 1925 and the claim was sought to be enforced against the following five properties: (1) Kona, (2) Rampur Khas, (3) Teona, (4) Sarar and (5) the tiled house at Kaithaulia.

The plaintiffs claim contribution in so far as they had to discharge more than their legitimate share out of the common burden. But in framing their claim they have not, as they should have done, asked for a definement of the respective liabilities of the several defendants. The plaintiffs are not entitled to a decree for a consolidated amount against the defendants jointly.

No contribution has been claimed in respect of the properties in Kaithaulia, Dayal Garh, Barahra and two annas of Kona on the ground that Sarjoo Prasad had mortgaged these properties to one Raghunath Prasad by two instruments dated 7th February 1890 and 12th January 1891, that Raghunath Prasad in execution of his decree on foot of these mortgages had these properties sold and that the value of these properties had been completely absorbed in satisfaction of these debts.

The owners of the several items of property included in the mortgage dated 18th April 1895 were duly represented in the action. There were altogether 21 defendants out of whom defendants 1 to 6 and defendants 9 and 10 contested the suit. Barring defendant 9, the other contesting defendants traversed the allegations contained in paras. 2 and 8 of the plaint in which it had been stated that four of the properties had been absorbed in discharging the decree of Raghunath Prasad on foot of the two earlier mortgages of the years 1890 and 1891.

The defendants contended that the plaintiffs were not entitled to a joint decree but that the plaintiffs must prove the proportionate liability of the various defendants with a clear specification of the particular property against which the said liability is to be enforced. The majority of the contesting defendants did not admit that the villages Kaithaulia, Dayal Garh, Barahra and a moiety share in Kona were not liable to contribute. They contended that the plaintiffs were not competent to cast the entire burden upon the remaining village. They further contended during the progress of the argument that the plaintiffs had not only failed to establish that four out of the ten properties mortgaged by Sarjoo Prasad had been swallowed up in satisfaction of the earlier mortgages in favour of Raghunath Prasad but that they had not brought the necessary materials on the record to enable the Court to apportion the liability of the various defendants.

On 16th January 1926, after argument in the case had been closed, the plaintiffs applied that a fresh issue be framed, viz., whether four out of the ten villages had been entirely absorbed in satisfaction of the decree obtained by Sarjoo Prasad on his earlier mortgages, that the case be adjourned and the plaintiffs be permitted to produce oral and documentary evidence bearing upon this issue.

There can be no manner of doubt that the case for the plaintiffs was conducted most negligently and in an unbusinesslike way in the Court of first instance. It is also abundantly clear that the trial Court was very considerate and gave the plaintiffs a larger share of latitude and indulgence than what they were entitled to ask for or expect. We have noticed that the application dated 16th January 1926 was made to the Court at the fag end of the case after the close of the argument. It is difficult to say that there was not some justification for rejecting this application.

The trial Court dismissed the suit on the ground that the plaintiffs had failed to properly frame their suit and had produced no evidence as would enable the Court to "apportion the liability of the amount on each of the villages mortgaged" so that it was not possible to fix the liability of the several defendants.

The lower appellate Court has in a clear and concise judgment affirmed the decision of the trial Court. The Courts below have thrown out the claim on a technical ground. We are of opinion that in view of the peculiar features of this case the claim ought not to rest here and ought to be tried on the merits. Exception has been taken to the following statement of law in the judgment of the lower appellate Court.

> " It is quite obvious that the appellants in this case could not possibly have obtained a decree in their favour without first establishing that a large number of properties which they have exempted were not liable to make any contribution."

If this statment stood alone, it might have been open to ciriticizm. But it has been qualified by the following observation :

> " It is true that on the facts of the case they (the plaintiffs) are entitled to some contribution though their right cannot be enforced for reasons given above."

We do not find any irreconcilability in the two statements and we do not think that the learned Judge intended to lay down the broad proposition literally that no right of contribution was available to the plaintiffs from the properties in the possession of the several defendants simply for their failure to make out that the other properties (exempted by them) were not liable to contribution. It is settled law that where the amount due under the prior mortgages exceeds the value of the property comprised therein, the entire burden of the second mortgage falls on the remaining properties in the hands of puisne transferees : *Ghulam Hazrat* v. *Gobardhan Das* (1).

The effect of a sale in execution of a decree in enforcement of a prior mortgage is twofold. It extinguishes the title of the mortgagor and it wipes off all encumbrances over the same property which are subsequent to the prior mortgage. Where portion of the security is not available, the subsequent mortgagee can proceed against the balance of the security. Where any portion of the mortgaged property has not been absorbed to satisfy the prior lien, it is not open to a mortgagee from either caprice, collusion or negligence to release portions of his mortgaged security and to throw the entire burden upon the remaining property. The reason for the rule is obvious :

> " for the law would not suffer the creditor to select his own victim, and from caprice or favouritism to turn a " common burden" into " a gross personal oppression: (Ghosh on Mortgage, Vol. 1, 1911, p. 369)."

It must be remembered that in such cases, the effect of the release of a portion of the property is to diminish the mortgagee's security to that extent. It would be unjust to allow the mortgagee to cast the entire burden upon the remaining security where it affects the rights of third parties who by transfers from the mortgagor have acquired interest therein : *Mir Esaf Ali Haji* v. *Panchanon Chatterjee* (2).

If the plaintiffs succeeded in proving that the mortgagor's interest in Raithaulia, Kona, Dayalgarh and Barahra had been completely absorbed in satisfaction of the prior charges under the mortgages dated 7th February 1890 and 12th January 1891, they were entitled to cast the entire burden upon the remaining properties including those purchased by themselves and Kalapnath Rai, and the remaining properties were liable to contribute according to their respective values at the date of the mortgage. If however the plaintiffs failed to prove that some of the properties had been so absorbed, they would be bound to include each and every item of the property in the hotchpot in order to enable the liability of each of the properties to be determined. If the plaintiffs voluntarily relinquished their claim for contribution from some of the properties, the burden on the other properties could not be allowed to be enhanced. But the plaintiffs' claim for contribution from the other properties cannot be dismissed upon the mere ground that they had improperly released portions of the mortgaged security from their claim. If the materials on the record be sufficient to determine the value of the properties in the possession of the defendants and to indicate the extent to which they have been relieved from the common burden the obvious duty of the Court is to decree the claim against the defendants for such amounts as are proved.

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(1) [1911] 33 All. 387=9 I. C. 933.
(2) [1910] 6 I. C. 842.

Unfortunately for the plaintiffs, they have failed to prove that portions of the mortgaged security were not available to them by reason of the execution of the decree obtained by Raghunath Prasad. They also appear to have failed to produce evidence as regards the respective values of the properties excluded from the claim and as regards the value of the properties which are in the possession of the several defendants. In the circumstances it was not possible for the Courts below to decree the claim.

It has been strongly urged that the trial of the suit has been vitiated and the plaintiffs misled by material issues not being framed in the case. It has also been contended that the plaintiffs were lulled into a sense of security by the subsequent conduct of some of the contesting defendants which tended to create an impression that they practically admitted that some of the properties had been absorbed in discharge of the prior liens held by Raghunath Prasad.

We have already seen that only a few out of the 21 defendants contended the suit. Of these defendant 9, Mithai Dubey did not traverse the statement in para. 2 of the plaint. But even he did not admit that four annas share of Mauza Barahra had been sold up in satisfaction of a prior mortgage. On the question whether some of the properties were not available to the plaintiffs, there was a distinct disagreement between the parties. It cannot of course, be controverted that the onus of proof lay upon the plaintiffs. But it is equally clear that it was the duty of the Court to frame clear and distinct issues on the points of divergence between the parties. Six issues were framed by the Court of which only two need be mentioned:

Issue 2—Are the plaintiffs entitled to contribution?

Issue 6—To what amount are the plaintiffs entititled from individual sets of defendants?

The material question in issue between the parties was whether the properties in Mauzas Kaithaulia, Kona, Dayalgarh and Barahra had been absorbed to satisfy the prior encumbrances of Raghunath Prasad. It was the duty of the trial Court to formulate proper and necessary issues relating to the amount of the encumbrances, if any, the value of the properties which were charged with those encumbrances and also the value of the properties outside the mortgages in favour of Raghunath Prasad. The lower appellate Court was of opinion that issue 6 was comprehensive enough to include the points in controversy and observes as follows:

> "As regards the argument that no definite issue was framed on the point under consideration I think there is absolutely no force in it. Issue 6 framed in the case clearly contemplated that the appellants will have to prove all the necessary facts in order to establish their claim against each one of the defendants."

We do not agree with this view. Issue 6 is not a general issue like issue 2. Issue 6 has in view the determination of amounts for which the individual defendants may be liable. The question of amounts is the last step in the process of evidence. The question of amounts does not arise till certain other facts had been ascertained in their natural and logical sequence. The necessary issues which emerge for trial are whether all the ten properties in the mortgage dated 18th April 1895 were liable to contribute or only some of them? What was the value of each of these properties? Which of these properties, if any was mortgaged to Raghunath Prasad under the instruments dated 7th February 1890 and 12th January 1891? What was the amount of the decree of Raghunath Prasad for which these properties were sold? These and other issues of an allied character ought to have been framed and decided before issue 6 could be taken up. If issue 6 be taken to be one of a general character, it ought to be remembered that a general issue from its vagueness more often than not serves as a trap for the unwary. A clear cut issue is always a warning to the party on whom the onus lies. We cannot predicate with certainty that the plaintiffs were not misled in this case by reason of the proper issue or issues not being framed by the Court. The contesting defendants do not appear to have pressed for these issues. On the other hand they submitted in Court a statement of accounts (paper No. 78-C) which as the lower appellate Court puts it

> "was intended only to show the amount which each of the properties in suit was liable to contribute on the assumption that the appellants would succeed in proving the fact that certain other properties which had been exempted were not liable to contribute."

We are not quite sure that the lower appellate Court is not making a very large assumption in favour of the respondents. There is nothing in the document itself to suggest that the statement contained therein is of a tentative or conditional character. But even if we allow that assumption to be made was not this document calculated to put the plaintiffs off their guard? They may well have considered that the defendants were not serious in not admitting paras. 2 and 8 of the plaint for they had not only not pressed for the necessary issues, but had indeed accepted the position in the statement of account (78-C) that some of the properties as alleged by the plaintiffs were not liable to contribute because they had been sold in satisfaction of the prior liens held by Raghunath Prasad. We apprehend that the trial has been vitiated for want of proper issues and that the plaintiffs may have been misled by the conduct of the defendants. We are therefore of opinion that the case should go back to the trial Court for a fresh trial with proper issues on fuller evidence. We allow this appeal, set aside the decrees of the Courts below and remand the case to the Court of first instance for trial de novo.

K.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 629

SULAIMAN, AG. C. J.

Puttu Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 228 of 1931, Decided on 26th May 1931, Reference submitted by Sess. Judge, Farrukhabad, D/- 26th March 1931.

U. P. Excise Act (4 of 1910), S. 64 (c)—Condition in license fixing hours for opening and closing of liquor shops and forbidding keeping open of shop at any other hour—Condition held not to mean that shop could not be closed even temporarily.

A general condition in the license applicable to all licensees was in the following terms: "The hours for the opening and the closing of the shops have been fixed as follows. It is necessary that shops should not be kept open at any other hour:

Held: that the object of the condition was to prevent the sale of liquor outside the fixed hours and the condition could not be interpreted as meaning that at no time between these two limits the shop should be closed even temporarily. [P 629 C 2]

Asst. Govt. Advocate—for the Crown.

Order.—This is a reference against an order convicting the accused under S. 64 (c), Excise Act (Act 4 of 1910), for having broken one of the conditions of his license.

When the Excise Inspector went to inspect his shop, he found it closed. When questioned later, the accused alleged that he had gone to a warehouse to bring four gallons of liquor which were entered in his register.

The learned Magistrate infers that it was not a case of temporary absence, but of the closing of the shop on account of picketing. He accordingly convicted the accused and sentenced him to pay a fine of Rs. 50.

The Sessions Judge has recommended that either the conviction be set aside or the fine be reduced to Rs. 5.

The fourth general condition in the license applicable to all licensees is in the following terms:

> "The hours for the opening and closing of the shops have been fixed as follows: It is necessary that shops should not be kept open at any other hour."

It is note-worthy that the condition does not say that the shop should not, on any account, be closed during these hours.

It seems to me that the object of this condition is to prevent the sale of liquor outside the fixed hours. This condition cannot be interpreted as meaning that at no time between these two limits the shop should be closed even temporarily. If that be the intention of the authorities, they ought to lay down the condition in more express terms.

In my opinion there was no breach of the condition in the license. I accordingly accept this reference and setting aside the conviction and sentence, acquit the accused and direct that the fine, if paid, be refunded.

R.M./R.K. *Conviction set aside.*

A. I. R. 1931 Allahabad 630 (1)

MEARS, C. J. AND SEN, J.

Yusuf Ali Khan—Appellant.

v.

Lachmi Mani Dassi—Respondent.

First Appeal No. 37 of 1930, Decided on 22nd January 1931, against order of Dist. Judge, Cawnpore, D/- 16th January 1930.

Criminal P. C. (1898), S. 195 (1) (a)—Appellate Court directing institution of complaint under S. 186, Penal Code—No appeal lies.

Where an appellate Court in the exercise of its authority under S. 195 (1) (a) has directed an institution of a complaint under S. 186, Penal Code, such order is not open to appeal. [P 630 C 1,2]

M. Mahomadullah—for Appellant.

Saila Nath Mukerji—for Respondent.

Sen, J.—Shrimati Lachmi Mani Dassi applied for the enforcement of a decree against Yusuf Ali Khan about the construction of a wall. The Court bailiff was deputed to have that wall constructed. He returned without doing so and submitted a report to the learned Munsif of Cawnpore, that Yusuf Ali Khan and certain other persons had obstructed him in the discharge of his duty. He accordingly prayed that proceedings be initiated against Yusuf Ali Khan under S. 186, I.P. C. This report was apparently made under S. 195 (a), Criminal P. C. The Munsif held a preliminary enquiry and came to the conclusion that no complaint should be filed against Yusuf Ali Khan. He accordingly rejected the application of the Amin. On an appeal being preferred to the learned District Judge of Cawnpore, he reversed the order of the Munsif and has directed the prosecution of Yusuf Ali Khan under S. 186, I. P. C. An appeal has been preferred to this Court. A preliminary objection has been taken that no appeal lies.

We are clearly of opinion that this objection is well-founded and ought to be sustained. The complaint made by Mr. Allsop was not under S. 476, Criminal P. C., because S. 476 does not embrace within its fold an offence under S. 186, I. P. C. Mr. Allsop evidently intended to proceed, and did proceed under S. 195 (a), Criminal P. C. The question which arises in this appeal is that where an appellate Court in the exercise of its authority under S. 195 (1) (a), Criminal P. C., has directed the institution of a complaint under S. 186, I. P. C., is the said order open to appeal. We do not find anything in S. 195, Criminal P. C., or in any other section of the Code and we wonder the filing of a second appeal in this Court.

We accordingly hold that no appeal lies. We dismiss the appeal with costs including fees on the higher scale. The stay order will be discharged.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 630 (2)

PULLAN, J.

Har Lal Singh & another—Appellants.

v.

Hari Singh and *others*—Respondents.

Second Appeal No. 1943 of 1928, Decided on 10th January 1931, against decision of Second Addl. Sub-Judge, Farrukhabad, D/- 22nd June 1928.

Hindu Law—Reversioners — Reversionary right cannot be said to be kind of heritable estate.

There is no authority for the proposition that the reversionary right under the Hindu law is a kind of heritable estate which descends from father to son : 22 *All* 33 (*F. B.*), *Rel. on.* [P 631 C 1]

M. Waliullah—for Appellants.

K. C. Mital—for Respondents.

Judgment.—The original plaintiff in this suit was one Rohan Singh. He came before the Court as being the nearest reversioner to the estate of one Raghunath Singh. This Raghunath Singh had died leaving a widow Mt. Kaunsilla who is still alive. On 3rd July 1914 Kaunsilla gifted the whole of the property which had devolved on her from her husband to her two daughters Nachkande and Bitoli and their respective husbands Hari Singh and Badal Singh. Subsequently both the daughters died and Rohan Singh as the nearest reversionary heir to the estate of Raghunath Singh claimed that on the death of the two daughters the property had devolved upon himself. This was his case, and in order to establish his claim on the death of the daughters he denied that their respective husbands were donees from Mt. Kaunsilla. He made further an alternative claim that, if possession over any portion of the property could not be given to him during the lifetime of Kaunsilla, the gift might be declared to be null and void and ineffectual on her death.

The Courts below have found that the deed of gift was executed in favour of both of the daughters of Kaunsilla and of their respective husbands. This being so, the estate could not be claimed by the nearest reversioner on the death of the two ladies. The two other donees had to be considered. As they were strangers there was no question of acceleration, and the plaintiff was clearly driven by this finding to his second relief, namely, a declaration that the gift should be held to be null and void on the death of Kaunsilla. The suit having been dismissed on both grounds, Rohan Singh died. His two sons Har Lal Singh and Kunwar Singh applied that their names should be placed on the record as the heirs of their father. The application was resisted and an order was passed by the Subordinate Judge admitting the names of the two sons of Rohan Singh as being their father's heirs. When deciding the appeal the Additional Subordinate Judge held that the sons of Rohan Singh could challenge the decision as to the possession of the property which their father had claimed as a right, devolving on him on the death of Nachkande and Bitoli, but that they could not claim the alternative relief because their position in the suit is only that of being heirs of Rohan Singh and not that of being reversioners of Raghunath Singh.

I have been asked to consider that this is a narrow view to take of the case and that although the two sons of Rohan Singh omitted to make any reference in their application for substitution of names to their claim to be the reversionary heirs of Raghunath Singh, they should still be treated as reversionary heirs, and be allowed to continue the appeal as representing the body of reversioners. It was held long ago by Mahmood, J., in a judgment which is quoted in a Full Bench decision in the case of *Bhagwanta* v. *Sukhi* (1), that there is no authority for the proposition that a reversionary right under the Hindu law is a kind of heritable estate which descends from father to son. It appears to me that these two persons who are maintaining this appeal only as their father's heirs cannot be heard to say that they are also continuing the appeal as the reversionary heirs of Raghunath Singh, which may or may not be the case, and is a question which is up to the present undetermined.

Even if they had this right, it is open to question whether their claim could be admitted in view of the fact that it is entirely opposed to the case set up by their father, and the finding of the Courts below that this gift by Kaunsilla was a valid gift in lieu of dower in favour of her daughters. It may be that on the death of Kaunsilla the nearest reversioners of that time may if so advised re-agitate this question, but I am not prepared to hold in this appeal that a decree can be passed in favour of these two persons who come forward as the sons of Rohan Singh declaring the gift to be null and void as against the reversioners of Raghunath Singh.

For these reasons the appeal fails and is dismissed with costs including costs in this Court on the higher scale.

R.M./R.K. *Appeal dismissed.*

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(1) [1899] 22 All. 33=(1899) A.W.N. 159 (F.B.).

A. I. R. 1931 Allahabad 631

PULLAN AND NIAMATULLAH, JJ.

Tulshi Prasad—Appellant.

v.

L. Dip Prakash and *others*—Respondents.

Second Appeal No. 1001 of 1928, Decided on 9th March 1931, against decision of Addl. Dist. Judge, Aligarh, D/- 9th March 1928.

(a) Civil P. C. (1908), O. 34, R. 6—Court can under O. 34, R. 6, pass decree against surety on sale proceeds proving insufficient for satisfaction of mortgage decree.

The language of O. 34, R. 6, does not preclude the Court from passing a decree against the mortgagor and his sureties signing the mortgage on the sale proceeds proving insufficient for satisfaction of the mortgage money. All that O. 34, R. 6, requires is that the balance should be legally recoverable from the defendant otherwise than out of the property sold. [P 632 C 1]

(c) Hindu Law—Debts—Son is liable for surety debts of father not tainted with immorality.

So far as Allahabad High Court is concerned ordinarily a son is liable for the surety debt of his father unless it is shown that the debt is tainted with immorality. [P 632 C 2]

N. P. Asthana—for Appellant.

P. L. Banerji—for Respondents.

Niamatullah, J.—This appeal arises out of proceedings under O. 34, R. 6, Civil P. C. The appellant is the son and legal representative of one Ram Narain. It appears that Asaf Ali who owned certain properties, executed a deed of simple mortgage on 20th August 1918, hypothecating his property, in favour of the present respondents. Five other persons, including Ram Narain, joined as executants of that deed, though they had no interest in the mortgaged property and were in fact only sureties. The deed makes it clear that they are personally liable for the debt contracted by Asaf Ali. The respondents instituted a suit for sale of the mortgaged property under O. 34, R. 4, Civil P..C., impleading all the executants or their representatives in interest, obtained preliminary and final decrees and had the mortgaged property sold. The sale proceeds proved to be insufficient for satisfaction of the mortgage money. They then applied, under O. 34, R. 6, Civil P.C. for a personal decree being passed against the executants of the mortgage deed or their representatives in interest. The present appellant objected to a personal decree being passed against him. The lower appellate Court overruled his objection and passed a simple money decree against him jointly with others. Hence this second appeal.

It is contended by the learned advocate for the appellant that a decree under O. 34, R. 6, Civil P. C., cannot be passed except as against the mortgagor, i. e., one who had interest in the hypothecated property the sale of which has already taken place. It is argued that in so far as no more than a personal undertaking had been given by the executants other than Asaf Ali, a simple money decree should have been passed in the first instance against them and no decree under O. 34, R. 6, would in that case be necessary. Assuming that a composite decree of this kind could have been passed in the first instance, we are unable to hold that the language of O. 34, R. 6, Civil P. C., precludes the Court from passing a decree on the sale proceeds proving insufficient for satisfaction of the mortgage money. All that that rule requires is that the balance should be legally recoverable from the defendant otherwise than out of the property sold. It is not disputed that, so far, at any rate, as Ram Narain was concerned, the whole of the mortgage money which would, of course, include the balance, was personally recoverable from him. We find nothing in any rule of law which prevents the mortgagee from obtaining a personal decree under O. 34, R. 6, Civil P. C., in circumstances like these. The liability of a surety is, in general, co-extensive with that of the principal debtor. Indeed Ram Narain made himself one of the principal debtors by joining in the execution of the bond. The learned advocate for the appellant has not been able to refer us to any authority in support of his contention. We are clearly of opinion that the lower appellate Court took a correct view in applying O. 34, R. 6, to the circumstances of the present case.

It is next contended that the son of Ram Narain, as the appellant is, is not responsible for surety debts of his deceased father who, it is not disputed, was a member of a joint Hindu family with the appellant. So far as this Court is concerned, it is settled law that ordinarily a son is liable for the surety debt of his father, unless it is shown that the debt is tainted with immorality. It is not suggested that such is the case here. Under these circumstances, we are satisfied that the decree passed by the lower appellate Court is correct in every respect. It is accordingly upheld and this appeal is dismissed with costs, including fees in this Court on the higher scale.

R.M./R.K. *Appeal dismissed.*

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* A. I. R. 1931 Allahabad 632

Full Bench

SULAIMAN, AG. C. J.,
MUKERJI AND BOYS, JJ.

Lila—Applicant.

v.

Mahange and *others*—Opposite Parties.

Civil Revn. No. 309 of 1930, Decided on 10th July 1931, against decree of Dist. Judge, Shahjahanpur, D/- 19th July 1930.

* (a) **Civil P. C. (1908), S. 115—Other remedy by way of suit open to applicant—Still revision is competent if interest of justice so demands.**

Ordinarily the High Court would not interfere if another convenient remedy is open to an applicant, particularly when that remedy is by way of appeal to a lower Court. But it cannot be laid down as a general proposition that the High Court has no power of interference at all or should not interfere where there is another remedy by way of a suit open to the applicant. Each case must be considered in its own merits and if the Court has acted without jurisdiction or with material irregularity and the applicant has been seriously prejudiced and interference is called for in the interest of justice, there is no reason why High Court should drive the applicant to a more circuitous remedy by way of a separate suit: *A. I. R.* 1931 *All.* 333, *not Foll.* [P 634 C 1]

(b) Succession Act (1925), Ss. 193 and 195—Omission to state conditions for satisfaction under S. 193 does not make order appointing curator illegal.

Ordinarily it is expected that the District Judge would clearly state that he is satisfied as regards the requisites but an omission to do so would not make the order appointing a curator under S. 195 illegal. [P 634 C 2, P 635 C 2]

Krishna Murari Lal—for Applicant.

Shiva Prasad Sinha and *M. A. Aziz*—for Opposite Parties.

Order of Reference.—This is a civil revision from an order of the District Judge of Shahjahanpur dismissing the applicant's objection to an order passed by him under S. 195, Succession Act. The learned Judge admits that in his order there was no mention of ths points referred to in S. 193 of the Act and it also appears that there were no clear findings on the point as referred to in S. 193 and S. 195. The learned Judge is inclined to think that the very fact that he passed the order under S. 195 showed that he had satisfied himself of the necessary requisites.

The applicant came up in revision to this High Court and urges that without the proper inquiry and without the necessary findings the order of the District Judge was without jurisdiction and that, in any case, it was illegal or at any rate there was a material irregularity in the procedure.

A preliminary objection is taken on behalf of the respondents that no revision lies inasmuch as another remedy is open to the applicant. Reliance is placed on a number of cases of this Court relating to revisions from orders passed under S. 9, Specific Relief Act, and it is urged that the same analogy applies: see *Jwala* v. *Ganga Prasad* (1), and *Ram Kishan Das* v. *Jai Kishan Das* (2); see also *Birj Gopal* v. *Dhapi Bai, A. I. R.* 1931 *All.* 333. It is further pointed out that S. 209 of the Act makes the order of the District Judge final, and it is urged that it implies that it should not be interfered with in revision. Certain other cases also are cited to the effect that no revision at all lies when another remedy is open to the aggrieved party.

The learned advocate for the applicant urges that if the order of the Court below is without jurisdiction or illegal the Court should set it aside even though a more inconvenient and circuitous remedy may be open to his client. He relies on several cases of the Madras High Court: *Kothandarama Reddy* v. *Jagathambal Ammal* (3), *Papamma* v. *Collector of Godavari* (4) and *Abdul Rahiman* v. *Kutti Ahmad* (5) and a case of the Bombay High Court, *Haji Mahommadbhai* v. *Bai Havabai A. I. R.* 1924 *Bom.* 507, in support of this contention that the order was without jurisdiction.

It is further urged that even if no revision lies to the High Court, the High Court can in the exercise of its inherent jurisdiction interfere with the order of the Court below in the ends of justice. Reliance is placed on the cases: *Harnand Lal* v. *Chaturbhuj* (6) and *Chaturbhuj* v. *Haranandan Lal* (7). In reply it is suggested that the inherent jurisdiction would be confined to matters of which a superior Court is actually seised and not to matters which have been disposed of by Subordinate Courts from which no appeal or revision lies.

As this application raises questions of law on which authoritative pronouncements are called for we direct that this case should be laid before the Chief Justice for the constitution of a larger Bench.

Sulaiman, Ag. C. J.—This is an application in revision from an order dismissing the objection of Lila to the appointment of a curator under S. 195, Succession Act (No. 39 of 1925). A preliminary objection is taken to the hearing of this revision on the ground that there is another remedy by way of a separate suit open to the applicant and that therefore this Court should not entertain the revision at all. The learned advocate for the respondent has relied on some cases in which the High Court declined to interfere because there was another remedy open. In one recent case it was also remarked that the High Court's power to interfere in revision was dependent on the fulfilment of the condition that no other remedy by suit, appeal or application was open, vide *Shair Ali* v. *Jagomohan Ram* (8).

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(1) [1908] 30 All. 331=5 A. L. J. 297=(1908) A. W. N. 142.

(2) [1911] 33 All. 647=11 I. C. 814.

(3) A. I. R. 1923 Mad. 229=71 I. C. 32.

(4) [1889] 12 Mad. 341.

(5) [1887] 10 Mad. 68.

(6) A. I. R. 1926 All. 212=93 I. C. 285=48 All. 356.

(7) A. I. R. 1928 All. 108=108 I. C. 141=50 All. 335.

Section 115 is no doubt discretionary and therefore it is open to the High Court to decline to interfere in particular cases. As a matter of practice it may be conceded that ordinarily the High Court would not interfere if another convenient remedy is open to an applicant, particularly when that remedy is by way of appeal to a lower Court. But it cannot be laid down as a general proposition that the High Court has no power of interference at all or should not interfere where there is another remedy by way of a suit open to the applicant. The remedy by way of separate suit would involve a protracted litigation through several Courts and is not always a convenient remedy when more effective and speedy remedy is available. There is no jurisdiction for restricting the power conferred upon the High Court under S. 115 by laying down that no revision should be entertained when a remedy by suit lies. Each case must be considered in its own merits and if the Court below has acted without jurisdiction or with material irregularity and the applicant has been seriously prejudiced and interference is called for in the interest of justice, there is no reason why we should drive the applicant to a more circuitous remedy by way of a separate suit. We accordingly overrule the preliminary objection.

On 9th April 1930 Mahange filed an application under S. 192 of the Act claiming to be the nephew of the deceased Khayali whose assets according to him had been wrongly taken possession of by Lila and asking for being put in possession. He also filed another application praying that a curator might be appointed for the making of an inventory. The learned District Judge ordered notice to issue on the first application and directed that the second application should be put up for hearing on 11th April 1930 on which date the applicant was to be examined. He fixed the 17th May 1930 for the appearance of Lila.

On 11th April 1930 the applicant was examined and he stated that he was the heir of the deceased who had left assets which had been taken possession of by the opposite party and that the assets included crops which were likely to be misappropriated by Lila. The learned Judge ordered that a curator should be appointed who should go and take possession of the property. This was done.

On 17th May 1930 the objector appeared but the case was postponed to 20th May 1930 on which date he filed his objection urging inter alia that the Court had no jurisdiction to interfere as the Court was not competent to try the suit and there was no compliance with the provisions of the Act. This objection has been dismissed.

It has to be conceded that the procedure adopted by the District Judge so far as the order issuing notice was concerned was irregular as S. 193 requires that the applicant should be examined on oath in the first place and further inquiry if necessary may be had and the Judge is to be satisfied as to the existence of conditions mentioned in S. 193 before issuing notice. The learned Judge however did ultimately examine the applicant. We are not dealing with any order passed for the appointment of an officer to take an inventory of assets under S. 194 of the Act, but with the order of the appointment of a curator under S. 195. The curator may be appointed even before the issue of the notice under S. 194, and indeed, in some cases it may be absolutely necessary to appoint a curator before the opposite party has had time to remove the assets. This order was passed after the applicant had been examined and there were materials before the District Judge on which he could be satisfied as to the conditions required by Ss. 193 and 195. No doubt the order passed by him on 11th April 1930 merely stated that in his opinion it was necessary to appoint a curator and did not specifically set forth the grounds on which he was so satisfied. The learned Jndge has made it clear by his subsequent order that he was satisfied by the evidence of the applicant as to all the grounds. Ordinarily it is expected that the District Judge would clearly state that he is satisfied as regards the requisites but an omission to do so would not make the order illegal, because the section does not in express terms require that he should record such clear findings. All that is necessary is that he should be satisfied as to the existence of these conditions. We think that although there was some irregularity in the procedure adopted by the learned Judge it was cured before the order for the appointment of the curator was passed and that therefore the order is no way illegal.

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(8) A. I. R. 1931 All. 333=131 I. C. 548.

It is not necessary for us to consider whether independently of S. 115 there is any inherent jurisdiction in the High Court to interfere with the orders passed by subordinate Courts.

We accordingly dismiss the application with costs.

P.N./R.K. *Revision dismissed.*

A. I. R. 1931 Allahabad 635

Full Bench

SULAIMAN, AG. C. J., MUKERJI, BOYS, KING AND BAJPAI, JJ.

Ram Karan Singh and *another* — Defendants—Appellants.

v.

Ram Das Singh and *others*—Plaintiffs —Respondents.

Second Appeal No. 314 of 1929, Decided on 4th August 1931, against decision of Sub-Judge, Jaunpur, D/- 15th November 1928.

(a) Interpretation of Statutes—Retrospective effect—Significance explained.

Sulaiman, Ag. C. J.—If a new enactment lays down that a person may under certain conditions sue for certain specified reliefs, and he sues after an Act has come into force it would not, strictly speaking, be giving to the Act a retrospective effect if he avails himself of its provisions. The Act is in force when he is suing, even though his cause of action might have accrued before the Act was passed. It would be a retrospective effect if the Court applied the Act to a suit previously instituted. [P 639 C 1]

(b) Civil P. C. (1908), S. 11 — Statutory right by new Act can be made defence to res judicata.

Sulaiman, Ag. C. J.—A statutory right conferred by a new Act may even be made a foundation of defence to the plea of res judicata. [P 639 C 2]

(c) Interpretation of Statutes—Substantive rights—Choice of forum and limitation are not matters of substantive rights, but are matters of procedure.

Sulaiman, Ag. C. J.—A substantial right is not assumed to be taken away by a new Act unless it expressly says so. But a right to sue in one Court rather than another or a right to wait for a particular period of time before suing is not a substantive right. The selection of forum and the period of limitation are ordinarily matters of procedure only. The selection of a Court in no way affects the right of suit itself. The Limitation Act does not necessarily extinguish the right, though it certainly places a bar against the remedy by suit. [P 639 C 2]

(d) Agra Tenancy Act (1926), S. 99—Applicability.

Sulaiman, Ag. C. J.—There is nothing in S. 99 which either curtails the period of limitation or fixes the forum. [P 639 C 2]

(e) Agra Tenancy Act (1926), S. 99—Civil Court's jurisdiction when barred.

Sulaiman, Ag. C. J.—Where a suit is "of the nature" of a suit under S. 99, even though it may not strictly come under that section, the jurisdiction of the civil Court is barred. [P 640 C 1]

(f) Interpretation of Statutes — Limitation Acts—Question of limitation should be decided as per Limitation Act in force at institution of suit and not at time of cause of action—Limitation.

Sulaiman, Ag. C. J.—When a question of limitation is raised it ought to be decided in accordance with the law of limitation in force at the time of the institution of the suit and not that in force at the time of the cause of action, unless there be any express provision to the contrary in the Act itself. [P 640 C 2]

(g) Agra Tenancy Act (1926), S. 121—Declaratory suit under S. 121 is cognizable by revenue Court only.

Sulaiman, Ag. C. J.—The fear of a curtailment of the period of limitation or of the taking away of any vested right does not apply to a declaratory suit under S. 121, as no period of limitation is fixed for such a suit. Such a suit is clearly cognizable by the revenue Court only, even though the denial of title takes place before the Act came into force.

If the plaintiff in a civil suit alleges that he is in possession of a holding and claims the declaration against the landholder or persons claiming through him, but, in the alternative asks for possession in case it be found that he was out of possession his plaint is liable to be returned for presentation to the revenue Court. The civil Court however may require him to make up his mind whether he would admit his dispossession and ask for recovery of possession. If he does not admit dispossession, the Court cannot allow him to lead evidence to show that he is in possession, but must return the plaint. If the plaintiff gives up his allegation of being in possession and amends his plaint so as to turn the suit into one for recovery of possession, on a dispossession which took place before the Act, the Court should proceed to try the question of title: 52 *All.* 501, *Expl.* [P 641 C 1]

(h) Agra Tenancy Act (1926), S. 99—S. 99 governs suits between rival tenants—"Claiming through"—Meaning explained.

Mukerji, J.—A suit berween rival tenants falls within the purview of S. 99, inasmuch as it is a suit by a tenant against a person claiming through the landholder. The words "claiming through" in Cl. (b), S. 99, mean holding a derivative title from the landholder. The idea is that where a suit is against a landholder or a person who pretends to be a land holder having a right to eject the plaintiff, or where the suit is against a person holding a derivative title from such landholder or person claiming as above, the suit should be governed by S. 99. "Claiming through" cannot mean raising a plea by way of defence or making a false claim without the shadow of title. [P 642 C 2]

(i) Agra Tenancy Act (1926), S. 99—S. 99 lays down remedies for wrong and is not rule of adjective law.

Mukerji, J.—Section 99 is not a rule of procedure of adjective law. It professes to lay down remedies for a wrong. [P 643 C 1]

(j) Interpretation of Statutes—Law of remedies has no retrospective effect and so also is the case with other substantive laws.

Mukerji, J.—The law of remedies is substantive law, and therefore ordinarily the law will have no retrospective effect. It is no doubt open to the legislature to enact a substantive rule of law and yet to give it a retrospective effect. But the presumption as regards interpretation is that unless and until the legislature gives the clearest indication that a rule of substantive law will have a retrospective effect, the Court will not give the rule that effect.

Where an existing right is likely to be taken away by the operation of an Act, unless there is something which compels a Court to give the Act a retrospective effect, it will not give the Act that effect: *Craies Statute Law (Edn. 3 by Please and Gorman) pp.* 326, 330 and 331, *Ref.* [P 643 C 1,2]

(k) Agra Tenancy Act (1926), S. 99—S. 99 is not retrospective in effect.

Section 99 has not a retrospective effect. The language of S. 99 points to the conclusion that it is applicable only when a cause of action arises after the Act has come into force. It contains the words "otherwise than in accordance with provisions of this Act." By using the words "this Act," the legislature intended that S. 99 should apply only where the cause of action arises after the Act has come into force. [P 644 C 2; P 645 C 1]

(l) Agra Tenancy Act (1926), S. 99—How S. 99 should be applied explained.

Mukerji, J.—Section 99 cannot be read apart from the law of limitation that is applicable to a suit under S. 99. [P 645 C 1]

(m) Agra Tenancy Act (1926), S. 99—Co-tenant's suit for possession—Dispossession in 1923—S. 99 does not apply—Plaintiff's remedy is in civil Court.

To a suit by a tenant against a co-tenant for recovery of possession, on the ground that he was dispossessed in 1923, S. 99 has no application. The plaintiff's remedy is in the civil Court. [P 645 C 2]

(n) Agra Tenancy Act (1926), S. 99—Co-tenant's suit for possession—Suit lies in revenue Court.

Boys, J.—Where a plaintiff sues for possession as co-tenant, alleging the defendant to be a co-tenant, he must go to the revenue Court: 51 *All.* 853, (*F. B.*), *Foll.*; 52 *All.* 501, (*F. B.*), *Dist.* [P 646 C 1]

(o) Agra Tenancy Act (1926), Ss. 99 and 121—Both sections deal with substantive rights and are not matters of adjective law.

Boys, J.—Section 99 and S. 121 both deal with substantive rights and are not matters of adjective law. They both declare the right of the plaintiff in certain circumstances to sue. They have nothing to do with the question of venue, or any other matter of procedure; these matters are provided for by S. 230 read with Sch. 4. Nor have they even anything to do with the question of limitation. [P 646 C 2]

(p) Agra Tenancy Act (1926), S. 99—Applicability.

Boys, J.—Section 99 is not applicable to any ejectment or resistance to possession which ejectment occurred or resistance commenced before the passing of the Act. [P 646 C 2]

(q) Agra Tenancy Act (1926), S. 99—S. 99 does not apply to suit where cause of action arose before 7th September 1926.

King, J.—Section 99 does not apply to a suit when the cause of action (i. e., the wrongful ejectment, or the wrongful prevention from obtaining possession) arose before 7th September 1926 when the Agra Tenancy Act 1926, came into force. [P 647 C 2]

(r) Interpretation of Statutes — Vested rights should be respected.

King, J.—Statutes should be interpreted, if possible, so as to respect vested rights: *Craies on Statute Law, Edn.* 3, *p.* 330 and *Henshall* v. *Porter* (1923) 2 *K. B.* 193, *Ref.* [P 648 C 1]

(s) Interpretation of Statutes — Limitation Acts—They are retrospective in effect.

Bajpai, J.—The law of limitation is a law of procedure and the general rule is that a statute of limitation is retrospective in its operation and governs all proceedings from the moment of its enactment, even though the cause of action might accrue before the Act came into force: 35 *All.* 227, *Ref.* [P 648 C 2]

(t) Limitation—Limitation for suits creates no rights—It merely prescribes time within which suits should be filed — Limitation Act (1908), S. 28.

Bajpai, J.—When a period of limitation is prescribed for the institution of a particular suit, it does not create any right in favour of anybody: but simply prescribes that a suit of that nature has to be filed within that particular period and, if it is not so filed, the remedy is lost, although the right remains. [P 648 C 2]

(u) Interpretation of Statutes — Limitation Acts—They are not always adjective — They at times create and extinguish rights.

Bajpai, J.—The law of limitation is not always a purely adjective law, inasmuch as in certain cases it provides for the creation of rights by prescription, and the corresponding extinction of rights (S. 28, Lim. Act of 1908) and if those rights have vested in individuals under one law of limitation, they cannot be divested by the introduction of a new law of limitation or by an amendment in the law. It is only when the retrospective application of a statute of limitation would destroy vested rights that it is not to be construed retrospectively, otherwise the ordinary rule is that rules of limitation are rules of procedure and no one has a vested right in any period of limitation. [P 649 C 1]

K. Verma—for Appellants.

L. M. Roy—for Respondents.

Order of Reference.—This is a defendants' appeal arising out of a suit for declaration, as it is worded:

"that the plaintiffs are the owners in possession of 4 bighas and 12 biswas in the holding in dispute specified below, and according to this proportion they (the plaintiffs) are entitled to realize rent from the subtenants, and defendants 1 and 2 have nothing to do therewith."

Defendants 3 to 8 are the alleged subtenants. The holding in dispute was a fixed rate tenancy comprising 6 bighas 17 biswas and 15 dhurs of which the plaintiffs claimed 4 bighas and 12 biswas.

At a later date a further relief was added that:

"an injunction may be issued to defendants 1 and 2, restraining them from offering obstruction in the plaintiffs' realizing the rent from the subtenants."

The plaint is as usual not very happily drafted to express what the plaintiffs obviously meant. In para. 4 of the plaint they stated that:

"Suit No. 194 of 1912 of the Court of the Munsif of Jaunpur has been fought between the parties in which it has been decided that plaintiffs are the owners in possession of 4 bighas and 12 biswas, this decision is final between the parties and it is binding upon them."

Paragraph 5 stated:

"A case has also been fought between the parties in the revenue Court which ordered that these plaintiffs are the owners of the property in dispute."

Now the history of the case which we shall have to set out in some detail, suggests that what the plaintiffs really meant by these pleadings was that they were the owners of 3/4ths (thus wrongly described in the judgments) of a fixed rate tenancy, while the defendants were the owners of the remaining 1/4th, that the plaintiffs and the defendants were not joint tenants of the whole fixed rate tenancy, but owned entirely separately from each other their own shares, and that therefore the defendants in interfering with the plaintiffs' collection of their own shares of the rents due by the subtenants were acting as trespassers.

The defendants pleaded that the rights of the plaintiffs or their predecessors-in-title to fixed rate tenancy in three-quarters had ceased as long ago as 25th June 1912, as a result of the ejectment suit brought by the father of the present defendants 1 and 2 in his capacity as zamindar against the predecessors-in-title of the plaintiffs.

It will be best now to state the history of the litigation about this property. One Badal Lonia owned a fixed rate tenancy. He mortgaged three-fourths of this to Bishunath, predecessor-in-title of the present plaintiffs. He subsequently sold the remaining one-fourth to the father of the present defendants 1 and 2. The description of the shares in the judgments as three-fourth and one-fourth appears to be a convenient method of briefly describing the shares.

On 22nd February 1912, Bishunath brought a suit on his mortgage, making Badal Lonia and the father of the present defendants 1 and 2 parties, and on 9th May 1912 he obtained an ex parte decree.

On 25th June 1912, the father of the present defendants 1 and 2 in his capacity as zamindar ejected Badal Lonia from three-fourths of the fixed rate tenancy, which had been mortgaged to Bishunath, for failure to pay rent. To this suit Bishunath was not made a party nor is, there anything to show that he knew anything about it.

About three years later, on 14th October 1915, Bishunath got the three-fourths of the fixed rate tenancy sold and himself purchased it. Subsequently he applied to the revenue Court and got mutation on 8th March 1917. The Assistant Collector relied on the civil Court proceedings in the mortgage suit and told the father of the present defendants that he should go to the proper Court and get a declaration if he felt that he was entitled to it. The Collector in his judgment upholding the order of the Assistant Collector said that he refused to be influenced by any games that the defendants' father might have been up to with the mortgagor in the matter of the ejectment. In the years 1920, 1921 and 1922 some suits were brought by the plaintiffs or Bishunath, their predecessor-in-title, for rent against the subtenants. The latter pleaded that they had paid the rent in good faith to the present defendants 1 and 2, and it being found that the plaintiffs and their predecessors-in-title had not ever collected any rents, there was no ground for holding that the payments of the subtenants which were actually made were made otherwise than "bona fide" by them and the suits were dismissed. That completes the history of the proceedings prior to the present suit which was instituted on 2nd September 1927. The plaintiffs say that defendants 1 and 2 denied the rights of the plaintiffs in June 1925, and date their cause of action from that denial, and also from 4th April 1923, when the last of the rent suits was decided against them in appeal. The trial Court dismissed the suit with costs. The lower appellate Court gave the plaintiffs the declaration asked for and is silent as to injunction. The defendants now appeal.

Two main questions arise. First, whether Act 3 of 1926, S. 99, applies to ejectments or obstruction to possession occurring before 7th September 1926. Secondly what is the exact form of the issue which a Court has to determine when considering the question of its jurisdiction in the light of S. 99, Act 3 of 1926. In reference to the first question, whether Act 3 of 1926, S. 99 is applicable at all to an ejectment or obstruction to possession occurring before 7th September 1926 it has been held by two Judges of this Court in *Abdul Hakim* v. *Mukarram Ali* (1):

> "that S. 99 can apply only to a dispossesion which took place after 7th September 1926."

It is true that the learned Judges were in that case dealing with dispossession from a grove, but the language used is general. In view of the fact that S. 99 only deals with procedure, and does not affect any vested rights, it is at least open to question whether S. 99 is not applicable to some cases, at any rate of ejectment or obstruction to possession of date prior to the commencement of the Act.

The second question is concerned with the interpretation of S. 99, Act 3 of 1926, and more particularly, with the interpretation of the decision of the majority of the Judges in *Ananti* v. *Chhannu* (2). We think that the effect of the judgment of the majority in this Full Bench may be stated as follows: 1. Whether the suit is cognizable by the Court must be determined, in the first place, by the allegations made in the plaint. 2. If upon the allegations in the plaint the suit does not appear to be cognizable by the Court the plaint will be returned for presentation to the proper Court. 3. If, on the allegations in the plaint, the Court is of opinion that the suit is cognizable by the Court, mere allegations, whatever they may be, in the written statement will not oust the jurisdiction of the Court to try the suit. 4. It will proceed to try the issue as to its jurisdiction, and if it finds the facts alleged by the plaintiff to be true, it will proceed to trial of the other issues. 5. If it proceeds to try the suit and finds that the facts alleged by the defendant are true, with the result that it has no jurisdiction, it will dismiss the suit; unless even at that late stage the plaintiff is allowed to amend his plaint so as to make it entertainable in a revenue Court, in which case the plaint can be returned for presentation to the revenue Court.

The only difficulty that arises is in reference to the use of the learned Judges of the phrase at p. 508:

> "If it is found . . , ... that the facts alleged by the defendant are true,"

and the repetition of practically the same phrase at p. 513,

> "the allegations made in the written statement . . . . found to be true."

Taken literally, it would be found that the allegations in the written statement are e. g., the defendant is a land-holder the defendant has collected rents, and such like statements of facts. We do not think however that the words we have quoted be taken to mean that the Court in trying the issue of jurisdiction must literally determine the truth or otherwise of such allegations. The issue that it has to frame in order to determine questions of jurisdiction is not whether the defendant is a landholder, tenant etc., but whether the defendant is "claiming as a landholder, tenant etc." in the words of S. 99. But we have it on the authority of the same Full Bench decision that the word "claiming" cannot be held to mean merely pleading a claim. The issue therefore which the Court has to determine is in effect whether the defendant is claiming as a landholder, tenant etc., and whether there is a reasonable substance in that claim. We think corroboration of our view that this was what was intended by the learned Judges is to be found in the passage at the bottom of p. 512 where they say:

> "It has been said that the object of the legislature was to attract to the revenue Courts all suits in which any question of tenancy rights is involved. We may accept this, but we may also insist that the question must be a real one and not merely a litigious allegation. If there is a real question the plaintiff will be aware of it, and he will either set it out in his plaint and have it tried by the revenue Court, or he will conceal it and find that his suit is dismissed by the civil Court."

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(1) A. I. R. 1930 All. 158=124 I. C. 478.

(2) A. I. R, 1930 All. 193=124 I. C. 540=52 All. 501 (F.B.).

Had it been clear that S. 99, Act 3 of 1926, was applicable to the dispossession in question in the present suit, which was long prior to 7th September 1926, we should have proceeded to apply the judgment of the Full Bench and the view that we take of it to the present case. There is however the initial question as to whether S. 99 is applicable at all, and in view of the decision of the two Judges to which we have already referred, we think it desirable that the matter should be considered by the Full Bench. It has already arisen more than once to the knowledge of one of us, and calls for authoritative decision. Another point that might have arisen in this case is the applicability of S. 121, Act 3 of 1926, but it does not appear to have been raised in either of the Courts below by either side or by either Court.

In view of what we have said, let the case be laid before the Hon'ble the Acting Chief Justice with a view to the constitution of a Full Bench. Their Lordships then referred the matter to the Full Bench, which gave its decision as under:

Sulaiman, Ag. C. J.—The plaint as it was filed and as it stands unamended was merely for a declaration of title on the allegation that the plaintiffs were in possession. After the arguments were over, the plaintiff applied that if they were found to be out of possession, a decree for possession might be passed. The plaint may accordingly be treated as a plaint in a suit for declaration of title and, in the alternative, for possession. If the new Tenancy Act of 1926 were to apply, the suit would be under S. 121, and in the alternative under S. 99 of the Act.

If a new enactment lays down that a person may under certain conditions sue for certain specified reliefs, and he sues after the Act has come into force it would not, strictly speaking, be giving to the Act a retrospective effect if he avails himself of its provisions. The Act is in force when he is suing, even though his cause of action might have accrued before the Act was passed. It would be a retrospective effect, if we applied the Act to a suit previously instituted. The present plaintiffs-tenants are being "prevented from obtaining possession" of a part of their holding, and they have also possibly been "ejected." The Act does not say that the ejectment should have been before the Act came into force. It of course implies that they should have been ejected or prevented from obtaining possession, before the suit is filed. The expression "otherwise than in accordance with the provisions of this Act," to my mind does not mean that even if they had been ejected in accordance with the provisions of the previous Tenancy Act, they have been conferred a right under S. 99. A statutory right conferred by a new Act may even be made a foundation of defence to the plea of res judicata. If the plaintiffs were ejected unlawfully before the new Act, they are persons who have been ejected "otherwise than in accordance with the provisions of this Act." Surely it cannot be said that in such a case they have been ejected in accordance with the provisions of this Act. If the plaintiffs fulfil the requirements of the section and bring themselves within its scope, there appears to be no reason why they cannot avail themselves of a new enabling section which has come into force before the suit is actually filed.

No doubt a substantial right is not assumed to be taken away by a new Act unless it expressly says so. But a right to sue in one Court rather than another or a right to wait for a particular period of time before suing is not a substantive right. The selection of forum and the period of limitation are ordinarily matters of procedure only. The selection of a Court in no way affects the right of suit itself. The Limitation Act does not necessarily extinguish the right, though it certainly places a bar against the remedy by suit.

It seems to me that so far as the old S. 79 and the new S. 99 are concerned, they do not deal at all with the choice of Court or the period of limitation. Under the former section a right to sue was conferred, and that right has been re-affirmed under the latter. Indeed, it has been to a certain extent enlarged, if not explained.

The period of limitation has been curtailed, if at all, as a result of S. 232 read with Sch. 4. The forum is fixed by virtue of S. 230 read with that schedule. There is nothing in S. 99 which either curtails the period of limitation or fixes the forum. This is patent.

from the fact that if S. 99 were omitted from Sch. 4, the result as to forum and limitation would be different, even though the phraseology of S. 99 were to be left absolutely untouched.

The legislature apparently intends that disputes relating to agricultural lands should be settled in the revenue Court, and settled promptly. It considers that six months provide an ample time for a tenant to sue. I would much rather consider it a deliberate provision than attribute to the legislature a blunder due to ignorance that there may be hard cases unprovided for.

Section 230 confers exclusive jurisdiction on revenue Courts and ousts the jurisdiction of the civil Courts of suits "of the nature" specified in Sch. 4. The legislature instead of saying "all suits specified in Sch. 4" has stated "all suits of the nature specified etc." It would therefore seem to me that if the present suit is "of the nature" of a suit under S. 99, even though it may not strictly come under that section, the jurisdiction of the civil Court is barred.

No doubt under the old Tenancy Act it was held that a suit between rival tenants was cognizable by the civil Court. But one possible view would have been that even a rival tenant could obtain adequate relief from the revenue Court by impleading the landholder also, and therefore the old S. 167 applied to his case. There was certainly no bar to his impleading the rival tenant in a suit under the old S. 95. He might also have impleaded the landholder in a suit under S. 79 by treating the possession of a person claiming through the landholder as the constructive possession of the landholder. Similarly, it was held in a number of rulings that if a tenant was prevented from obtaining possession, he was not "dispossessed." Here again a different view was possible. Might it not be that the legislature has merely disapproved of these rulings? On this view the new Act in no way curtails the period of limitation or alters the forum.

Again, the only question before a civil Court is one of jurisdiction. The further question, what period of limitation would apply if the suit were filed in a revenue Court is not at all before us. Whatever we may say would be a mere obiter dictum and would not be binding on the revenue Courts. Revisions and appeals arising out of suits under S. 99 would lie exclusively to revenue Courts. In Sch. 4 there is no starting point of limitation mentioned where a tenant is prevented from obtaining possession as distinct from dispossession. It may be that the revenue Courts may hold that the six months rule does not apply to such prevention. Or it may be that they may hold that the right to sue on such prevention has been conferred for the first time by the new Act which would give a fresh start for limitation. Or they may hold that such a suit is not barred by limitation at all, as there is no period of limitation fixed for it in the schedule. Or they may say that in such a case the cause of action accrues year after year, and the rights of the parties must be determined irrespective of any question of limitation. It is unnecessary to speculate what the revenue Courts may actually hold as it is quite outside our function to do so. All that I can say is that when a question of limitation is raised it ought to be decided in accordance with the law of limitation in force at the time of the institution of the suit and not that in force at the time of the cause of action, unless there be any express provision to the contrary in the Act itself.

I would not wish to express any opinion on the case of a rent-free grantee, who was not a tenant, and it is doubtful whether his interest was a "holding" under the old Act.

I have accordingly grave doubts as to the inapplicability of S. 99. But I must admit that as a result mainly of some of the previous rulings of this Court, there might be great hardship in some cases and plaintiffs may be left without any remedy. As my learned brethren think that the section should not be made to apply where a cause of action on an ejectment had arisen before the Act was passed, I am not prepared to dissent, but solely because of the hardship mentioned above.

Defendants 1 and 2 are admittedly two of the zemindars of the mauza. After they obtained ejectment of Badal from the revenue Court they consistently took up the position that the fixed rate tenancy was extinguished, and never said that they continued to be co-tenants. I might have been inclined to the view held by the Board of Revenue that ejectment by a few out of several landholders would bring the case under the old S. 79 also. The entire coparcenary body cannot be treated as a corporation or as a single juristic unit. All the cosharers are landholders. For a person to be a landholder it was not necessary under S. 3 (5) of the old Tenancy Act that the whole rent should be payable to him. But the majority of my learned brethren think that the question does not arise because it is now found that the defendants are cotenants, and they therefore must have ejected the plaintiffs in the capacity of co-tenants and not zamindars. As it is not disputed that S. 99 of the new Act would now cover the case of dispossession by some of the landholders only, the question has lost its importance. I need not therefore consider the position under the old S. 79 at any length.

The fear of a curtailment of the period of limitation or of the taking away of any vested right does not apply to a declaratory suit under S. 121, as no period of limitation is fixed for such a suit. Such a suit is clearly cognizable by the revenue Court only, even though the denial of title took place before the Act came into force.

It follows that if the plaintiff alleges that he is in possession and claiming the declaration against the landholder or persons claiming through him, but, in the alternative, asks for possession in case it be found that he was out of possession, his plaint is liable to be returned for presentation to the revenue Court. The Court however may require him to make up his mind whether he would admit his dispossession and ask for recovery of possession. If he does not admit dispossession, the Court cannot allow him to lead evidence to show that he is in possession, but must return the plaint. If the plaintiff gives up his allegation of being in possession and amends his plaint so as to turn the suit into one for recovery of possession on a dispossession which took place before the Act the Court should proceed to try the question of title.

With regard to the interpretation of the rule laid down by the majority of the Judges in the Full Bench case of *Ananti* v. *Chhannu* (2) the referring order accurately represents it. The word "claiming" does not mean pleading in the written statement. If the suit cannot be thrown out on the allegations contained in the plaint, the Court must proceed to determine the question of fact whether the person sued against was a landholder, or any person claiming as landholder, or any person claiming through such landholder or person. A mere false allegation that he was so claiming would not do. The expression "claiming through such landholder or person" is an adjectival clause qualifying the word "person." It must be found that the defendant was such a person. One cannot be a person claiming through such landholder or person, unless he either derives title from him (e. g., a transferee) or holds under him (e. g., as a thekadar, lessee or tenant, etc.) or is authorized by him and is acting on his behalf as an agent or servant. If such a fact were established in investigation by the Court, then, unless the Court permits the plaintiff to amend his plaint, the suit would have to be dismissed because the allegation, on which the plaintiff came to Court, that the defendant was a mere trespasser, would be found to be untrue.

Mukerji, J.—This is a reference to the Full Bench to determine whether the suit brought under the following circumstances is cognizable by the civil Court in which it was instituted, or whether it should have been filed in the revenue Court.

The plaintiffs, who are the respondents here, are the sons and legal representatives of one Bishunath Singh. One Badai Lonia was a tenant at fixed rate of a holding comprising six bighas odd of land. The tenancy at fixed rate being transferable under the law, Badal Lonia made a simple mortgage of about 3/4ths of this holding in favour of Bishunath on 28th October 1903. Several years later, on 20th July 1911, he sold the remaining area of his holding to Sumran Singh, the father of defendants 1 and 2, who are the appellants before us. Bishunath Singh brought a suit on his mortgage, and made Sumran a party to the suit, along with the mortgagor, Badal. Bishunath obtained an ex parte decree for sale on 9th May 1912. In due course the decree was executed, the property mortgaged was sold and was purchased by Bishunath Singh himself, who got delivery of possession on 14th October 1915. In the meanwhile, Sumran, who was a cosharer in the village, took steps to have Badal ejected, and took delivery of possession as against Badal on 25th June 1912. To these ejectment proceedings Bishunath was no party, and the lower appellate Court has found that the ejectment proceedings were fraudulent and held behind the back of Bishunath Singh in order to injure him. Bishunath Singh's name was recorded in the revenue papers by an order dated 8th March 1917, in spite of Sumran's objection to the contrary.

It appears that the fixed rate tenancy is in the possession of certain subtenants, and they pay rent. Bishunath Singh sued the subtenants for recovery of rent, but the subtenants pleaded that they had paid their rent in good faith to Sumran Singh. The suits succeeded in the first Court, but were lost in the Court of appeal, which gave its judgment on 4th April 1923. Thereupon, the respondents brought the suit out of which this appeal has arisen to obtain a declaration that they were the owners of 3/4ths of the holding, and to that extent were entitled to recover the rents from the subtenants. While the suit was still pending in the Court of first instance, the plaintiffs asked for possession. The plaintiffs' case was that the principal parties, that is to say, the plaintiffs and defendants 1 and 2, were co-tenants, and the defendants as holders of a fractional share in the tenancy had no right to usurp the entire rent payable by the subtenants.

The defence was that defendants 1 and 2 were in possession as zamindars, having ejected Badal before Bishunath could put the tenancy to auction sale in pursuance of his mortgage decree. They also pleaded that the suit was not cognizable by the civil Court, and was barred by the six months' rule of limitation, inasmuch as S. 79, Tenancy Act, 1901, applied to the case.

The first Court dismissed the suit on the ground that the plaintiffs-tenants' rights had come to an end. In appeal by the plaintiffs, the subtenants were exempted on the ground that the main contest lay between the plaintiffs and defendants 1 and 2. The appellate Court found that the ejectment proceedings were bad and collusive, that the defendants' father could not have ejected the mortgagor tenant, because the former himself was liable to pay the rent, being a fractional owner of the tenancy, that the land being actually in the possession of subtenants, there could have been no dispossession of the plaintiffs and that, in any case, the dispossession of the plaintiffs was not by a zamindar, but by a co-tenant. The learned Subordinate Judge also found that defendants 1 and 2 were not the sole zamindars of the holding in question but were one of 35 or 36 cosharers owning the holding. On the question of jurisdiction both the Courts below held that the suit was cognizable by the civil Court.

In appeal the question is whether the suit was cognizable by the civil Court. The argument of the appellants is that the suit is between co-tenants, and therefore falls withing the purview of S. 99, Tenancy Act of 1926, and that being the case, S. 230, Tenancy Act of 1926, barred the jurisdiction of the civil Court.

There can be no doubt that a suit between rival tenants falls within the purview of S. 99, inasmuch as it is a suit by a tenant against a person claiming through the landholder. It was held by a Full Bench of three Judges in the case of *Sahdeo* v. *Budhai* (3) that a suit between co-tenants falls within the purview of S. 99, Tenancy Act of 1926 The words "claiming through" in Cl. (b), S. 99, mean, holding a derivative title from the landholder. The idea is that where a suit is against a landholder or a person who pretends to be a land-holder, having a right to eject the plaintiff, or where the suit is against a person holding a derivative title from such landholder or person claiming as above, the suit should be governed by S. 99, Tenancy Act of 1926. "Claiming through" cannot mean raising a plea by way of defence or making a false claim without the shadow of title. Here in this case, the defendants are purcshaers of a quarter share of the fixed rate tenancy, and therefore they are persons who "claim through" the landholder. The suit is, on the face of it, governed by S. 99.

The question however is whether S. 99 has a retrospective effect, and applies to a case where the cause of action arose before the Act came into force. In the case before us the Court below has granted a decree for possession, and therefore we must take it that the prayer for amendment of the plaint for granting possession was allowed by the lower appellate Court. The dispossession in this case must be taken to have taken place in 1923, when the appellate Court decided against the plaintiffs. The plaintiffs' cause of action, for the suit for claiming possession arose in 1923, namely, more than three years prior to the coming into force of the Act of 1926. As stated above, the question is : Does this Act apply ? If it does, the suit was wrongly brought in the civil Court, and it will be our duty to return the plaint to the plaintiffs for presentation to the proper Court.

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(3) A. I. R. 1929 All. 571=117 I. C. 337=51 All. 853 (S.B.).

There are solid reasons against holding that S. 99 has a retrospective effect.

Section 99 is not a rule of procedure of adjective law. It professes to lay down remedies for a wrong. The law of remedies is substantive law, and therefore ordinarily the law will have no retrospective effect. This is a well-known proposition of law, for which no authority need be quoted. It is, no doubt, open to the legislature to enact a substantive rule of law and yet to give it a retrospective effect. But the presumption as regards interpretation is that, unless and until the legislature gives the clearest indication that a rule of substantive law will have a retrospective effect, the Court will not give the rule that effect.

In Craies' Statute Law (Edn. 3 by Pease and Gorman) there appears the following opinion at p. 326 :

> "If the enactment is expressed in language which is clearly capable of either interpretation, it ought to be construed as prospective only."

Again the book quotes Lord O'Hagan as having pronounced the following :

> "Unless there is some declared intention of the legislature clear and nnequivocal or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective and not retrospective."

At p. 330 appear the following observations:

> "It is a well recognized rule that statutes should be interpreted, if possible, so as to respect vested rights."

Again :

> "In the absence of anything in an Act to show that it is to have a retrospective effect, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time that Act is passed."

I may lay emphasis on the last quotation. Again at p. 331 we have the following :

> "It seems a strong thing to hold that the legislature could have meant that a party who. under a contract made prior to the Act, had as perfect a title to recover a sum of money as he had to any of his personal property, should be totally deprived of it without compensation."

I have quoted enough from the book to show that where an existing right is likely to be taken away by the operation of an Act, unless there is something which compels a Court to give the Act a retrospective effect, it will not give the Act that effect.

In the light thus thrown by decided cases, on the authority of which the observations quoted in Craies are based, I shall consider the provisions of S. 99.

So far as the Allahabad High Court is concerned, it was settled law that a suit between rival tenants was cognizable by civil Court, and the rule of limitation applicable was 12 years. No doubt some Judges have expressed a doubt as to the correctness of this proposition, but the proposition has been so long held in this Court that the rule laid down amounted to a rule of law. It is not necessary to quote authorities on the point. In view of this rule of law, the plaintiffs could very well wait for four years before they instituted the suit in 1927 to recover possession from their co-tenants. If the plaintiffs are now told that S. 99 applied to their case because the suit fell within the language of S. 99, the result would be that the plaintiffs would find that the six months' rule of limitation, under Art. 12, Sch. 2, Tenancy Act of 1926, applied to their case, and their suit was already time barred in October 1923, well nigh three years before the Act of 1926 came into force. This is a position which is hardly desirable. It was argued that the legislature really disapproved of the decisions of the High Court in which it was held that suits between tenants were covered by the Civil Procedure Code and not by the Tenancy Act of 1901, and really gave effect to a decision of the Board of Revenue to the contrary. This may be so ; but did the legislature say in so many words, or by necessary implication, that they were not only overruling the opinion of the Allahabad High

Court, but were also giving the law framed by them a retrospective effect, with the result described above? I fear there is no such indication of the mind of the legislature to be found within the four corners of S. 99.

Again, there is a number of cases in which similar hardships would accrue.

A rent-free grantee was not a tenant under the Tenancy Act of 1901, nor is he a tenant under the Tenancy Act of 1926. Yet the legislature has deemed it fit to put him down with a tenant under the rule enacted in S. 99 of the Act of 1926. A rent-free grantee, not being a tenant, did not come within the purview of S. 79, Tenancy Act of 1901, which provided remedies for ejectment by a landholder. A rent-free grantee's suit, in case of ejectment by a landholder, was therefore, before the passing of the Act of 1926, cognizable by the civil Court, and the rule of limitation applicable to such a suit was 12 years, and not 6 months. Supposing that a rent-free grantee was ejected a year before the Act of 1926 came into force. When he brings his suit for recovery of his land against the landholder, he finds, if S. 99 applies, that he has to go to the revenue Court. So far there is no harm. But he finds also that his suit, by the application of Art. 12, Sch. 4, Act of 1926, was already barred by time, six months prior to the promulgation of the Act of 1926. Is it a position desirable? Are we bound to hold that S. 99 has a retrospective effect, although the result of such retrospective effect would be so disastrous?

Again, let us take the case of a suit by a tenant against a person who claims to be a landholder, although he may not be one. Such a suit, before S. 99 came into force, was undoubtedly a suit cognizable by the civil Court, and governed by 12 years' rule of limitation. If the tenant was dispossessed by a person claiming to hold the position of a landholder, and claiming a right to eject the tenant, more than six months before the passing of the Act of 1926, he will find, when he brings his suit under S. 99, that it was already time-barred at the date of the institution of the suit, although he never had any reason to suppose that he should bring his suit so quickly.

Then again, let us take the case of a tenant who got a seven years' lease from the landholder. Let us suppose that having paid the premium and obtained a written and registered lease, the tenant is unable to get possession, and he must bring a suit. To such a suit S. 79 of the Act of 1901 did not apply, for it was no case of ejectment. It was accordingly held by this Court that the tenant's suit, in the circumstances, would lie in the civil Court, and the rule of limitation would be 12 years. If the tenant, after the passing of this Act, brings his suit within a year of his cause of action, namely, the date of the execution of the lease in his favour, he would be told that his suit was already time barred within six months of the arising of his cause of action. This is a contingency which must be avoided, and we must hold that S. 99 has not a retrospective effect.

Examples may be multiplied to show that similar hardships would arise in other cases also.

But it has been argued that hardship is no good reason for interpreting a law otherwise than it should be interpreted, that if any hardship arises, it is not on account of an application of S. 99, but by the application of the rule of limitation, which is only a procedural law, and that when S. 99 gives only a right of suit and says that a tenant and others mentioned there "may sue," S. 99 must be applied. I shall consider this argument seriatim.

Before I take up any of these arguments, I will point out that the language of S. 99 of the Act of 1926 also points to the conclusion that it is applicable only when a cause of action arises after the Act has come into force. It contains the words "otherwise than in accordance with the provisions of this Act." A plaintiff is allowed to sue under S. 99, and to ask for the remedies prescribed by it where he finds himself ejected from, or prevented from obtaining possession of his holding. How can it be said, if the ejectment of the plaintiff took place, or if the prevention from obtaining possession took place, before the Act came into force. Supposing the plaintiff described above wants to bring his suit at once and there is no Act of 1926 in force, how will he know that he has been ejected from, or prevented from obtaining possession of his holding "otherwise than in accordance with the provisions of the

Act of 1926?" It has been argued that the words "otherwise than in accordance with the provisions of this Act" mean nothing but this:" otherwise than in accordance with law." If that was so, it would have been much easier and more expressive to use the latter expression than the former. By using the words "this Act," I should think the legislature intended that this S. 99 should apply only where the cause of action arises after the Act has come into force.

Now I take up the three arguments which I have noticed above.

First I take up the question whether the hardship alluded to above is caused by S. 99, or by the application of the law of limitation, and whether therefore we should apply S. 99, irrespective of the consequences due to the application of the law of limitation. In my opinion, this argument is only partial, and does not take notice of the full consequence of the application of S. 99. S. 99 cannot be read apart from the law of limitation that is applicable to a suit under S. 99. The argument of hardship is advanced only to show that it was not the intention of the legislature to apply S. 99 to cases in which the cause of action arose before the enforcement of the Act. If we were otherwise certain that S. 99 must be applied to a suit of the nature described in S. 99, then it would be immaterial for the purposes of the Court administering justice, whether the law of limitation adversely affected or not the litigants: for then we can take it that the legislature did not care if some cases of hardship did occur. But it is precisely because we do not know in clear terms that the legislature meant to apply S. 99 to cases where the cause of action arose before the law came into force, and because we know that as a matter of principle, substantive law, or indeed any law, is not to be given a retrospective effect, unless the intention is clear on the point, that we have to look to the consequences of the application of the law. So much for the first and second arguments.

The third argument is that the words "may sue" only make the section an enabling one, and not a compulsory one, and wherever the facts of the case bring it within the language of S. 99, it must be applied. This again, in my opinion, is a fallacious argument. Where S. 99 does not apply, because the cause of action arose before S. 99 became the law, the suit is based, not on S. 99, but on older law, i. e., either the Civil Procedure Code or the Tenancy Act of 1901. The present suit is not under S. 99 of the Act of 1926, and there is no compulsion on the plaintiffs to sue according to S. 99.

I come to the conclusion, then, that to the case before us, namely, to a suit by a tenant against a co-tenant for recovery of possession, on the ground that he was dispossessed in 1923, S. 99 has no application.

It follows that the plaintiffs' remedy is in the civil Court.

On the allegations made in the plaint, the suit was cognizable by the civil Court. The suit was taken cognizance of by the civil Court. Although the plaintiffs alleged in the plaint that they had been dispossessed by a co-tenant, it was open to the defendants to show that they (the defendants) had dispossessed the plaintiffs, not in their capacity of tenants, but in their capacity of zamindars. In other words, if the defendants succeeded in showing that they were the zamindars of the fields in question, and that they had dispossessed the plaintiffs in their (defendants') capacity as zamindars, the Court would be bound to find that it was a case to which S. 79 of the Act of 1901 applied, and the suit would be thrown out on the ground that the plaintiffs came to Court on a false cause of action, which did not give the civil Court jurisdiction to try the suit. But such is not the case here. It has been found that the plaintiffs' allegation is true, namely, that they were dispossessed by their co-tenants.

The rule of limitation for a suit like this, in which the cause of action arose in 1923, was 12 years, and the present suit is within that time. The result is that the suit was rightly decreed by the lower appellate Court.

I would, for the foregoing reasons, dismiss the appeal with costs, including counsel's fees in this Court on the higher scale.

Boys, J.—This case was referred to a Bench by Bajpai, J. sitting singly.

It came up for hearing before myself and Smith, J.

Before us, the Division Bench, the case was argued as if the plaint was framed as asking for relief against a trespasser. It is immaterial now to consider why this view of the case was accepted in argument, but it may be that it was to some extent due to the pleadings in para. 3 of the plaint, and paras. 13 and 16 of the written statement. The case was therefore argued before the Division Bench with reference to the effect on it of the decision in *Ananti* v. *Chhannu* (2), where it was held that where the plaintiff sues as a tenant alleging the defendant to be a trespasser, the case is cognisable by the civil Court. As the Division Bench was in some doubt as to the meaning of the Full Bench when speaking of the issues to be tried by the civil Court, the case was referred to a stronger Bench with a view to interpret that part of the Full Bench decision in reference to which the Division Bench was in doubt. We were further of opinion that an important point was involved in the case, namely, as to the applicability of S. 99, Tenancy Act 3 of 1926, to cases where the ejectment, or the date on which the plaintiff first began to be resisted in obtaining possession, was prior to the commencement of the Act.

On the case coming before a Full Bench of three Judges, attention was drawn specifically to para. 1 of the plaint which suggests that the position taken by the plaintiff was that he as co-tenant of three-quarters of an undivided fixed rate tenancy was being resisted by the defendants as co-tenants of the remaining quarter. In this aspect of the case, it is manifest that the decision of this Court applicable is not *Ananti* v. *Chhannu* but *Sahdeo* v. *Bhudai* (3), in which it was held that where a plaintiff sues for possession as co-tenant, alleging the defendant to be a co-tenant, he must go to the revenue Court.

If this is all that there was in the case the appeal would have had to be allowed.

There remained however the question of the applicability of S. 99, and with this may be considered also the applicability of S. 121 also, of Act 3 of 1926. S. 121, again, was not relied on in argument before the Division Bench, but in our referring order we made reference to this section as requiring consideration.

I have no hesitation in holding that Ss. 99 and 121 both deal with substantive rights and are not matters of adjective law. They both declare the right of the plaintiff in certain circumstances to sue. They have nothing to do with the question of venue, or any other matter of procedure; these matters are provided for by S. 230 read with Sch. 4. Nor have they even anything to do with the question of limitation.

To consider S. 99 first: I am of opinion that it is not applicable to any ejectment or resistance to possession, which ejectment occurred or resistance commenced before the passing of Act 3 of 1926.

In the first place it does not apply to any ejectment, etc., which has been effected "otherwise than in accordance with the provisions of this Act." These words are ambiguous. Literally read, they clearly suggest that the Act is only intended to be applicable to circumstances occurring after the commencement of the Act, for a person could not be ejected or prevented from obtaining possession in accordance with the provisions of this Act before the Act came into force. On the other hand, to read the Act thus literally would mean to hold, in the first place, that a person, who had been lawfully ejected prior to the Act under the previously existing law, could be said not to have been ejected "in accordance with the provisions of this Act," and therefore under S. 99 a right of suit would be conferred by S.99. This is manifestly absurd, but in effect any such absurdity would be prevented by the principle of res judicata.

I am disposed to think, that the existence of these saving words and the form in which they occur, may be very simply accounted for. A draftsman would naturally set out to say the circumstances under which a person ejected, etc., could sue. It would then occur to the draftsman or to somebody else:

> "But you have given him a right to sue "if ejected," and that would cover even lawful ejectment under this very Act."

This would suggest naturally incorporation of the words "otherwise than in accordance with the provisions of this Act." It might have occurred, but evidently did not occur, to the draftsman that there was also the case of ejectment according to law under the previous Act.

Enough has been said to indicate that the words are ambiguous, and no amount of speculation can remove that ambiguity ; and that being so, the most beneficial interpretation must be given to the words, and that is, that the Act does not apply to events occurring before the Act came into force. That is the most beneficial interpretation manifestly, for otherwise a suit might by the harsher construction be barred by limitation and might, owing to the change in the law, be barred by limitation months or years before the Act came into force.

It is true that in certain cases a new period of limitation may bar the remedy which a plaintiff would have had before the statute came into force giving the new period of limitation, but I cannot find anywhere that this is a hard and fast rule applicable without exception to all cases, and it appears to me that the present is a case to which certain remarks of Lord Campbell, C. J., are particularly applicable. I quote from Craies' Statute Law, Edn. 4 of Hardcastle on Statutory Law, 1907, p. 331 :

> "The question arose whether this Act had a retrospective operation and was to apply to cases of damage done before its passing. The Court decided that it was retrospective, and Lord Campbell, C. J., in giving judgment, said : 'If the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention on the part of the legislature not to give it a retrospective operation, but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal . . . . . .' A certain time was allowed before the Act was to come into operation, and that removes all difficulty."

Now in the present case the hardship caused by holding the Act to be in the sense we are now considering retroactive is manifest, and in the Act itself there is no period of grace allowed to suggest that it was intended to be so retroactive. The Act came into force within seven days (i. e. the necessary period for printing and notifying in the Gazette) from the date of the Governor-General's assent.

As to S. 121 it has been established before us that on the pleadings as eventually settled this must be regarded as not merely a suit for a declaration but a suit also for possession.

I would therefore hold that the civil Court had jurisdiction and dismiss the appeal.

King, J.—I agree with Mukerji, J., that the jurisdiction of the civil Court to try the suit is not ousted by S. 99 read with S. 230, Agra Tenancy Act, 1926.

As the lower appellate Court has granted a decree for a declaration and for possession, we must take it that the plaintiff was allowed to amend his plaint by adding a prayer for possession. Before this amendment of the plaint the plaintiff sought merely a declaration of his right as tenant. The jurisdiction of the civil Court to try such a suit was clearly barred by S. 121 read with S. 230, Tenancy Act, 1926. The material allegations and reliefs set forth in the amended plaint may be taken to be briefly as follows: The parties are co-tenants of a fixed rate holding, the plaintiff having a three-fourths share and the defendants a one-fourth share. The holding is cultivated by subtenants. The defendants collect the whole rent from the subtenants and deny the plaintiff's right to any share of rent, and thus have wrongfully dispossessed the plaintiff. The cause of action arose on 4th April 1923 when the plaintiff's rent-suit was dismissed by the appellate Court, and also in June 1925 when the defendants denied the plaintiff's title. The plaintiff prays for a declaration of title to three-fourths of the holding and for recovery of possession.

If we ignore the date of the cause of action, then the suit clearly falls within the scope of S. 99, Agra Tenancy Act, 1926, and the jurisdiction of the civil Court is barred by S. 230.

The main question for our determination therefore is whether S. 99 applies to a suit when the cause of action (i.e., the wrongful ejectment, or the wrongful prevention from obtaining possession) arose before 7th September 1926 when the Agra Tenancy Act of 1926 came into force.

I think this question should be answered in the negative, partly on general principles of interpretation, but mainly on the interpretation of S. 99 itself.

Before the Tenancy Act of 1926 came into force the plaintiff had a vested right of suing the defendants, his co-tenants, who had wrongfully dispossessed him, for recovery of possession. The suit lay in the civil Court, as S. 79, Tenancy Act, 1901, only applied to a suit by a tenant against his landholder. The plaintiff's case was that the defendants ejected him as co-tenants and not as landholders, and the Court below has found this to be correct. The period of limitation was 12 years. We may take the cause of action to have accrued on 4th April 1923 when the plaintiff's rent suit was dismissed by the appellate Court. It is clear therefore that the plaintiff had a vested right of suit on 6th September 1926. Did he lose that right on 7th September 1926 when the new Act came into force ?

Now it is a well recognized rule that statutes should be interpreted, if possible, so as to respect vested rights : Craies on Statute Law, Edn. 3, p. 330. Many cases might be cited to show that Courts have refused to allow statutes to have retrospective effect, although their language seemed to imply that such was the intention of the legislature, because, if the statutes had been so construed, vested rights would have been defeated.

The Gaming Act, 1922 repealed S. 2, Gaming Act, 1835 (which made money paid to the holder of securities given for consideration arising out of certain gaming transactions recoverable from the person to whom the securities were originally given) and enacted that :

> " no action for the recovery of money under the said section shall be entertained in any Court."

In *Henshall* v. *Porter* (4), McCardie, J., held that in accordance with well-established rules of construction, as well as by virtue of S. 38 (2), Interpretation Act, 1889, the Act of 1922 does not prevent the bringing of an action under the repealed section of the Act of 1835, after the date when the repealing Act came into force, in respect of a cause of action which had arisen before that date.

It must be observed that S. 38 (2), Interpretation Act, 1889, is almost verbally identical with S. 6, U. P. General Clauses Act, 1904.

In accordance with well-established rules of interpretation therefore S. 99 must not be construed as defeating the plaintiff's vested right of suing for recovery of possession unless the legislature makes it perfectly clear that this was their intention.

Now if we construe S. 99 as applying to suits where the cause of action arose before the 7th September 1926, it is clear that the plaintiff is absolutely deprived of his remedy. The period of limitation for a suit under S. 99 is six months from the date of wrongful dispossession. This means that the suit became time barred on 5th October 1923, about three years before the Act of 1926 came into force.

It is argued that the time within which a suit must be instituted is a question of procedure and there is no vested right in procedure. This is true, but in the present case if S. 99 were held applicable it would not merely mean that the plaintiff must sue in the revenue Court instead of in the civil Court and that he must file his suit within a shorter period. It means that the plaintiff cannot sue at all, as his suit had become time barred long before the new Act came into force. Hence the alteration in the rule of procedure would operate as an alteration of substantive law in absolutely depriving the plaintiff of his remedy. This is an undoubted hardship, and this case is by no means likely to be an isolated or exceptional case.

These considerations emphasize the duty of the Court to interpret the statute, if possible, so as to respect vested rights.

Turning now to the consideration of the language of S. 99 I think it may be fairly held to indicate that it is not intended to apply to cases where the cause of action arose before 7th September 1926.

Section 99 provides for a suit by a tenant. . . . ejected from or prevented from obtaining possession of his holding. . . . " otherwise than in accordance with the provisions of this Act." I lay stress on the last words. " This Act" means of course the Act of 1926. Now take the case of a tenant ejected in 1923. It was obviously impossible at the time of the ejectment to determine whether he was, or not, ejected in accordance with the Act of 1926. S. 99 clearly could not apply to such a case unless we amplify the phrase so as to mean

> " otherwise than in accordance with the provisions of this Act, if this Act had been in force at the time of the ejectment."

But this is very far fetched. I think the language of the section shows that it was only intended to apply to cases where the cause of action arose after the Act of 1926 came into force. It is only in such cases that it is possible to decide whether the dispossession was, or was not, in accordance with the provisions of the Act of 1926.

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(4) [1923] 2 K.B. 193=92 L.J. K.B. 866=39 T.L.R. 409=67 S.J. 537=129 L.T. 443.

I hold therefore both upon the general rules of interpretation, and upon the interpretation of the section itself, that S. 99 does not apply to this suit, as the cause of action arose before 7th September 1926. The civil Court therefore had jurisdiction to try the suit. I agree that the appeal should be dismissed with costs.

Bajpai, J.—I agree generally with the opinion of the Acting Chief Justice, but like him I am not prepared to dissent from the order proposed by the majority of the Bench.

I only wish to point out that I am of the opinion that the law of limitation is a law of procedure and the general rule is that a statute of limitation is retrospective in its operation and governs all proceedings from the moment of its enactment, even though the cause of action might accrue before the Act came into force. In *Soni Ram* v. *Kanhaiya Lal* (5), their Lordships of the Privy Council held that in a suit brought on 4th March 1907 for the redemption of a mortgage, dated 2nd January 1842, the law of limitation applicable to the case was not Act 14 of 1859, the law in force on the date of the acknowledgments, but Act 15 of 1877 which was in force at the time of the institution of the suit.

It is said that the application of this principle might work great hardship in cases where the legislature in its wisdom curtails by a new enactment the period of limitation prescribed for a particular kind of suit, for it might well happen that a litigant in the belief that he had, for instance the 12 years for instituting the suit after accrual of the cause of action might wait for seven years and then, if a new Act is passed and the period is cut down to six years, he will not be entitled to maintain a suit, because he would be beyond time by a year on the date the new Act came into force and his right would be lost for no fault of his whatsoever. This argument assumes that a legislature would adopt such a drastic measure without making provisions for cases of this kind by inserting a period of grace. I am therefore of the opinion that no argument can be advanced based only on the hardship of the situation, because I am sure that where the legislature cuts down the period of limitation, it will always provide for hard cases by putting in a period of grace.

When a period of limitation is prescribed for the institution of a particular suit, it does not create any right in favour of anybody; but simply prescribes that a suit of that nature has to be filed within that particular period and, if it is not so filed, the remedy is lost, although the right remains. That the right remains and is not extinguished is clear by the fact that, if a new enactment is passed and prescribes a longer period of limitation, the suer would be entitled to avail himself of that extended period of limitation and obtain redress. I wish however to make it clear that the law of limitation is not always a purely adjective law, inasmuch as in certain cases it provides for the creation of rights by prescription, and the corresponding extinction of rights (S. 28, Lim. Act of 1908), and if those rights have vested in individuals under one law of limitation, they cannot be divested by the introduction of a new law of limitation or by an amendment in the law. It is only when the retrospective application of a statute of limitation would destroy vested rights that it is not to be construed retrospectively; otherwise the ordinary rule is that rules of limitation are rules of procedure and no one has a vested right in any period of limitation.

By the Court.—The suit, as amended by the addition of the prayer for possession, was cognizable by the civil Court, and we accordingly dismiss the appeal with costs, including counsel's fee in this Court on the higher scale.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 649

SULAIMAN, AG. C. J. AND BAJPAI, J.

Bishen Sarup—Applicant.

v.

M. Abdul Samad—Opposite Party.

First Appeal No. 107 of 1930, Decided on 17th March 1931, against order of Dist. Judge, Agra, D/- 17th April 1930.

(a) Evidence Act (1872), S. 74—General power-of-attorney.

A copy of the general power-of-attorney cannot be obtained by any person who is no party to the deed. [P 650 C 2]

(b) Evidence Act (1872), S. 74 (2)—S. 74(2) does not apply to document not registered but executed and authenticated before Sub-

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(5) [1913] 35 All. 227=19 I.C. 291=40 I.A. 74 (P.C.).

Registrar under Registration Act (1908), S. 33 (1) (a).

Section 74 (2) cannot apply to a document executed and authenticated before the Sub-Registrar under S. 33 (1) (a), Registration Act, but not registered, and when the original is not forthcoming it is open to a party to prove a private copy of it in the way allowed by law. [P 650 C 2]

(c) **Transfer of Property Act (1882), S. 106 —Notice is not required to fixed term lease.** Section 106 does not apply to the case of a lessee for a fixed term when the term has expired. [P 650 C 2]

(d) **Transfer of Property Act (1882), S. 116 —S. 116 regulates rights of lessor and lessee inter se.**

The provisions contained in S. 116 regulate the rights of the lessor and the lessee inter se when a suit for ejectment is brought.[P 651 C 1]

(e) **Ejectment—Suit by lessee against person continuing in possession impleading lessor is maintainable.**

A suit by the plaintiff as lessee against defendant who is continuing in possession is maintainable without a proper ejectment suit having been brought by the lessor himself when the lessor is impleaded as another defendant. [P 651 C 1]

N. P. Asthana and *Baij Nath Sahai*—for Applicant.

N. C. Vaish, P. L. Banerji and *Shabbir Husain*—for Opposite Party.

Sulaiman, Ag. C. J.—This is a defendant's appeal arising out of a suit for recovery of possession on the strength of a lease. Defendant 2 is the owner of the property which consists of a quarry to be worked. He had granted a lease in favour of defendant 1 which was to expire at the end of May 1928. Another lease was executed by Pahlad Narain, professing to be the general attorney of the owner, on 10th April 1926, in favour of the plaintiff for a period of 10 years to come into effect from June 1928 on the expiry of the lease in favour of defendant 1.

The plaintiff alleged that he had not obtained possession and accordingly sued to recover possession. He impleaded both the owner and the former lessee as defendants. On behalf of the defendants it was denied that any valid lease was executed by Pahlad Narain. On behalf of the owner it was urged that the alleged agent had no authority to grant any such lease. There was also a plea of want of notice under S. 106. A few other pleas also were taken.

The learned Subordinate Judge framed no less than seven issues, but disposed of the case on his findings of fact on issues 1 and 2 only. The learned District Judge has come to a contrary conclusion on those points and has remanded the whole case.

The first point to be considered is whether a private copy of the power-of-attorney under which Pahlad Narain, the agent, professed to act was admissible in evidence. The Courts below have differed.

A copy of the general power-of-attorney cannot be obtained by any person who is no party to the deed. The original could be produced either by defendant 2 or his agent Pahlad Narain, and we think that a copy could be obtained by these persons alone. The learned Subordinate Judge had first ordered defendant 2 to produce either the original power-of-attorney or a certified copy within 10 days. This he failed to do. Later on he was allowed to appoint a special attorney for the purpose of obtaining such copy from Patna where the deed had been executed. The only copy which was obtained from Patna was of an abstract of the power-of-attorney and not a copy of the whole document, although an application for a copy of the whole document had been made.

The abstract shows that the document was executed before and authenticated by the Sub-Registrar under S. 33 (1) (a), Registration Act. It was obviously not registered and that is why a complete copy of the original has not been retained by the Sub-Registrar. S. 74, sub-S. (2), Evidence Act, cannot apply to this case because the Sub-Registrar was not called upon to keep a public record of this private document. We are therefore satisfied that the learned District Judge was right in holding that when the original was not forthcoming it was open to the plaintiff to prove a private copy of it in the way allowed by law.

The other question that is raised on behalf of the defendants is that notice under S. 106 should have been given before the suit was instituted. As pointed out by the learned District Judge, this is not a suit for possession brought by the plaintiff lessee against his own lessor, defendant 1, who is retaining actual possession. S. 106 does not apply to the case of a lessee for a fixed term when the term has expired.

It is contended on behalf of the appellant that by virtue of the provisions contained in S. 116, notice became necessary if the lessor subsequently assented to his continuing in possession on the expired lease or accepted rent. But these sections regulate the rights of the lessor and the lessee inter se when a suit for ejectment is brought.

The next question urged is whether a suit by the plaintiff as lessee against defendant 1, who is continuing in possession, is maintainable without a proper ejectment suit having been brought by the lessor himself. Reliance is placed on the case of *Ibad Ullah Khan* v. *Ram Charan Sah* (1) for the proposition that no such suit by a lessee is maintainable. An examination of the facts of that case however shows that there the lessee could have been ejected only by the revenue Court, and he not having been so ejected, the civil Court had no power to dispossess him. It was in these circumstances that the learned Judge of the Oudh Court held that a suit by the lessee in a civil Court was not maintainable. Under S. 108, sub-S. (b), the lessor is bound on the lessee's request to put him in possession of the leased property. Thus there is a liability on the lessor to put the lessee in possession even though the actual transfer of interest in the immovable property may not have taken place. There is no reason why the lessee should not be able to enforce his own rights and the liability of the lessor to put him in possession. If the lessee can sue the lessor for possession in order to enforce the same, there seems to be no good ground why he should be debarred from doing so, merely because the lessor chooses to allow another person to continue in possession of the leased property. In this case both the lessor and the person in actual possession have been impleaded and we cannot see that there is any defect in the frame of the suit which is fatal to the claim.

As the learned Subordinate Judge had disposed of the question of ownership only and left practically all the other issues undecided, the learned District Judge thought that the case had been disposed of on a preliminary point and he accordingly remanded the whole case for disposal. He also directed that the parties should have an opportunity to produce evidence on the question of the authority of Pahlad Narain to grant the lease. He has also left undecided the other matters which are covered by issues 3, 4, 6 and 7. The plea covered by issue 5 had been given up at the trial.

We think that the order of the learned District Judge is right and we accordingly dismiss the appeal, and direct that the costs should abide the event.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 651

SULAIMAN, AG. C. J.

Sabir Husain Khan—Plaintiff — Applicant.

v.

Jan Mohammad—Defendant — Opposite Party.

Civil Revn. No. 79 of 1931, Decided on 15th April 1931, against decree of Small Cause Court Judge, Allahabad, D/- 22nd July 1930.

Limitation Act (1908), Art. 97 — Suit for setting aside decree purchased by plaintiff decreed—Decree reversed by District Judge but on appeal to High Court decree of first Court restored—Suit for refund of price on ground of failure of consideration — Time begins to run from date of High Court's decree.

Where a suit for the setting aside of the decree purchased by plaintiff on the ground of fraud is decreed in the first Court and the decree of the first Court is reversed by the District Judge but on further appeal to the High Court the decree of the first Court is restored in a suit by pliaintiff for refund of the price on the ground of failure of consideration time begins to run from the date of the High Court's decree and not from the date of the first Court's decree as when the first Court's decree was set aside by the District Judge it was superseded and it no longer remained in force: *A. I. R.* 1918 *P. C.* 151, *Dist.* 42 *Mad.* 507, *Rel. on.* [P 652 C 1]

Mushtaq Ahmad—for Applicant.

Judgment. — This is a plaintiff's revision from a decree of the Court of Small Causes. The plaintiff had purchased a decree which was ultimately set aside on appeal to the High Court. The first Court had decreed the suit for the setting aside of that decree on the ground of fraud but that decree was reversed by the District Judge. It was on a further appeal to the High Court that the decree of the first Court was restored. The present suit for refund of the price on the ground of failure of consideration was filed more than six years after the first Court's decree setting aside the decree which had been purchased but was within three years of the High Court's judgment. The learned Judge of the Court below has relied on the case of of *Juscurn Boyid* v.

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(1) [1920] 53 I. C. 140.

Pirthi Chand (1) and has held that time began to run from the date of the first Court's decree and the claim was barred by time.

It seems to me that when the first Court's decree was set aside by the District Judge it was superseded and it no longer remained in force. It was impossible for the present plaintiff to have brought a suit for the refund of the sale consideration when the suit for the setting aside of the decree which he had purchased had been dismissed by the District Judge. Time would begin to run from the date of the High Court's decree which restored the first Court's decree. The case of their Lordships of the Privy Council relied upon by the Court below is obviously distinguishable. At p. 153 their Lordships observed that

> "under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal."

The decree of the District Judge was one of reversal and not dismissal. This view is in accordance with that of the Madras High Court in *Sarvothama Rao* v. *Chinnasami Pillai* (2). I accordingly allow this revision and setting aside the decree of the Court below send the case back to that Court for disposal on the merits. Costs will abide the event.

P.N./R.K. *Revision allowed.*

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(1) A. I. R. 1918 P. C. 151=50 I. C. 444=46 I. A. 52=46 Cal. 670 (P. C.).

(2) [1919] 42 Mad. 507=49 I. C. 729.

A. I. R. 1931 Allahabad 652

SULAIMAN, AG. C. J. AND BAJPAI, J.

Sat Rohan Prasad Tewari — Defendant—Appellant.

v.

Bharath Prasad Man Tewari and *others*—Plaintiffs and Defendants—Respondents.

Second Appeals Nos. 356 and 407 of 1929, Decided on 15th April 1931, against decision of Second Addl. Dist. Judge, Gorakhpur, D/- 5th December 1928.

Limitation Act (1908), Art. 99—Decree against karta for debt for joint family purposes—After partition karta taking on himself alone whole liability—For suit for contribution by karta against other members, time begins to run from this latter date and Art. 99 applies —Contribution.

A money decree had been passed against the karta of a joint Hindu family and the debt was created for the family use. After separation, the karta in lieu of the money decree took upon himself the whole liability and sued the other separated members for contribution.

Held: that the joint family debt was wiped out when the whole liability had been taken on himself by the karta and therefore the time for the suit for contribution began to run from this latter date and that the appropriate article applicable to such a claim was Art. 99: 20 *Cal.* 18, *Ref.* [P 653 C 1]

A. P. Pandey—for Appellant.

N. Upadhiya—for Respondents.

Sulaiman, Ag. C. J.—This is a defendant's appeal arising out of a suit for contribution. It has been referred by a learned Judge of this Court to a Bench of two Judges because of the question of law involved in it. The plaintiff had three brothers who formed a joint Hindu family. They were indebted to a firm Bilas Rai, which kept the account in the name of two brothers, Bharat and Lachhman. In 1913, a suit was brought against Bharat and Lachhman for the amount due from the joint family and on 4th June 1913 a decree for Rs. 450 with future interest at six per cent per annum was passed against defendants. This decree was against the family which was represented by its karta. Admittely by that time the family was joint.

A separation took place several years afterwards. In 1924 Bharat, plaintiff, was arrested in execution of this decree and he executed a simple mortgage on 4th July 1924 in lieu of the amount due under the simple money decree. Later on another suit was filed on the basis of this mortgage deed which also was decreed, and Bharat executed a fresh mortgage-deed in lieu of this mortgage decree. Bharat then instituted a suit on 4th July 1927 for contribution against his three brothers.

The defendants pleaded that the claim was barred by limitation. The contention on their behalf was that the right to claim contribution arose on the date when the debts were incurred and that Art. 107 was a bar to their claim. In support of this contention reliance was placed on the case of *Aghore Nath Moukhopadhya* v. *Girish Chander Mukhopadhya* (1). Possibly in that case the debt was considered to be the personal debt of the manager, and it was supposed that he had expended that amount for the purposes of the family.

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(1) [1893] 20 Cal. 18.

It seems to us that in the present case the debt was not the personal debt of the karta, but was the joint family debt for which the whole family was liable. Although the simple money decree in 1913 was passed against two elder members of the family only, it was a decree against the whole family and was capable of execution by attachment of the entire family property. Therefore it was a debt due from all the four brothers. While the family continued to be joint, there was no occasion for one of the four brothers to bring a suit for contribution. No cause of action accrued for it and time did not begin to run against Bharat.

It is only when separation took place that the rights and liabilities became separate and distinct. Bharat by executing a simple mortgage in 1924 discharged a joint debt by taking upon himself the responsibility of paying it. So far as the joint debt was concerned, it was wiped out on that occasion, and it may therefore be assumed in favour of Bharat that he discharged that debt by taking the responsibility upon himself alone in 1924. The time therefore began to run against Bharat from 4th July 1924 and the appropriate article which would apply to his claim would be Art. 99, Lim. Act. The suit was brought just within three years of that date and was therefore in time. We must accordingly overrule the plea of limitation.

The second plea that has been put forward before us is that the suit is premature inasmuch as no actual payment has yet been made by Bharat. We have already pointed out that Bharat discharged the joint debt by taking upon himself the sole responsibility for paying it. This was tantamount to payment of the joint debt by him. We therefore overrule this plea also.

It appears that the plaintiff in his plaint claimed contribution, not on the basis of the amount due under the decree of 1913, but on the basis of the simple money decree which was obtained against him later on. It seems to us that the defendants cannot be liable for any enhanced rate of interest which Bharat alone might have agreed to pay subsequent to the partition. Their liability is to pay a proportionate share out of the joint debt together with the interest allowed by the decree that had accumulated up to 4th July 1924 when it was discharged. The amount due up to that date as stated in the decree was Rs. 450 with simple interest at Re. 1-4-0 p. c. p. m. from the date of the decree. The plaintiff would be entitled to three-fourths of that amount with simple interest at the above rate on that amount from 4th July 1924 till the date of realisation.

The amount due on this basis would be a good deal more than that allowed by the Court below. As the respondent has acquiesced in the decree and has not filed any cross-objection inasmuch as his suit was based on the amount due under his mortgage deed, we do not think that the decree should in any way be varied.

The appeal is accordingly dismissed with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 653

PULLAN AND NIAMATULLAH, JJ.

Naunita Kunwar and *others*—Defendants—Appellants.

v.

Mullo and *others*—Plaintiffs—Respondents.

Second Appeal No. 1003 of 1928, Decided on 28th February 1931, from decision of Addl. Sub-Judge, Benares, D/- 5th March 1928.

Hindu Law — Alienation—Widow—Inadequate consideration is no ground for setting aside sale.

While it is correct to say that a transfer by a Hindu widow for legal necessity and for an adequate price is binding on the reversioner, it does not necessarily follow that a sale otherwise justified must under all circumstances be set aside if it can be shown that the price fetched was not adequate. Circumstances might exist which make it absolutely necessary for the widow to sell her husband's own property even for an inadequate price. Each case must depend upon its own circumstances. If the necessity for the sale of the property was so great that the husband's property must be sold and if under the circumstances then existing it was not possible for her to obtain the full value of the property which had to be sold and she could not get more than what is considered to be an inadequate price, the sale would nevertheless be valid. [P 654 C 2]

K. N. Katju and *Maheshwar Nath Kaul*—for Appellants.

Gadadhar Prasad—for Respondents.

Niamatullah, J.—This is a defendants' appeal arising out of a suit brought by the original plaintiff Mt. Mullo who died pending appeal and is now represented by her sons for recovery of possession of certain property left by her father Ganesh who had died sonless, and subsequently transferred by his widow during the time she was in possession of his estate, to Mahabir Prasad who in turn transferred it to the appellant.

The property to which this appeal, as argued before us, relates consisted of a few plots in all measuring 3.70 acres. It had been leased for ten years by Ganesh to a certain thekadar at an annual rent of Rs. 6. The lease was to expire in 1913. On 27th March 1911 his widow sold it to Mahabir Prasad for Rs. 200. It has been found by the lower appellate Court that money was urgently required for the plaintiff's marriage which could not be celebrated otherwise than by selling this property. On 4th December 1911 Mahabir Prasad, who it should be mentioned, resided in the city and not in the village in which the land is situate, sold it for Rs. 400 to the appellant who is one of the zamindars of the village in which the plots in dispute lie. It is not disputed that after the death of the widow the plaintiff became entitled to the land in suit as the daughter of Ganesh. She instituted the suit which has given rise to the present appeal on 28th October 1926 impugning the saledeed dated 27th March 1911 as invalid having been made without legal necessity. In defence it was pleaded by the present appellant that the aforesaid sale was valid as the plaintiff's mother was justified by legal necessity to transfer the property now in dispute for the purpose of raising funds to marry the plaintiff. It has been found by the lower appellate Court that "there was valid necessity for executing the first sale deed" (dated 27th March 1911) "by Mt. Bindo." It proceeded to consider whether the price of Rs. 200 obtained by the plaintiff's mother under the saledeed dated 27th March 1911 was adequate. Having considered the circumstances of the case, especially the fact that Mahabir Prasad was able to sell the property eight months later for Rs. 400, it arrived at the conclusion that the sale was for inadequate consideration. It should be noted that the lower appellate Court has not definitely found that the market value of the property in 1911 was Rs. 400 or thereabout. On that finding the lower appellate Court set aside the sale on condition of the plaintiff paying Rs. 200 which, according to the lower appellate Court, had been obtained by the plaintiff's mother for a necessary purpose. The present second appeal has been preferred by the appellant.

The lower appellate Court seems to be of opinion that a sale by a Hindu widow, otherwise justified by legal necessity, should be set aside if the price obtained by her was inadequate. We are unable to accept the broad proposition stated in these terms. While it is correct to say that a transfer by a Hindu widow for legal necessity and for an adequate price is binding on the reversioner, it does not necessarily follow that a sale otherwise justified must under all circumstances be set aside if it can be shown that the price fetched was not adequate. Circumstances might exist which make it absolutely necessary for the widow to sell her husband's property even for an inadequate price. Each case must depend upon its own circumstances. If the necessity for the sale of the property was so great that the husband's property must be sold, and if under the circumstances then existing it was not possible for her to obtain the full value of the property which had to be sold and she could not get more than what is considered to be an inadequate price, the sale would nevertheless be valid. In the case before us there is evidence that the plaintiff's mother could not secure a purchaser willing to pay more than Rs. 200. The finding of the lower appellate Court that the plaintiff's marriage had to be celebrated and that the expenses thereof could not be defrayed except by sale of the property in dispute must be accepted. We must therefore take it that the plaintiff's mother was obliged by circumstances to sell the property within a limited time. She sold it at about twenty years' purchase. But for the circumstance that the vendee from her was able to sell it for double the price eight months later to a cosharer in the village it would not have been reasonable to pronounce the opinion that the property was sold for an inadequate price. On the whole we think that there was not only legal necessity for the sale of the property but there was also legal necessity for selling it at the price at which it was sold to Mahabir Prasad.

For the foregoing reasons we are of opinion that this appeal should be allowed in part. The decree of the lower appellate Court is set aside so far as it relates to the saledeed dated 27th March 1911 as to which the plaintiff's suit shall stand dismissed.

As parties have succeeded in part the appellant shall have three-fourths of her costs in all Courts.

V.B./R.K. *Appeal party allowed.*

A. I. R. 1931 Allahabad 655

MUKERJI AND SEN, JJ.

Shadi Lal—Appellant.

v.

Jagdamba Sahai and *others*—Respondents.

First Appeal No. 14 of 1928, Decided on 21st April 1931, against decision of Sub-Judge, Bareilly, D/- 15th August 1927.

(a) Civil P. C. (1908), S. 144 — Mortgage suit — Preliminary decree — Defendants appealing—Final decree obtained and put into execution — Appellate Court varying preliminary decree — Defendant's application under S. 144 held competent — Civil P. C. (1908), S. 97.

After a preliminary decree had been passed in a mortgage suit, the defendant had filed an appeal against it. In the meanwhile the plaintiff obtained a final decree and got it executed against the defendant. The appellate Court then varied the preliminary decree, on which the defendant applied under S. 144 for restoration. The plaintiff objected that the application was not competent, because there being no appeal filed against the final decree the properties sold in execution of that decree could not be restored as that decree had neither been varied nor reversed.

Held: that where the preliminary decree has been varied or reversed by the appellate Court, it follows that the final decree passed thereon, and all the execution proceedings which have taken place in pursuance of the final decree, fall through and that there could be no necessity for filing an appeal from the final decree: 36 *Cal.* 336 (*P.C.*), *Dist.* [P 656 C 1]

(b) Civil P. C. (1908), S. 144 and O. 21, R. 90—Application to set aside sale under O. 21, R. 90, dismissed — Still application under S. 144 can be entertained.

Even though an application to set aside a sale under O. 21, R. 90 is dismissed yet an application under S. 144 can be entertained because S. 144 prescribes a remedy which is separate from and independent of the remedy which is open to a person under O. 21, R. 90. [P 656 C 1]

N. Upadhiya, *Kalindi Prasad* and *G. S. Pathak*—for Appellant.

N. P. Asthana, *Ram Nama Prasad* and *S. N. Seth*—for Respondents.

Sen, J.—One Shadi Lal was the purchaser of a usufructuary mortgage which had been executed by Lala Inder Sahai, father of Munshi Jagdamba Sahai, in favour of a third party. Shadi Lal instituted a suit for recovery of Rs. 14,000 in enforcement of this mortgage. The suit was directed against Jagdamba Sahai, Uma Sahai alias Lallan, Champa Kuer and many others. It was prayed that the amount be realized by sale of zamindari shares in Janib Nagla and Maheshpur and of a house in mohalla Barahmanpuri in the city of Bareilly. The defendants appealed from this decree and their appeal was numbered and registered as No. 391 of 1923. During the pendency of the appeal, Shadi Lal applied for and obtained a final decree. This decree was put into execution and the three aforesaid properties were sold and purchased by Shadi Lal himself. The house in Barahmanpuri was purchased by him, on 27th January 1925, and Shadi Lal was put into formal possession of the house, on 1st May 1925.

On 10th November 1926, this Court varied the preliminary decree passed by the trial Court and reduced the amount to Rs. 7,000 and directed that the said amount was charged upon only one of the properties, namely, Janib Nagla and not the other two, namely Meshpur and the house in Barahmanpuri.

On 21st December 1926, Jagdamba Sahai alias Lal Bahadur moved an application under S. 144, Civil P. C., for being restored to possession of the house. This application was followed by an application made by Mt. Sarup Rani on similar lines which was made on 11th May 1927 and in which she stated that the house had been purchased by her mother Sukhdei and that upon the death of the mother it had devolved upon her and that Jagdamba Sahai had nothing to do with it.

The Court below accepted the contention of Mt. Sarup Rani and has passed a decree for the restoration of possession of the house by Shadi Lal to Mt. Sarup Rani.

It was contended by Shadi Lal that the application under S. 144, Civil P. C., was incompetent. It was argued that the defendants not having filed an appeal from the final decree and the property having been sold in execution of the said decree, no application for restoration of possession could be made under S. 144, Civil P. C., because the final decree had neither been varied nor reversed. This contention was overruled and rightly overruled by the Court below. Where the preliminary decree has been varied or reversed by the appellate Court, it follows that the final decree passed thereon and all the execution proceedings, which have taken place in pursuance of the final decree, fall through and that there could be no necessity of filing an appeal from the final decree. Reliance has been placed upon the decision of the Privy Council in *Ram Golam Sahu* v. *Barsati Singh* (1). The facts of this case are toto caelo different. The preliminary decree was strictly speaking not reversed by the appellate Court. The amount of the mortgage money for which the decree was passed by the trial Court was increased by the appellate Court. This ruling therefore does not in any way militate against our view.

The defendants appear to have made an application for setting aside the auction sale under O. 21, R. 90, Civil P. C. This application was dismissed and the sale confirmed. It has been argued that where the sale has been confirmed, no application under S. 144, Civil P. C., can be entertained, because it would be to nullify the injunction contained in O. 21, R. 92, Civil P. C. S. 144, Civil P. C., prescribes a remedy which is separate from and independent of the remedy which was open to a person under O. 21, R. 90, Civil P. C. This is the view of the Court below. We are of opinion that this view taken is sound and we entirely agree with it. Shadi Lal claims to recover a sum of Rs. 1,400 for the expenses incurred in the repairs of the house. We have not been taken through the evidence in this case, but after hearing Mr. Pathak for the appellant we have no hesitation in upholding the conclusion arrived at by the Court below that Shadi Lal has failed to make out that Rs. 1,400 or anything near Rs. 1,400 had been spent by him in the repairs of the house. All that he had spent was about Rs. 300. He has remained in possession of this house from 1st May 1925 right up to the date of the decision of the Court below. The Court below was justified in holding that even upon the most conservative view, the rent of the house could not be less than Rs. 12 per month. Under these circumstances the amount laid out by Shadi Lal for the repairs of the house has been amply repaid.

The respondents have filed a cross-objection. We are of opinion that there is no force in this cross-objection. We accordingly dismiss this appeal with costs and also the cross-objection with costs which will include fees on the higher scale.

B.V./R.K. *Appeal* and *cross-objection dismissed.*

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* A. I. R. 1931 Allahabad 656

MUKERJI AND ALLAN, JJ.

Madho Singh and *another* — Defendants—Appellants.

v.

Lala Keshab Deo and *another*—Plaintiff and Defendants—Respondents.

Second Appeal No. 625 of 1929, Decided on 24th June 1931, from decision of Addl. Dist. Judge Aligarh, D/- 24th January 1929.

*** Civil P. C. (1908), O. 32, R. 3 — O. 32, R. 3, applies to revenue proceedings and failure of party to apply for appointment of guardian is irregularity that can be cured if substantial justice is done — Agra Tenancy Act (1926), S. 264.**

Order 32, R. 3, applies to the proceedings in revenue Court and it is incumbent upon a party taking proceedings against a minor under S. 81 to formally make an application for appointment of the guardian of the minor. Failure to do so is an irregularity, and the minor who is not properly represented cannot have the decree or order set aside on the sole ground of irregularity but must show that he was really prejudiced by that decree or order: 30 *Cal.* 1021; 33 *I. C.* 805 and 59 *I. C.* 671, *Foll.* [P 657 C 1, 2]

D. P. Malaviya—for Appellants.

Panna Lal—for Respondents.

Mukerji, J.—This case has been referred to a Bench of two Judges on the ground that the case involves a point of some difficulty.

The facts of the case briefly are these: There were two occupancy tenants of a holding, e.g., Madho Singh the defendant-appellant before us, and Hoti Lal. The zamindar was Lala Keshab Deo. The rent of the occupancy holding being in arrears, proceedings were taken by Lala Keshab Deo under S. 81, Agra Tenancy Act, 1926. This rule of law laid down that it was open to a landholder to apply to the tahsildar for issue of a notice to his tenants for payment of arrears of rent and for his ejectment in case of default. A notice was issued to Hoti Lal, and also to Madho Singh under the guardianship of his uncle Hoti Lal. It has been found as a fact that Hoti Lal had no interest adverse to Madho Singh. The tenants did not appear. The arrears of rent being not made good, an order for ejectment was made on 11th April 1927 and a formal delivery of possession was effected on 29th April 1927.

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(1) [1909] 36 Cal. 336=1 I. C. 124=36 I. A. 27 (P.C.).

The tenants, in spite of the order of ejectment and delivery of possession stuck to the land and the landholder Keshab Deo had to bring the suit out of which this appeal has arisen, for ejectment of the tenants in the civil Court and for damages.

Hoti Lal has not defended the suit but Madho Singh has and his sole ground of defence is that he was not properly represented in the previous proceedings.

There can be no doubt that the Civil Procedure Code applies to the proceedings in the revenue Court under the provision of S. 264, Tenancy Act, and it was incumbent on Keshab Deo to formally make an application for appointment of a guardian. The irregularity is there and the question is: What is the result of that irregularity?

In a series of cases starting with *Walian* v. *Banke Behari* (1) followed in *Ram Brickh* v. *Tarak Tewari* (2) and *Chattar Singh* v. *Tej Singh* (3) it has been held that the minor who was not properly represented in the previous litigation cannot have the decree or order made against him set aside on the sole ground of irregularity, but must show that he was really prejudiced by that order. If, in spite of the irregularity, a decree or order could be made against the minor and if the minor had no possible defence to the proceedings taken against him in which the order or decree complained of was made, he cannot challenge the order or decree complained of simply on the ground of irregularity. The reason for this rule is obvious. O. 32, Civil P. C., contains a rule of procedure and procedure is meant only for the purpose of justice. If there has been done substantial justice to the minor's case, the mere fact that there had been some defect in the procedure cannot matter.

In this particular case before us, the minor Madho Singh takes exception to the proceedings on the ground of irregularity in the appointment of a guardian and on that ground alone. He does not say that the arrears of rent had really been paid up when the proceedings were taken under S. 81, Tenancy Act. He does not say that, if a proper guardian (other than Hoti Lal) had been appointed the arrears of rent would have been paid off. He does not say that the arrears of rent have since been made good since the order of ejectment had been made, on 11th April 1927. He does not even say that an offer to make good the arrears was made and was rejected. In these circumstances, we do not see how the minor can say that he has been prejudiced by the proceedings taken against him and Hoti Lal.

In the circumstances we think that the decrees of the Courts below are right and we dismiss this appeal with costs including counsel's fees in this Court on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 657

SEN AND NIAMATULLAH JJ.

Ghasi Ram and *another* — Defendants —Appellants.

v.

Ram Dial and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 741 of 1928, Decided on 16th January 1931, against decision of Sub-Judge, Budaun, D/- 4th February 1928.

(a) Civil P. C. (1908), O. 34, R. 5—Conditions inconsistent with preliminary decree should not be introduced in final decree — Order in which properties are to be sold, if not given in preliminary decree, should not be introduced in the final decree.

It is not desirable that any conditions should be introduced in the final decree which might be in form, in substance or in effect inconsistent with the preliminary decree. Where therefore the preliminary decree does not specify the order in which the different mortgaged properties should be sold, no such order should be specified in the final decree. [P 658 C 2]

(b) Mortgagor and Mortgagee—Mortgagee decree-holder has no absolute right to sell mortgaged properties in any order he chooses —Executing Court has to decide that order.

A mortgagee decree-holder has not an unfettered right to sell the property at his sweet will and pleasure in any order that he chooses. The Court which has to execute the final decree may and ought to prescribe the order in which the mortgaged properties are to be sold. When the question as to which of the properties has to be sold first comes before the Court, the solution of the question will depend upon a determination of the equities between the holders of the properties. [P 658 C 2, P 657 C 1]

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(1) [1903] 30 Cal. 1021=30 I. A. 182=8 Sar. 512 (P. C.).

(2) [1916] 33 I. C. 805.

(3) [1920] 59 I. C. 671.

Akhtar Husain Khan—for Appellants.
A. Agarwala—for Respondents.

Niamatullah, J.—This is an appeal by the defendants and arises from an order passed by the learned Subordinate Judge of Budaun, dated 4th February 1928, modifying the final decree passed by the trial Court, dated 30th July 1927. Hashmat Ali, defendant 1, and Daud Husain, defendant 2 owned certain properties in mauza Jamoh and mouza Karaulia. Hashmat Ali was in possession of property in mouza Jamoh. Ghasi Ram and his minor nephew Ved Prakash defendants 4 and 5 were the purchasers of the equity of redemption in mouza Karaulia. An application was made by the two last mentioned persons in the trial Court before the passing of the preliminary decree that the Court should direct that the property in mouza Karaulia should not be sold in enforcement of the plaintiff's mortgage till the property in mouza Jamoh han been sold. An isssue was framed as to whether Ghasi Ram, defendant 4, was entitled to get the property of Hashmat Ali mortgagor sold first. This issue was answered in the negative, and a preliminary decree was passed without prescribing the order in which the mortgaged properties had to be sold.

On an application being made for the preparation of the final decree, Ghasi Ram applied on 20th July 1927 renewing his prayer that the order in which the properties should be sold should be indicated in the final decree and that his property in mauza Karaulia should not be sold till execution in respect of the other property had taken place. The mortgagee decree-holder appears to have been a consenting party to this scheme. Lala Banarsi Das, defendant 3, who was also a subsequent transferee of the mortgaged properties did not appear in Court to contest this application. The trial Court allowed this application on the ground that the opposite party had no objection. It therefore directed that the mortgaged properties be sold in two lots and that the property in possession of defendant 1 should be sold in one lot before the other property was sold and if the sale proceeds were not sufficient to satisfy the decree-holder's claim then the property in possession of Ghasi Ram was to be sold. Lala Banarsi Das appealed to the lower appellate Court. He contended that it was not within the competence of the trial Court to pass a final decree in deviation from the preliminary decree and to fetter the hands of the mortgagee as to the order in which he might choose to sell the mortgaged properties in enforcement of his claim. This plea found favour with the appellate Court. We are of opinion that ordinarily speaking it is not desirable that any conditions should be introduced in the final decree which might be in form, in substance or in effect inconsistent with the preliminary decree. But the law in this respect appears to have been stated by the lower appellate Court a little too broadly. The lower appellate Court observes:

> "It is true that the decree-holder has the right to put any property to sale but the lower Court has not left his hands unfettered."

We are not prepared to subscribe to the proposition that a mortgagee decree-holder has an unfettered right to sell the property at his sweet will and pleasure in any order that he chooses. Cases are conceivable in which, if the decree-holder is allowed to sell the property in an order according to his own liking, it might operate seriously to the prejudice of other holders of subordinate interests in the property.

Stress has been laid that a similar prayer made by Ghasi Ram before the passing of the preliminary decree has been refused and that the order operates as res judicata. We are of opinion that the order does not amount to any thing more than this that Ghasi Ram has no absolute right in law to claim that his property should not be sold in the first instance and that the property belonging to the other transferee should be put up for sale first. The order in question, in our view, does not operate as res judicata.

We are further of opinion that we ought not to introduce any conditions into the final decree which has been passed in this case. At the same time, we would like to indicate and emphasise that upon equitable considerations the Court which has to execute the final decree may and ought to prescribe the order in which the mortgaged properties are to be sold. When the question as to which of the properties has to be sold first comes up before the Court, the solution of the question will depend upon a determination of the equities between the holders of the properties.

Subject to the observations contained above, we are of opinion that the decree passed by the Court below is correct. We would accordingly dismiss this appeal. We make no order as to costs.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1931 Allahabad 659

MUKERJI AND NIAMATULLAH, JJ.

B. B. & C. I. Ry. Co.—Applicant.

v.

Mitthu—Opposite Party.

Civil Revn. Nos. 217 and 218 of 1930, Decided on 10th April 1931, against order of Sub-Judge, Farrukhabad, D/- 25th February 1930.

*** Civil P. C. (1908), S. 115—Application to sue as pauper accepted—Order being of interlocutory nature no revision lies.**

Where an application to sue as a pauper is accepted, no revision lies because, where a question as to taxation has to be decided, the decision of the first Court should be taken to be final so far as the parties are concerned and it cannot therefore be contended that because an appeal is not allowed a revision should be entertained. Revision cannot be entertained because the order accepting an application to sue as pauper is not "a case decided" but is more or less in the nature of an interlocutory order : *A. I. R.* 1930 *All.* 758, *Dist.* ; 32 *All.* 623, *Rel. on.* [P 659 C 2, P 660 C 1]

I. B. Banerji and *I. Q. Mody*—for Applicant.

M. Waliullah—for Opposite Party.

Mukerji, J.—These are two applications in revision in two different suits of a similar nature, which were heard together and decided by the learned Subordinate Judge on 25th February 1930.

It appears that there was a railway accident and certain persons were hurt. Two suits were instituted for recovery of damages against the railway administration. The plaintiffs in the suits declared that they were paupers and unable to pay the court-fee stamp. An enquiry was started, after giving information to the Government Pleader and to the opposite party. The enquiry has resulted in a declaration that the plaintiffs are entitled to sue as paupers.

The railway has come up in revision.

The first question is whether a revision lies.

The learned counsel for the appellant has argued that if a revision is not entertained the result will be that at no subsequent stage, either in the suit or in an appeal, his client will be entitled to question the validity of the order of the learned Subordinate Judge. In other words, he assumes that because no appeal is provided for under the law against the decision of the learned Subordinate Judge, that a plaintiff should be allowed to sue as a pauper, a revision should lie. No authority for such a broad proposition was cited and could be cited.

The question whether court-fee should be paid or not is really a matter that is important from the point of view of Government and Government alone. The Court fees Act, S. 12, lays down that :

> "every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit."

Again, there is a similar provision in the Stamp Act which says that where a document, even if it is insufficiently stamped, is admitted as sufficiently stamped by a Court, at subsequent stages of the litigation, the parties are not entitled to question the validity of the order.

The principle seems to be that, where a question as to taxation has to be decided, the decision of the first Court should be taken to be final so far as the parties are concerned. This will go to show that it cannot be contended on principle, that because an appeal is not allowed a revision should be entertained.

Now we come to interpret the relevant section, namely, S. 115, Civil P. C. It lays down that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court. The question is whether any case has been decided by the learned Subordinate Judge. The result of the decision of the learned Subordinate Judge is really to start a case and not to put an end to a litigation or any controversy. It has been held in *Sumatra Devi* v.

Hazari Lal (1) that a decision disallowing an applicant to sue as a pauper is a "case decided". That has been so held because the matter ends there, and unless the applicant is prepared to pay court-fees, he cannot prosecute his application by way of suit any further. There the matter ends. But, in this particular case, the matter does not come to an end ; but the litigation continues. We cannot therefore say that a case has been decided. The order is more or less in the nature of an interlocutory order and not a final order.

In *Muhammad Ayub* v. *Muhammad Mahmud* (2) a Division Bench of this Court held that where an application to sue as a pauper is accepted, no revision lies. Thus, we have got a clear authority in support of the proposition that no revision is maintainable. We agree with that view and dismiss the present applications with costs.

B.V./R.K. *Revision disallowed.*

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(1) A.I.R. 1930 All. 758=126 I.C. 1=52 All. 927.

(2) [1910] 32 All. 623=6 I.C. 831.

A. I. R. 1931 Allahabad 660

BOYS, J.

Mufti Mohammad Baqar and *another*—Plaintiffs—Appellants.

v.

Namwar Singh and *others* — Defendants—Respondents.

Second Appeal No. 1428 of 1929, Decided on 8th January 1931, against decision of Sub-Judge, Jaunpur, D/- 29th July 1929.

Civil P. C. (1908), S. 11—Separate suits—Separate decrees — In both same question arising between parties—Appeal against one decree only — Even on appeal succeeding nothing causing prejudice to other decree—Appeal is not barred by rule of res judicata.

Where it appears to an appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties, or arising out of two appeals to a subordinate appellate Court, and only one of such decrees is brought before it in appeal, and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he had brought succeeds, the right of appeal is not barred either by the rule of res judicata, or at all, by reason of his failure to appeal from the decree which does not prejudice him. The ultimate rights of parties must be adjusted and regulated according to the final decision of the last Court of appeal: 33 *All.* 51 *held overruled by A. I. R.* 1923 *All.* 490. [P 661 C 2]

M. Muhmudullah—for Appellants.

A. Sanyal and *Kedar Nath Sinha*—for Respondents.

Judgment.—This appeal arises out of a suit for redemption, two other suits for redemption by other plaintiffs having been also filed and tried along with Suit No. 289 of 1928 out of which this appeal arises. It will be necessary to state the facts with precision. Maula Koeri owned a fixed rate and occupancy tenancy. He died and his widow Mt. Jamuni executed a usufructuary mortgage on 23rd October 1905, in favour of one Ramlal. On Mt. Jamuni's death there were three claimants to the property: firstly, Bishnath Koeri, who claimed to be a daughter's son of Mula Koeri; secondly, Sukhu Koeri, who claimed to be a collateral of Mula Koeri; and thirdly, the zamindars who claimed that the property had lapsed to them. None of these three claimants thought fit to endeavour directly to establish his claim to the property. Each of them decided to secure his position, if possible, by filing a suit to redeem the mortgage. All three accordingly filed separate suits against the heirs of Ramlal, the mortgagee, those heirs being defendants 1 to 7.

The first suit to be filed in point of time was Suit No. 289 of 1928 filed by the zamindars who claimed that the property had lapsed to them. It was no doubt by way of answer to this suit that first Sukhu Koeri and then Bishnath Koeri filed similar suits for redemption, Nos. 322 of 1928 and 442 of 1928 respectively. In each suit the heirs of Ramlal were the only original defendants.

These three suits were consolidated by bringing all the parties on the record of each separate suit on to the record of of both the other suits. There was one trial the evidence being taken in Suit No. 289. Judgment was delivered in Suit No. 289 and copies of the judgment were placed on the records of Suits Nos. 322 and 442, those copies of course being in effect and law judgments in those cases.

There followed separate decrees in each of the suits, the decree in No. 289 decreeing the suit without any reference to the other suits or the decrees in those suits: and similarly in Suits Nos. 322 and 442 there were decrees dismissing those suits respectively without any reference to Suit No. 289 or the decree therein. I am informed that this is the nature of the three decrees, and counsel on both sides agree that this is so. Bishnath's Suit No. 442 having been decreed and the suits of Sukhu Koeri, No. 322, and of the zamindars, who are the appellants here, Suit No. 289, having been dismissed, Sukhu Koeri submitted to the dismissal of his suit. Bishnath having had his suit decreed, of course, had nothing further to do. The zamindars, plaintiffs in Suit No. 289, appealed against the dismissal of their suits. They did not however file any appeal against the decree obtained by Bishnath in Suit No. 442, and at the hearing of their appeal the objection was taken that it could not be heard or judgment passed in their favour in view of the fact that there was an outstanding decree against them in Bishnath's Suit No. 442, which had become final. The lower appellate Court, the Sessions and Subordinate Judge of Jaunpur, accepted this contention holding that the case was governed by the decision of the Full Bench in *Zaharia* v. *Dibia* (1), and has repelled the contention of the appellant that the case came within the principles laid down by a later Full Bench of this Court in *Ghansham* v. *Bhola* (2). A careful perusal of both these judgments suggests to my mind strongly that their Lordships in the latter case, while they did not in so many words overrule the decision in the earlier case, did very largely qualify it. While I recognize that it is very difficult, to my mind impossible, to say that the decision in the first case does not govern the present case, I am also of opinion that the principles laid down in the latter case govern the present and must be taken as qualifying the decision in the earlier case. After referring to the case, *Zaharia* v. *Dibia* (1), his Lordship the Chief Justice and the three other of the Judges constituting the Bench said:

> "It therefore becomes necessary to lay down once and for all the practice which should in future bind the Court, and to negative the general applicability of the rule in *Zaharia* v. *Dibia* (1)."

In *Ghansham* v. *Bhola* (2) a plaintiff obtained a decree for the amount of his mortgage and the sum representing interest, but as the trial Court thought that the interest was very heavy it refused the plaintiff costs. The plaintiff filed an appeal against so much of the decree as refused him costs and succeeded in getting his costs. The defendant also appealed against the severity of the amount of interest allowed and he also succeeded the interest being reduced. The plaintiff, of course content with the result in the appellate Court in his own appeal giving him costs, appealed only against the decree in the defendant's appeal reducing the amount of interest. It was objected at the hearing of the second appeal in this Court that the plaintiff could not be heard in appeal here as he had not appealed against the other decree passed by the appellate Court. This objection the respondent was able to take because each decree in the lower appellate Court recited the whole result, namely, the allowing of the costs and the reduction of the interest, and it was contended that as in the plaintiff's decree in the appellate Court there was whether unnecessarily or not, an inclusion of the reduction of interest he could not appeal to this Court against the decree in the defendant's appeal without also appealing against the decree in his own appeal. It will be noticed therefore that the two decrees in this case of *Ghansham* v. *Bhola* (2) were identical. In the case before me they are not identical. I have however to consider not whether there is some more or less accidental difference in facts here and there due to drafting, for very few cases are likely to be on absolutely the same footing as to facts, but I have to see whether the principle in the later Full Bench governs this case or not. The majority of the Judges at p. 510 said:

> "Where it appears to an appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties, or arising out of two appeals to a subordinate appellate Court, and only one of such decrees is brought before it in appeal, and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he had brought succeeds, the right of appeal is not barred either by the rule of res judicata, or at all, by reason of his failure to appeal from the decree which does not prejudice him."

It is true that their Lordships continued to say:

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(1) [1911] 33 All. 51=7 I. C. 156 (F.B.).
(2) A. I. R. 1923 All. 490=74 I. C. 411=45 All. 506 (F.B.).

> "It would be indeed wrong for an appellant to appeal against a decree which did not prejudice him and to which he did not object, or to appeal against two duplicate decrees where an appeal against one of them would be sufficient, and he is certainly under no obligation to do so."

It is of course true that as to the first of the alternatives stated in the quotation last made the decree in Suit No. 442 obtained by Bishnath did prejudice the present appellant, but it was also said that it would be wrong for him to appeal against two duplicate decrees where an appeal against one of them would be sufficient. It is true that here we are not dealing with two identical decrees but in effect the case does come clearly within the principle of the quotation first made. All the points raised in Suit No. 442 were raised in Suit No. 289 and there is nothing prejudicial to the appellant in the decree in suit No. 442 which is not raised and cannot be set right in the appeal in Suit No. 289.

I hold therefore that there is nothing to prevent the lower appellate Court from proceeding to hear and dispose of the appeal from the decree in Suit No. 289.

As to the bearing of the decree which it will make in appeal if it should turn out to be in favour of the present appellants, the plaintiffs in Suit No. 289, we have the statement of the majority of the Full Bench in *Ghansham* v. *Bhola* (2) where they say at the bottom of p. 510:

> "The ultimate rights of the parties must be adjusted and regulated according to the final decision of the last Court of appeal."

I set aside the decree of the lower appellate Court and return the case for it to re-admit the appeal for hearing and disposal on the merits. Costs will abide the result.

Leave to appeal is asked for and granted.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 662

PULLAN AND NIAMATULLAH, JJ.

Sheobans Rai—Plaintiff—Appellant.

v.

Shah Madho Lal—Defendant—Respondent.

First Appeal No. 534 of 1927, Decided on 30th March 1931, against decision of Addl. Sub-Judge, Agra, D/- 9th May 1927.

Negotiable Instruments Act (1881), S. 79—S. 79 does not exclude jurisdiction of Court under Usurious Loans Act (1918), S. 2 (3).

Section 79, Negotiable Instruments Act, does not exclude the jurisdiction of the Court conferred on it by S. 2 (3), Usurious Loans Act. [P 662 C 2]

S. K. Dar and *N. P. Asthana*—for Appellant.

K. N. Malaviya—for Respondent.

Niamatullah, J.—This is a plaintiff's appeal arising out of a suit brought by him for recovery of Rs. 10,616 on foot of a promissory note, dated 8th March 1925, executed by the defendant-respondent in lieu of Rs. 7,000 advanced in cash by the plaintiff. The interest stipulated in the promissory note was at the rate of 30 per cent per annum.

The only defence which it is necessary to take notice of for the purpose of the appeal has reference to the high rate of interest. The defendant pleaded that the rate of interest agreed on was excessive and that it was a fit case in which the Court should reduce it to a reasonable rate. The lower Court has decreed the suit, except so far that the interest has been reduced from 30 per cent to 24 per cent.

The plaintiff has appealed claiming the interest at the contractual rate; while the defendant has preferred cross-objection praying for further reduction in the rate of interest. We have heard the learned counsel on both sides, and are clearly of opinion that no interference is called for.

It has been argued by the learned advocate for the plaintiff-appellant that S. 79, Negotiable Instruments Act is mandatory and that a Court has no power to reduce the rate of interest entered in a promissory note. We are unable to accede to this contention. The Negotiable Instruments Act must be read with other enactments passed subsequent thereto. If under the Usurious Loans Act, which was passed after the Negotiable Instruments Act before the promissory note in question was executed the Court has a discretion to reduce interest in a proper case, there is nothing in S. 79, Negotiable Instruments Act which excludes such a discretion. The Usurious Loans Act, S. 2 (3), is applicable to all suits for the recovery of loans advanced after the commencement of that Act. It is quite general, and includes not only suits based on bonds but also on negotiable instruments. We are clearly of opinion that S. 79 does not exclude the jurisdiction of the Court conferred on it by the Usurious Loans Act.

The lower Court has found that 30 per cent simple interest agreed to by the defendant was unreasonable in the circumstances in which the parties were at the time the loan was advanced. Nothing has been shown to us to justify the view contrary to that of the Court below in that respect. The rate of interest which has been allowed by the Court below is prima facie reasonable. We hold that the appeal and the cross-objection should both be dismissed. Accordingly the decree appealed from is upheld. The appeal and the cross-objection are dismissed with costs.

V.B./R.K. *Appeal* and *Cross-objections dismissed.*

✲ A. I. R. 1931 Allahabad 663

SULAIMAN, J.

Khushnud Husain—Applicant.

v.

Janki Prasad and *another*—Opposite Parties.

Civil Revn. No. 387 of 1930, Decided on 15th January 1931, against decree of Munsif, East of Badaun, D/- 17th April 1930.

✲(a) **Civil P. C. (1908), S. 115—Fact that there is other remedy does not oust High Court's revisional jurisdiction where Court below has acted without jurisdiction.**

The fact that another remedy is open to the plaintiff may be a ground for the refusal to exercise the revisional jurisdiction in a fit case, but that would not oust the jurisdiction of the High Court to interfere in cases where the Court below has acted entirely without jurisdiction: 30 *All.* 331 and 33 *All.* 647, *Dist.* [P 663 C 2]

(b) **Jurisdiction—Civil and revenue Courts —Suit barred by Tenancy Act will be so barred even if brought under Specific Relief Act (1877), S. 9.**

If a civil suit were barred by the provisions of the Tenancy Act, it would be immaterial whether the suit is brought under S. 9, Specific Relief Act or under S. 9, Civil P. C. It will be barred even if it is brought under S. 9, Specific Relief Act. [P 663 C 2]

(c) **Jurisdiction—Civil and revenue Court.**

In order to decide the question whether civil Court has jurisdiction to try the suit or not, the Court should examine the plaint: *A. I. R.* 1930 *All.* 193, *Foll.* [P 663 C 2]

Mushtaq Ahmad—for Applicant.

K. Verma—for Opposite Parties.

Judgment.—This is an application in revision from a decree of the Court below under S. 9, Specific Relief Act. The revision is filed on the ground that the suit was not cognizable by the civil Court but was one exclusively triable by the revenue Court. A preliminary objection is taken on behalf of the respondents that no revision lies inasmuch as there is another remedy open to the plaintiffs. Reliance is placed on the case of *Jwala* v. *Ganga Prasad* (1) and *Ram Kishen Das* v. *Jai Kishen Das* (2). In the former case the revision had been filed on the ground that the order of the Magistrate under S. 145, Criminal P. C., was a bar to a suit under S. 9, Specific Relief Act, and in the second case the ground was that the Court below had made a mistake of law in holding that the plaintiff was not entitled to sue. In neither of these cases the ground of revision was that the Court below had absolutely no jurisdiction to hear the suit. It seems to me that the fact that another remedy may be open to the plaintiffs may be a ground for the refusal to exercise the discretion in a fit case, but that would not oust the jurisdiction of the High Court to interfere in cases where the Court below has acted entirely without jurisdiction. The position would be different when the decree of the Court below is ultra vires. The High Court would ordinarily interfere in setting aside such an order.

I therefore overrule the preliminary objection. Coming to the merits of the revision it is no doubt proved that the property in dispute is an occupancy holding which is an agricultural land. The Court below has thought that the provisions of the Tenancy Act are not applicable to a case where the plaintiff comes to the civil Court under S. 9, Specific Relief Act, for recovery of possession. Its view is based on the fact that it is only a civil Court which can entertain a suit under that section. This argument does not appeal to me. If a suit were barred by the provisions of the Tenancy Act, it would be immaterial whether a civil suit is brought under S. 9, Specific Relief Act or under S. 9, Civil P. C.

The law on this question has been laid down in the recent Full Bench case of *In re Ananti* v. *Chhannu* (3). In view of the law laid down therein, I must examine the plaint. The plaintiffs alleged that their grandfather Sohan Lal was the occupancy tenant and on his death he left three sons two of whom are since dead. The plaintiffs as the grandsons of Sohan Lal claimed the tenancy and alleged that Mt. Shama Kunwar the widow of one of the sons of Sohan Lal had no right in it, although her name was fictitiously recorded in the revenue papers. The plaintiffs alleged that they were actually cultivating the land and were in possession of it, that a lease was obtained from Mt. Shama Kunwar but the lessee failed to obtain possession under it; then subsequently another lease dated 21st June 1929 was obtained by the defendant from Mt Shama and under the pretence of having secured rights under this lease the defendant forcibly dispossessed the plaintiffs from their fields. The plaintiffs expressly alleged that Mt. Shama had no right whatsoever to this land and that the defendant is a trespasser. It was not expressly alleged in the plaint that the tanancy was a joint family tenancy or that the grandsons of Sohan Lal had succeeded to it to the exclusion of the widow Mt Shama Kunwar. But there can be no doubt that the plaintiffs did not admit that the defendant was in any way a subtenant holding the land from the plaintiffs. In this view of the matter there was no admission in the plaint which would show that the suit as brought was not cognizable by the civil Court.

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(1) [1908] 30 All. 331=(1908) A. W. N. 142.

(2) [1911] 33 All. 647=11 I. C. 814.

(3) A. I. R. 1930 All. 193=124 I. C. 540 (F.B.).

Once the plaint was entertained the plaintiffs had to be pinned down to the allegations in their plaint and if those allegations were not proved the suit would have to be dismissed. The Court below however has gone into the question of fact and has found that the plaintiff had been in possession within six months of the suit and were forcibly dispossessed by the defendant. On that finding it has accordingly given the plaintiffs a decree under S. 9, Specific Relief Act. This finding cannot be challenged in revision. The finding of the Court below is of course not final on the question of real title, which would have to be fought out in a subsequent litigation. The application is accordingly dismissed with costs.

S.N./R.K. *Revision dismissed.*

A. I. R. 1931 Allahabad 664

BENNET, J.

Kalka Pershad and *another*—Plaintiffs—Appellants.

v.

Jangi Singh and *others*—Defendants—Respondents.

Second Appeal No. 509 of 1929, Decided on 20th March 1931, against decision of Addl. Sub-Judge, Shahjahanpur, D/- 2nd January 1929.

Agra Tenancy Act (1926), S. 86 (1) — Zamindars suing for ejectment — Plaint alleging that defendants were grove-holders and that plot in suit had lost its character as grove—Suit would lie in revenue Court.

The question whether civil Court or revenue Court has jurisdiction to try a suit depends upon the allegations in the plaint. [P 664 C 2]

Plaintiffs claimed to be zamindars of a certain grove of which the defendants were grove-holders. The plaint alleged that the plot having lost the trees had lost its character as a grove. The suit was for possession and removal of trees.

Held : that such a suit for ejectment would lie in the revenue Court. [P 665 C 1]

S. B. Johari—for Appellants.

B. Malik and *Krishna Bahadur*—for Respondents.

Judgment.—This is a second appeal by the plaintiffs against a decree of the lower appellate Court dismissing the plaintiffs' appeal and upholding a decree of the Court of first instance which dismissed the suit of the plaintiffs. The lower appellate Court found that the suit should have been instituted in the revenue Court, and that the civil Court in which the suit was instituted had not jurisdiction to try it. This question depends on the allegations in the plaint.

The plaint claimed that the plaintiffs were zamindars of a certain grove in which the defendants were grove holders and in para. 4 it was alleged that the trees in the grove had been lost and the plot had become clear of trees and the plot had lost its character of a grove. Hence the plaintiffs ask for possession and removal of trees. Now under S. 197, sub-S. (a), Act 3 of 1926 (Agra Tenancy Act) it is provided :

> "It shall be presumed that a groveholder holds the land in respect of which he is groveholder as a nonoccupancy tenant under a lease the term of which will expire when the land ceases to be grove land."

On the allegations in the plaint the defendants were holding as non-occupancy tenants under the lease the term of which had expired. Under S. 197 (e) it is provided that a grove-holder shall be liable to ejectment on the ground that he holds under a lease the term of which has expired. Such a suit for ejectment would lie under S. 86, sub-S. (1) in the revenue Court, and the lower appellate Court was not correct in referring to Ss. 84 and 85. It is clear therefore that on the allegations in the plaint the suit would lie in the revenue Court, and I find accordingly. Two points remain in second appeal. firstly that the lower Court was not correct in coming to a finding that as a matter of fact the land had ceased to be grove. It is unnecessary for the purposes of jurisdiction to come to such a finding as the jurisdiction appears on the allegations in the plaint, and accordingly I set aside this finding of the lower appellate Court and I leave the matter open for the decision of the revenue Court. The remaining point is that under O. 7, R. 10 a Court which finds that it has not jurisdiction to entertain the suit should return the plaint for presentation to the proper Court. Accordingly I direct in the present case that the plaint be returned for presentation to the proper Court. The second appeal is otherwise dismissed with costs.

S.N./R.K. *Appeal dismissed.*

⁕ A. I. R. 1931 Allahabad 665

MUKERJI AND BENNET, JJ.

Ali Mohamed — Defendant — Appellant.

v.

Zakir Ali—Plaintiff—Respondent.

Second Appeal No. 1170 of 1928, Decided on 30th March 1931, against decision of First Sub-Judge, Cawnpore, D/- 31st March 1928.

(a) Tort—Malicious prosecution—Suit for damages does not lie where process has not been issued on accused.

A suit for damages for malicious prosecution will not lie where no process has been issued by the Magistrate for the attendance of the person accused: 37 *Cal.* 358; 38 *Cal* 880; 37 *Mad.* 181 and *A. I. R.* 1929 *Pat.* 271, *Rel. on*; 27 *I. C.* 449, *Disc.* 64 *I. C.* 741; *A. I. R* 1927 *Oudh* 471; 28 *Bom.* 226 and 2 *Bom.* 481, *Ref.* [P 665 C 2]

⁕ **(b) Tort—Malicious prosecution — Dismissal of complaint is termination of criminal proceedings in favour of accused.**

The dismissal of a complaint under S. 203, Criminal P. C. is a termination of the criminal proceedings in favour of the accused. All that is required for the plaintiff to show in a suit for malicious prosecution is that the criminal proceedings terminated in favour of the plaintiff and if the plaintiff shows that the Magistrate passed an order in his favour and the defendant fails to show that the proceedings were revived, then the plaintiff has shown all that is necessary for the suit. [P 666 C 2]

(c) Tort — Defamation — Criminal complaint.

Criminal complaint is absolutely privileged so far as the civil Court is concerned: 40 *All.* 341 (*F. B.*), *Foll* [P 666 C 2]

⁕ **(d) Tort—Malicious prosecution — Accused not asked to appear before Court of law cannot be said to have suffered damages.**

If the accused has not been asked to appear in a Court of law, or if he appears of his own motion, it cannot be said that he has suffered any damage: *A. I. R.* 1929 *Pat.* 271, *Rel. on.* [P 667 C 2]

M. H. Faruqi—for Appellant.

M. Walliullah—for Respondent.

Bennet, J.—This second appeal by the defendant has been referred to a Bench of two Judges by a learned single Judge because a difficult question of law is involved. The facts which have been found in the present case are that the defendant made a complaint in the criminal Court against the plaintiff under Ss. 449 and 506, I. P. C., and also asked for security to keep the peace to be taken under S. 107, Criminal P. C. The Subdivisional Magistrate did not issue any summons or other process to the accused, but he called under S. 202, Criminal P. C., for a report from the police, and the Sub-Inspector made an inquiry and sent a report and after receiving that report the Subdivisional Magistrate went to the villags of the parties himself and went to the house of the accused and held an inquiry. He came to the conclusion that the complaint lodged by the defendant was false, and he dismissed this complaint under S. 203, Criminal P. C. The accused then filed the present plaint. The question which has arisen in second appeal is whether a suit for damages for malicious prosecution will lie where no process has been issued by the Magistrate for the attendance of the person accused. On this point there are a number of conflicting rulings, but the weight of authority of the Courts in India is that no such suit for damages lies. This view has been taken in the following rulings: *DeRozario* v. *Gulab Chand Anundjee* (1), *Gopal Jan* v. *Bholanath Khettry* (2), *K. Sheik Meeran Sahib* v. *Ratnavelu Mundali* (3) and *Subhag Chamar* v. *Nand*

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(1) [1910] 37 Cal. 358=6 I. C. 877.
(2) [1911] 38 Cal. 880=11 I. C. 311.
(3) [1914] 37 Mad. 181=21 I. C. 703.

Lal Sahu (4). On the other hand the plaintiff-respondent relied on the following rulings: *Bishan Prasad Narain Singh* v. *Phulman Singh* (5), *Bishan Singh* v. *Ram Bahal Roy* (6), *Gursaran Das* v. *Israr Haidar* (7), *Ahmadbhai* v. *Framji Edulji* (8) and *Imperatrix* v. *Lukshman Sakharam* (9). Now in some of the rulings on which the plaintiff relies the proposition enunciated by the plaintiff does not find full support. Thus in 19 *C. W. N.* 935 at p. 93 it is stated:

> " The prosecution might be infructuous, if, for instance, no notice was served upon the accused. In such a contingency, the action for damages for malicious prosecution would fail, not because there was no prosecution commenced, but because there was no damage done to the plaintiff."

The view of damages taken by the Calcutta High Court in this case is that the damages should be material, that is, that the plaintiff should show that he suffered damages by having to defend himself in the criminal Courts. It is true that under English law the case is apparently otherwise. In Halsbury's Laws of England, Vol. 19, para. 1443, p. 677, it is stated:

> " To succeed in an action for malicious prosecution a plaintiff must prove . . . . . ."
>
> " (v) that the plaintiff has suffered damage; unless, indeed, the proceedings necessarily import damage to his fame or person."

And in para. 1470 p. 688, it is stated:

> " To support an action for malicious prosecution or other malicious legal proceedings, one of three heads of damage must be proved, if not implied by law:
>
> (1) Damage to a man's fame, as where the matter of which he is accused is scandalous.
>
> (2) Damage done to the person, as where his life, limb, or liberty is endangered or.
>
> (3) Damage to his property, as where he is put to the expense of acquitting himself of the crime with which he is charged."

Now in India it is only damage under the second and third heads which has been considered sufficient to start an action for malicious prosecution. If damage to a man's reputation was concerned sufficient to start a suit for malicious prosecution, then the position would arise that damages to reputation could be the basis of a suit for malicious prosecution although such damages could not be the basis of a suit for defamation; it has been held in a Full Bench case of this High Court, *Chunni Lal* v. *Narsingh Das* (10), that where a person presents a petition to a criminal Court he is not liable in a civil suit for damages in respect of statements made therein which may be defamatory of the person complained against. The Full Bench case of this High Court has laid down that there is an absolute privilege for a complaint to a criminal Court so far as a civil Court is concerned, and that no suit will lie for damages for defamation. It would therefore be contrary to the spirit of this ruling if we were to hold that such damages could form the basis of a suit for malicious prosecution. We note that in the particular ruling on which the plaintiff relies on *Bishan Singh* v. *Ram Bahal Roy* (6) the accused was directed by a Sub-Inspector to appear before the Magistrate and in the case to which reference has been made in *Bishun Prasad* v. *Phulman Singh* (5) a notice was issued to the accused and he was present at the inquiry on the criminal complaint which was under S. 107, Criminal P. C. although that was apparently a preliminary inquiry and not after a notice had been issued to the accused to show cause why he should not furnish the security demanded. After considering the various rulings produced in this case we are of opinion that the criminal prosecution does not take place so far as the accused is concerned until process issues for the accused to be present and on that view we consider that in the present case a suit for damages for malicious prosecution will not lie. We further think that in the circumstances no damage can be said to have been suffered by the plaintiff. On both these grounds we consider that the present suit of the plaintiff will fail.

Some further argument was made by the learned counsel for the appellant to the effect that the dismissal of a complaint under S. 203, Criminal P. C. is not a termination of the criminal proceedings in favour of the accused, because such a complaint might be revived by the Magistrate. If this doctrine were extended then there could be no suit for damages for malicious prosecution for even in the case of an acquittal the acquittal could be set aside by an appeal of the Local Government under S. 417, Criminal P. C. But all that is required for the plaintiff to show on this point in a suit for malicious prosecution is that the criminal proceedings terminated in favour of the plaintiff and we consider that if the plaintiff shows that the Magistrate passed an order in his favour and the defendant fails to show that the proceedings, were revived, then the plaintiff has shown all that is necessary for the suit.

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(4) A. I. R. 1929 Pat. 271=119 I. C. 133=8 Pat. 285,

(5) [1914] 27 I. C. 449.

(6) [1920] 64 I. C. 741.

(7) A. I. R. 1927 Oudh 471=105 I. C. 553=2 Luck. 746.

(8) [1904] 28 Bom. 226=5 Bom. L. R. 940.

(9) [1874] 2 Bom. 481.

(10) [1918] 40 All. 341=45 I. C. 540 (F. B).

In this case the question was also argued in second appeal as to whether the plaintiff would be entitled to damages for defamation on account of the defamatory statements contained in the complaint made by the defendant to the Magistrate. But the Full Bench ruling of *Chunni Lal* v. *Narsingh Das* (10) has definitely held that the criminal complaint is absolutely privileged so far as the civil Court is concerned. I allow this appeal and dismiss the suit of the plaintiff with costs in all Courts.

Mukerji, J. — My learned brother has discussed all the cases that have been cited before us and I entirely agree with him that the suit must fail. I wish to add just a few words as to the principle which must underlie a suit like this.

This is a suit for "malicious prosecution." There must be a prosecution before the plaintiff can succeed. The question therefore arises: What is "prosecution?" Is it synonymous with "institution of a criminal proceeding" as has been held indicatable under S. 211, I. P. C. as an offence against justice or is it something beyond institution of a criminal proceeding? A mere institution of a criminal proceeding may not affect the plaintiff at all although it may affect a Court of justice or the mode of dispensing justice and it may be punishable under the criminal law. The plaintiff to succeed must show that he has a cause of action. Now what can be his cause of action, if he was never called upon by the Court before which the complaint was filed, to appear and answer a charge or even to appear and attend the proceedings. A complaint may be filed and the accused person may not even hear of it, although behind his back an inquiry may be ordered under S. 202, Criminal P. C., and some witnesses may be examined. The plaintiff in the civil suit is not at all hurt. He may not have, as I have said, heard of the fact that a complaint had been filed against him. Can it be said that the plaintiff has a cause of action? The answer should be in my opinion in the negative.

A suit in the circumstances of the present case must again fail on the ground that no damage has occurred. Tort has been defined as "wrong independent of contract." A wrong therefore is essential in order that a suit based on tort may be maintained. Now if the plaintiff has not been asked to appear in a Court of law, or if he appears as in the case of *Subhag Chamar* v. *Nand Lal Sahu* (4) of his own motion it cannot be said that he has suffered any damage.

On principle therefore the suit cannot be maintained if notice has not been issued to the plaintiff to appear and answer a criminal charge.

S.N./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 667

SULAIMAN, AG. C. J. AND BAJPAI, J.

Murli Dhar—Applicant.

v.

Ram Gopal—Opposite Party.

Civil Revn. No. 72 of 1930, Decided on 11th March 1931, against order of Sub-Judge, Moradabad, D/- 9th January 1930.

Civil P. C. (5 of 1908), S. 115 — Court ordering at decree-holder's instance that loss in sale-price should be recovered from defaulting auction-purchaser—Judgment-debtor applying for recovering loss — Court dismissing application as that order was not in favour of judgment-debtor — Order of dismissal though wrong was not revisable as the error was only one of pure law — Civil P. C. (5 of 1908), O. 21, R. 71.

A mere error of law howsoever gross would not in itself be sufficient for interference in revision. That error of law must result either in a failure to exercise jurisdiction or wrong exercise of jurisdiction or any irregularity in the exercise of jurisdiction before the High Court can interfere under S. 115, Civil P. C. [P 668 C 2]

Order under R. 71, O. 21, was passed at the instance of the decree-holder that the loss in the price should be recovered from the defaulting auction-purchaser. The judgment-debtor subsequently applied for recovering the loss but the Court dismissed that application as the order was not passed in favour of the judgment-debtor.

Held : that the dismissal of the application was wrong as the order under R. 71 need not be passed expressly in favour of the judgment-debtor. But the error was only an error of law not involving jurisdiction and so the order was not revisable. [P 668 C 2]

L. M. Roy—for Applicant.

S.N. Seth—for Opposite Party.

Sulaiman, Ag. C. J.—This is an application in revision from an order refusing to recover the amount of the deficiency on resale from the auction-purchaser. The property was sold at auction and purchased by Ram Gopal respondent. He failed to deposit the whole amount and the property had to be resold on 12th May 1924 at a loss. The Court at the instance of one of the decree-holders Nand Kishore passed an order on 14th September 1928 holding that the auction-purchaser was liable for the loss. As that order had been passed at the instance of Nand Kishore it did not expressly mention the judgment-debtor Murli Dhar's name. Nothing was done to recover the amount from the auction-purchaser for a long time during which the decree-holders ultimately succeeded in realizing the entire decretal amount from the judgment-debtor. On 15th October 1929 the judgment-debtor filed an application in the Court for execution of the order against the former auction-purchaser Ram Gopal.

The learned Judge thought that if the application had been made within three years of the resale, he would have treated this as an application under O. 21, R. 71, for making the defaulting auction-purchaser liable for the loss, but as it was more than three years after the resale he could not treat it as such an application. He then considered that the order of 14th September 1926, having been passed at the instance of Nand Kishore and not being in favour of the judgment-debtor Murli Dhar, the latter had no right to execute it and the learned Judge was unable to allow his application, which was accordingly dismissed.

It is quite clear that a mere error of law howsoever gross would not in itself be sufficient for interference in revision. That error of law must result either in a failure to exercise jurisdiction or wrong exercise of jurisdiction or any irregularity in the exercise of jurisdiction before the High Court can interfere under S. 115, Civil P. C.

There is no doubt that the learned Judge has erred in law in thinking that the judgment-debtor ought to have procured an order in his own name. Under S. 71 the order against an auction-purchaser can be made at the instance of either the decree-holder or judgment-debtor and when once such an order has been made the latter can recover the difference in the price from the auction-purchaser. The rule does not require that the order should in so many terms state that it is passed against the auction-purchaser and in favour of the judgment-debtor. As things have happened the decree-holders got their money and were therefore not interested in the recovery of this amount. It is only the judgment-debtor who is entitled to recover it.

On the other hand the learned Judge did entertain the application made by the judgment-debtor but wrongly thought that he was not entitled to any relief because the order was not in his favour expressly. This is an obvious error of law but it is difficult to say that it amounted to a failure on the part of the Subordinate Judge to exercise jurisdiction. The remedy of the judgment-debtor, if any, may be by way of an application for review of that order. We however do not wish to express any opinion on this question. We think no revision lies. The application is dismissed but without any order as to costs.

S.N./R.K. *Revision dismissed.*

⁕ A. I. R. 1931 Allahabad 668

MUKERJI AND BENNET, JJ.

Jadunath Singh— Plaintiff — Appellant.

v.

Hanuman Singh and *others*—Defendants—Respondents.

Second Appeals Nos. 319, 320 and 343 of 1928, Decided on 9th April 1931, against decision of District Judge, Allahabad, D/- 18th November 1927.

* **(a) Cosharer—Suit for profits—Principle for computation of profits in case of mortgage by cosharer of specified plot or part of his share stated.**

When a cosharer makes an usufructuary mortgage of part of his share or of specific plots of which he is in exclusive possession, a Court in a suit for profits should regard the cosharer and his mortgagee as a single unit. If that cosharer and his mortgagee together are in receipt of a greater share of profits than they are entitled to, then a decree should be passsd against them in favour of a plaintiff who is in receipt of less profit than he is entitled to by his share. The adjustment between the cosharer and his mortgagee of the liability which they jointly incurred to such a plaintiff is a matter for the cosharer and his mortgagee to settle between themselves. What the Court has to look to is whether the cosharer plus the mortgagees are in possession of a greater area of *sir* and khudkasht than they are entitled to, that is whether they are receiving more profits than they are entitled to, taking the annual net income of their area into account. [P 669 C 2]

(b) Cosharer—Suit for profits—Principle in case of sale stated.

If a cosharer chooses to sell a specific plot, then that plot must still be considered as part of his share for the purpose of a suit for profits. [P 670 C 1]

M. L. Agarwala—for Appellant.

Shiva Prasad Sinha and *Kedar Nath Sinha*—for Respondents.

Bennet, J.—These are two appeals by the plaintiff and one appeal by certain defendants against an order in first appeal by the learned District Judge of Allahabad in a suit for profits by the plaintiff. There were originally two suits, one in regard to Mahal Bhagwant Singh and one in regard to Mahal Sheozor Singh. The plaintiff is a cosharer in these mahals and he is not in possession of any area of *sir* and khudkasht and he has not been receiving any rents or profits for the years in suit. In Mahal Bhagwant Singh there are 45 defendants and it is found that these defendants are in possession of different areas of *sir* and khudkasht some of which they cultivate and some of which they sublet to subtenants. There is also in this mahal about 10 bighas of land which is let to non-occupancy tenants. The Court of first instance decreed the suit of the plaintiff granting him a decree in Mahal Bhagwant Singh for Rs. 572-13-8 as his share of profits assigning different amounts as due from different defendants according as the Court of first instance held in the statements A and B that different defendants had cultivated more than their share. In Mahal Sheozor Singh a sum of Rs. 248-0-6 was awarded to the plaintiff on similar grounds in statement Exs. C and D. The lower appellate Court set forth certain principles one of which was that where fields were separately sold or mortgaged these specific plots should not be taken into account in these suits for profits. Accordingly, as a result of this principle, the lower appellate Court reduced the area of land which yielded profits of Mahal Bhagwant Singh to 91 bighas instead of 138 bighas and it found that nothing was due to the plaintiff in that mahal.

The result of this finding is that the plaintiff, although he is a cosharer in Mahal Bhagwant Singh and has not received any profit for the years in suit is held to be due no profits for those years. This is a very extraordinary result and gives rise to the presumption that there was something wrong in the theory of the lower appellate Court. Now the plaint set forth that of the 45 defendants, defendants 1 to 28 were cosharer and defendants 29 to 45 were possessory mortgagees of part of the mahal. We do not find anything on the record to indicate that defendants 29 to 45, are not mortgagees of shares, but even if some of them were mortgagees of specific plots, we do not think that on this account they should be exempted from a decree for share of profits. In our view, when a cosharer makes a usufructuary mortgage of part of his share or of specific plots of which he is in exclusive possession, a Court in a suit for profits should regard the cosharer and his mortgagee as a single unit. If that cosharer and his mortgagee together are in receipt of a greater share of profits than they are entitled to, then a decree should be passed against them in favour of a plaintiff who is in receipt of less profit than he is entitled to by his share. The adjustment between the cosharer and his mortgagee of the liability which they jointly incurred to such a plaintiff is a matter for the cosharer and his mortgagee to settle between themselves. What the Court has to look to is whether the cosharer plus the mortgagees are in possession of a greater area of *sir* and khudkasht than they are entitled to, that is, whether they are receiving more profits than they are entitled to, taking the annual net income of their area into account.

The question of the sale of a specific plot by a cosharer is in our opinion similar. If a cosharer chooses to sell a specific plot, then that plot must still be considered as part of his share for the purpose of a suit for profits. Otherwise it would be possible for cosharers to sell specific plots and with a result that a cosharer not in possession of specific plots would be altogether deprived of any benefit from his share in the mahal. These are the general principles which we consider should govern a suit where such questions arise. But from the evidence on the record we are not at all satisfied that even assuming the principles adopted by the lower Court to be correct the result followed which is found in the judgment of the lower appellate Court. We consider that proper tabular statements should be prepared showing exactly how each cosharer plus his mortgagee is in possession of an excess share of profits. We have considered only the case of mahal Bhagwant Singh, but the case of mahal Sheozor Singh is similar.

Accordingly we remand this case to the lower appellate Court for disposal in view of the law which we have laid down. Costs here and hitherto will abide the result.

In Appeal No. 343 of 1928 the questions raised in the memorandum of appeal are questions of fact and we do not pass any orders in regard to them. But as we are remanding this case for disposal again by the lower appellate Court it will be open to learned counsel for the defendants to take those points before the lower appellate Court. The order as to costs is similar.

V.B./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 670

MUKERJI AND BENNET, JJ.

Municipal Board, Etawah — Defendant—Appellant.

v.

Mt. Ram Sri and *another*—Plaintiffs—Respondents.

First Appeal No. 357 of 1927, Decided on 12th February 1931, against decision of Addl. Sub-Judge, Etawah, D/- 18th May 1927.

(a) Adverse possession—Suit based on title extending over 30 years—Plea need not be specifically raised.

Where a suit is based on title extended over 30 years plea of adverse possession need not be specifically pleaded as it is included in the plea of title: 24 *Mad.* 387 (*P.C.*), *Foll.* [P 672 C 1]

(b) U. P. Municipalities Act (1916), S. 318—Question of title cannot be decided by Municipal Board or under S. 318 by District Magistrate or Commissioner.

No question of title can be decided by the Municipal Board specially where it itself is a party, and it could never have been contemplated that the question of title should be decided under S. 318 of the Act, by the District Magistrate or by the Commissioner [P 672 C 2]

(c) Tort—Damages— Entire amount must be received by one suit.

In a suit for damages based on an act of tort the entire amount of damages have to be recovered in one suit and several suits are to be discouraged. [P 672 C 2]

Iqbal Ahmad and *Mukhtar Ahmad*—for Appellant.

Ambika Prasad—for Respondents.

Mukerji, J.—This appeal arises out of a suit for a declaration of title and for damages instituted by the respondents against the Municipal Board of Etawah under the following circumstances. There is a piece of land which has been painted red on the plan prepared in the Court below by the Court amin. The plaintiffs' case was that plaintiff 1 was the owner of the land and she had on that plot four small shops fetching a rent of about Rs. 80 a month. Plaintiff 2 is her lessee. The shops were burnt down in June 1926 and the land was laid vacant. The plaintiffs made an application to the Municipal Board for permission to build again on the land, but this permission was refused on 27th August 1926 on the ground that the Municipal Board was the owner of the land and not the plaintiffs. The plaintiffs accordingly asked for a declaration that they were the owners of the land in suit. They also asked, as already stated, damages on the ground that having been not allowed to rebuild the shops they had been losing Rs. 80 a month as rent. The Municipal Board contested the plaintiffs' right to the land in suit, and they contended that it was a part of land belonging to the Municipal Board. Indeed, it stated that the land in suit was a part of the main street, the land in question being only a part of the pavement which ran alongside of the main street, and was meant for the pedestrians to walk upon. The learned Subordinate Judge, who heard the case at length, came to the conclusion that the plaintiffs had established their right to the land. He found that when the shops existed on the spot they were four in number and they fetched a rent of Rs. 73 per month. He also found that since the shops had been burnt down, the rent had gone up and it was but a fair estimate of the rent of the shops that could be built on the land to say that they could fetch Rs. 80 per month. The whole suit was accordingly decreed.

Before us it has been contended that the respondents have failed to prove their title. We have been taken through the entire evidence on the record which is large. We shall notice only such of the documents as we consider to be very pertinent to the case.

To start with, the plaintiff produced a a sale deed in their favour dated 21st December 1871. By this document one Durga Prasad, by whose name the local bazar goes, professed to sell two shops to a predecessor-in-title of plaintiff 1. According to the boundaries of these shops, they extended right to the main street. If there was any ambiguity in the sale deed, they are clearly removed by the subsequent conduct on the part of the owner and his tenants. We find that as early as in 1880 one Jagannath, being a tenant of the land in suit, applied to the Municipal Board for permission to build up a tiled shed : see p. 55 of the record. Shortly after this he again applied for permission to build what has been described as a "khirki." It appears that Jagannath wanted to construct a cellar beneath the land in suit, because he wanted some place to keep his cloth. This permission was given. We find that as a matter of fact there is a cellar beneath the land in suit, and the door which leads to the cellar is shown in the map prepared by the amin. On behalf of the appellant it was contended that this cellar must have been constructed without permission from the Municipal Board, but we do not consider that the suggestion is correct. The Municipal Board gave its sanction by the order printed at p. 59. Thus we find that since 1880 at any rate plaintiff 1 and her predecessors and her tenants have been occupying the land in suit with the permission of the Municipal Board and in open defiance of anybody else's title and right. A large number of rent-notes have been produced to prove that the shops on the site were occupied by tenants of plaintiff 1 from time to time.

The Municipal Board claims to be the owner of the land which has been described as "patri," or pavement running on either side of the main street. The learned Subordinate Judge inspected the locality, and he found that the whole of the "patri" land, in any case, the major portion of the patri land, had been fully occupied by shops. He found on the evidence that the patri land was two feet higher than the main street. This fact would show that the land described as patri was never meant to be a pavement for the pedestrians to walk upon.

As against all this evidence the Municipal Board have been able to produce, but a few documents, and they are not of much use. At p. 41 is a copy of the proceedings of the Municipal Board. It clearly goes to show that the inner portion of what has been described as Humeganj was acquired by the Municipal Board and was sold to one Durga Prasad, the vendor of the plaintiffs under the sale deed of 1871. It was argued that Durga Prasad owned only the inner side of the bazar and therefore he had no title which he might confer on the predecessor-in-title of plaintiff 1. But this argument is entirely fallacious. The document does not show that Durga Prasad was not the owner of the outer portion of the bazar when he acquired from the Municipal Board the inner portion of it.

The document at p. 45 goes only to support the transaction recorded at p. 41. At p. 47 is a statement of a certain gentleman, but the relevancy of this statement as evidence is entirely doubtful. On the other hand at p. 129 is a copy of the proceedings of the Public Works Committee of the Municipal Board. It is very interesting and throws a flood of light on the whole affair. It appears that the committee found that the "patri" land or lands lying by the roadside were being claimed and transferred by the shopkeepers as their private property. The Municipal Board, it was stated, never acquiesced in the claims, but it was planting trees and selling them when they dried up in the exercise of the right of possession. It was resolved that in future the Municipal Board would refuse permission to build to whosoever might apply for the purpose if the application related to the patri land. This resolution itself shows that the Municipal Board was not certain about its own title.

The learned Subordinate Judge has pointed out that the Municipal Board produced no document in its possession which would go to show that it was the owner of the land in suit. The list of properties owned by the Municipal Board was not produced and the overseer who spoke about it stated that it contained only the area of the land which was owned and he was not in a position to say, with the aid of this document, whether the land in question belonged to the Municipal Board. The learned Subordinate Judge found that the Municipal servants admitted before him that this land in suit had no tree planted on it by the Municipal Board and the Municipal Board never exercised any right of possession over it such as sweeping the place, etc.

Having considered all the evidence on the record we are of opinion that the land in suit is the private property of plaintiff 1 and in any case plaintiff 1 by completing adverse possession extending over 30 years has completed that title in herself as against the Municipal Board. The plea of adverse possession need not be specifically pleaded as it is included in the plea of title: see *Vasudeva Padhi Khadanga Garu* v. *Maguni Devan Bakshi Maha Patrulu Garu* (1).

The only other point for consideration is whether the plaintiffs are entitled to the damages decreed in their favour. It was argued before us that the Municipal Board was entitled to refuse permission on the ground that the building abutted on the land and erection of any construction on the land would be undesirable as an obstruction to the traffic and for other similar reasons. It is however not the case that the Municipal Board considered the question of building on the land from this point of view. They only considered the question whether they should allow the plaintiffs to build, it being assumed that the property was not of the plaintiffs but of the Municipal Board. This is conclusively shown by the order passed by the Municipal Board and printed at p. 151 of the record.

It was argued before us that no suit is maintainable against the Municipal Board for anything done in pursuance of the duties cast upon it under S. 180, Municipalities Act, and that the only remedy of the aggrieved party is by way of an appeal to the District Magistrate or to the Commissioner under S. 318, Municipalities Act of 1916. We have already answered this argument when we stated that the Municipal Board never professed to act under S. 180, Municipalities Act of 1916. They did not decide whether assuming that the land was the respondents' property it would be desirable from the point of view of the public as represented by the Municipal Board that plaintiff 1, the original owner of the land, should be prohibited from building on it. No question of title can be decided by the Municipal Board specially where it itself is a party and it could never have been contemplated that the question of title should be decided under S. 318 of the Act by the District Magistrate or by the Commissioner.

As regards compensation we have found that the amount claimed is a fair and proper one. The act of the appellant has deprived respondent 1 from gaining the benefit she used to get from her property and for no fault of her own. In a suit for damages based on an act of tort the entire amount of damages have to be recovered in one suit and several suits are to be discouraged. On this principle the plaintiffs are entitled to the entire amount decreed to them by the Court below.

In the result, the appeal fails and is hereby dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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(1) [1901] 24 Mad. 387=28 I. A. 81=7 Sar. 819 (P.C.).

* A. I. R. 1931 Allahabad 673

MUKERJI AND BENNET, JJ.

In the matter of *an application by Gulabchand Choteylal* and *others*.

Misc. Case No. 649 of 1930, Decided on 26th February 1931.

(a) **Income-tax Act (1922), S. 66 (3)—Application of—Limitation Act (1908), S. 12.**

Section 12, Limitation Act, does not apply to a proceeding under S. 66 (3). [P 673 C 2]

(b) **Income-tax Act (1922), S. 67 (A) — S. 67 (A) does not refer to time required for copies of orders of Income-tax officer or Assistant Commissioner.**

Section 67 (A) refers merely to the time required for obtaining a copy of the order of the Income-tax Commissioner and does not authorize the extension of the period of limitation by the time required for obtaining the orders of the Income-Tax Officer and the Assistant Commissioner: 40 *All.* 1, *Ref.* [P 673 C 2]

* (c) **Income-tax Act (1922), S. 66 (3) — Allahabad High Court Rules regarding income-tax references, R. 1— Extension cannot be obtained for copies of orders of Income-Tax Officer and of Asst. Commissioner.**

Although it is a fact that within the rules framed for procedure of Allahabad High Court in regard to income-tax references, R. 1 states that where an application is made under S. 66 (3), Income-tax Act, there should be copies of the order of the Income-Tax Officer, the Assistant Commissioner of Income-Tax and the Commissioner of Income-Tax disposing of the case, the mere fact that these orders are required does not connote that the applicant has a right to extend the period of limitation by the period required for obtaining orders other than those of the Commissioner of Income-tax under reference. [P 674 C 1]

Gopi Nath Kunzru—for Assessee.

U. S. Bajpai—for the Crown.

Bennet, J.—This is an application by an assessee to the High Court asking that the Commissioner of Income-tax should be required to state a case under S. 66, Income-tax. The learned Government Advocate has taken a preliminary objection that the application is time barred. S. 66 (3), Income-tax Act, states:

> "If on any application being made under sub-S. (2) the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may within six months from the date on which he is served with notice of the refusal, apply to the High Court."

Now it is admitted that the Commissioner refused to state a case on 19th April 1930 and that the notice of refusal was communicated to the assessee on 3rd May 1930. The application to the High Court was made on 12th November 1930 and was not accompanied by any copies of the order of the Commissioner or of the Assistant Commissioner or of the Income-Tax Officer. Under S. 67 (a):

> "In computing the period of limitation prescribed for an appeal under this Act or for an application under S. 66, the day on which the order complained of was made, and the time required for obtaining a copy of such order shall be excluded."

It is admitted that application for a copy of the order of the Income-tax Commissioner was not made until 22nd November 1930, that is, after the application under S. 66 (3) was filed in this Court. Accordingly, the period for obtaining a copy of the order of the Commissioner cannot be applied to extend the period of limitation. But it is contended that two other periods should be used for extension of limitation, namely, from 26th to 29th May 1930, a period of four days occupied in obtaining a copy of the order of the Income-Tax Officer, and from 14th to 18th March 1930, a period of five days, in obtaining a copy of the order of the Assistant Commissioner on appeal. If these two periods of nine days in all were added, it is true that the application to this Court would be within time. The question therefore is whethere any rule exists under which these two periods can be used to extend the period of limitation. S. 67 (a), Income-tax Act, refers merely to the time required for obtaining a copy of "such order", that is, for the order which is the subject of a reference under S. 66 (3). Accordingly, it is clear that this section does not authorize the extension of the period of limitation by the time required for obtaining the other two orders in question. Reference was also made to the Limitation Act, S. 12, but that does not apply to a proceeding under S. 66 (3), Income-tax Act.

It was also argued by learned counsel that there would be some analogy between the case of a second appeal being filed in the High Court under the Civil Procedure Code. If that be so, then the analogy is unfortunate for the applicant, because it has been held by a Full Bench of this Court in *Narsingh Sahai* v. *Sheo Prasad* (1) that although a rule of this Court with reference to the presentation of an appeal from an appellate decree required that the memorandum of appeal should be accompanied not only by a copy of the decree or order, but where it exists, a copy of the judgment of the Court of first instance, still this rule did not connote that the appellant had a right to exclude from the period of limitation for filing his appeal, the time requisite for obtaining a copy of the judgment of the Court of first instance.

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(1) [1918] 40 All. 1=42 I. C. 855 (F. B.).

It is a fact that within the rules framed for procedure of this Court in regard to Income-tax references, R. 1 states that where an a application is made under S. 66 (3), Income-tax Act, there should be copies of the order of the Income-tax Officer, the Assistant Commissioner of Income-tax and the Commissioner of Income-tax disposing of the case. But the mere fact that these orders are required does not connote that the applicant has a right to extend the period of limitation by the period required for obtaining orders other than those of the Commissioner of Income-tax under reference.

Under these circumstances, we consider that this application is time barred and we therefore dismiss it with costs. We assess the fee of the Government Advocate at Rs. 100 and allow him one month for the filing of the certificate.

V.B./R.K. *Order accordingly.*

⁂ A. I. R. 1931 Allahabad 674

MUKERJI AND BENNET, JJ.

Janki Prasad and *others*—Plaintiffs—Appellants.

v.

Karamat Husain and *others* — Defendants—Respondents.

Second Appeal No. 1117 of 1928, Decided on 9th April 1931, against decision of Dist. Judge, Bareilly, D/- 26th March 1928.

(a) Highway—Processions—There is right of conducting religious processions on highways.

There is a right in British India to conduct a religious procession with its appropriate observances along a highway. No restrictions can be put on the right except that it should be exercised subject to the orders of the Magistrate and of the police authorities and of public rights: *A. I. R.* 1925 *P. C.* 36, *Foll.*

[P 676 C 1]

(b) Jurisdiction — Suit for declaration of right of music on roads — Civil Courts can decide when playing music will amount to nuisance—Highway.

(Per *Bennet, J.*) —Where the plaintiffs have asked for a declaration from the civil Court in regard to their rights to play music in a temple it is within the jurisdiction of the civil Court to state to what extent the exercise of those rights would prove a nuisance to other persons who have rights in the neighbourhood.

[P 676 C 2]

⁑ (c) Public Rights—Right of worship in India—Essentials stated.

The following five propositions sum up the general law in India of religious worship: (1) every person has a right to worship; (2) the right is independent of custom; (3) the right is not absolute but is limited by the right of others; (4) the exercise of the right may be limited by order of the public authorities. Such orders may be passed under S. 144, Criminal P. C., to prevent urgent nuisance or breach of the peace, or under S. 133, Criminal P. C., to prevent a nuisance in a public place, or under S. 30, Act 5 of 1861, the Police Act, in the case of public assemblies and processions; (5) the exercise of the right may be limited by the civil Courts on the ground of nuisance, public or private: *Soltau* v. *De Held*, 2 *Sim. N. S.* 133, *Ref.*; *Gaunt* v. *Finney*, (1872) 8 *Ch. A.* 8; *Webb* v. *Barker*, (1881) *W. N.* 158; *Motion* v. *Mills*, (1897) 13 *T. L. R.* 427; *Heath* v. *Mayor of Brighton*, (1908) 98 *L. T.* 718, *Ref.*

[P 677 C 1, 2]

⁑ ⁑ (d) Tort — Nuisance— Injunction—Thakurdwara and mosque side by side—Suit for declaration and injunction by plaintiffs that they have right to take out music past a mosque and for injunction to people in mosque not to disturb it—Right of music can be granted but not of injunction restraining others from interfering with plaintiff's rights—High way, music.

A thakurdwara and a mosque were very close to each other. The plaintiffs in a representative capacity brought a suit for declaration of their right of worship and of taking out processions with music past the mosque and for an injunction restraining the defendants from interfering at any time with the aforesaid rights of the plaintiffs.

Held: that the plaintiffs both in their individual capacity and as members of the Hindu community had a right to take out religious and social processions accompanied by music along public roads even while passing the mosque and a right to perform worship in the thakurdwara accompanied by music subject in both the cases to any orders or directions issued by the Magistrate or the police under S. 144, Criminal P. C., or under other enactments provided that the exercise of such rights did not amount to a nuisance recognized by law. The plaintiffs could not be granted the injunction asked for because the defendants had a right to claim that the plaintiffs should not commit a nuisance: *A. I. R.* 1930 *Mad.* 701; 6 *Mad.* 203 (*F. B.*); *Sturges* v. *Bridgman*, (1879) 11 *Ch. D.* 852; *A. I. R.* 1931 *All.* 341, *Ref.*; *A. I. R.* 1930 *Mad.* 701, *not Appr.*; 2 *Mad.* 140 and 1 *Lah.* 140, *Ref.* and *Expl.*

[P 681 C 2]

(e) Public Rights—Every subject of Crown has equal right of worship which can be exercised so long as civil rights of others are not encroached on.

(Per *Mukerji, J.*)—The basis of the decision in a Court of law must be the civil rights and civil rights alone and no account can be taken of mere sentiments of a certain section of the subjects of the Crown. The civil right of every subject of the Crown is that he would be entitled to carry on his worship in any method he likes, but only so long as he does not by his performances affect others injuriously. In this view both Hindus and Mahomedans have the right to carry on their worship, the Mahomedans in their mosque, and the Hindus in their temple, unrestricted, each by the others, so long as the civil rights of the parties are not encroached upon : *A. I. R.* 1925 *P. C.* 36, *Rel. on.* ; 6 *Mad.* 203 (*F. B.*), *Ref.* [P 685 C 1, 2]

(f) **Penal Code (1860), S. 268—Annoyance caused to religious ideas by innocent acts of other is not nuisance.**

(Per *Mukerji, J*). — The sort of annoyance which the section aims at is not the kind of annoyance which the religious ideas of a class of people may suffer on account of an otherwise innocent act of another section of the public : 10 *All.* 44, *Ref.* ; 30 *All.* 181 ; 7 *Mad.* 590, *Rel. on.* ; 12 *Bom.* 437, *Expl.* and *Ref.* [P 686 C 1]

✻ (g) **Penal Code (1860), S. 268—Unless there be public nuisance Hindus have unrestricted right of worship in temples — Public rights.**

(Per *Mukerji, J*). — The Hindus have every right to carry on their worship in their own way, in accompaniment of music and singing, and nobody, who holds that this sort of practice is improper, has a right to interfere with it, so long as the exercise of the rights of worship by the Hindus does not come within the provisions of S. 268, Penal Code, by causing common injury or common danger or common nuisance to the public or to the people in general who may occupy property in the vicinity, namely, the mosque near by : 30 *All.* 181. *Rel. on.* ; 12 *Bom.* 437 ; 7 *Mad.* 590 and 10 *All,* 44, *Ref.* [P 687 C 1]

✻ (h) **Tort—Nuisance—Hurting religious feelings of others does not amount to private nuisance.**

(Per *Mukerji, J*).—Interference with religious observances according to the notions of a particular class of individuals does not amount to private nuisance : *St. Helens Smelting Co.* v. *Tipping*, (1865) 11 *H. L. C.* 642, *Ref.*. [P 687 C 2]

✻ (i) **Jurisdiction—Civil Court can declare only civil rights and stop their interference.**

(Per *Mukerji, J*).—If the result of each party exercising its rights leads to breaking of heads or riot, the authorities responsible for the peace of the land may bind the parties down till they are brought to their senses and either they stop all the exercise of their rights or come to reasonable terms with one another. That would be a matter with which a civil Court has no concern ; but where parties insist on the full exercise of their rights and they are prepared to act within their rights, a civil Court has no alternative but to declare those rights and stop an interference, if there be any, with the exercise of those rights. [P 689 C 1]

K. D. Malaviya—for Appellants.

Bennet, J.—This is a second appeal by certain Hindu plaintiffs against a decree of the learned District Judge of Bareilly. The circumstances are that in the town of Senthal in the Bareilly District there is a mosque which has been established for a long time, and at a very short distance from the mosque, apparently within a dozen yards according to the map on the record, there has been more recently a Hindu temple established. The plaintiffs are representative Hindus, who brought a suit for a declaration as follows :

"(a) It may be declared that the plaintiffs and the other Hindus are competent to perform the pujapath (worship) of Sri Thakurji Maharaj and the other deities installed in the thakurdwara situate in qasba Senthal, pargana and tahsil Nawabganj, bounded as below, by ringing ghantas, gharyal, by blowing sankh, and by ringing other religious musical instruments without restrictions of time and to perform kirtan, gayan, ras lila on Monday and Ekadashi (11th day) day according to the rite, custom and belief observed by Sanathan Dharam Hindus and to do utshab on Janam Asthami, and the other festivals according to the old practice and rite mentioned in para. 2 of this plaint and that no person has any right to throw obstacles.

(b) A perpetual injunction may be issued to the defendants restraining them from interfering at any time with the plaintiffs' prayer made in relief (a)."

It is to be noted that there are two matters in this declaration: one the right to perform music in the temple during worship and the other the right to conduct certain established processions. The District Judge has granted declarations as follows :

"Firstly the Hindus are allowed to blow music in their temple, whether it is a private or public place of worship, at any time except during the five recognized periods, of Mahomedan prayer."

In regard to processions the Munsif had passed this order :

"The plaintiffs should preferably take their processions to the Samda talab by a route avoiding the mosques and imambaras, but if they pass before them there will be a suspension of the band, music and everything of the like. If Janam Asthami and Dad Kandon coincide with Muharram, there shall be absolutely no music or anything of the like in the first ten days and on the 40th day (chehulum). Parties under circumstances shall bear their own costs. The declaration so granted is subject to the discretion of the executive authorities."

In regard to processions the District Judge passed the following order :

"I uphold the order of the lower Court about processions with the alteration that music should not be played before mosque and Imambaras during Mahomdan prayer times, and I agree with the lower Court that it should not be played at all during the first ten days of the Muharram, or on the 40th day."

Now the validity of both the orders of the District Judge has been challenged by the plaintiffs on appeal, and the claim that they should get a declaration of their rights without any restrictions whatever. The learned counsel for the appellants relied on a ruling of their Lordships of the Privy Council reported in *Mansur Hasan* v. *Muhammad Zaman* (1). In that case there was a dispute between Shias and Sunnis, and the Shias claimed to have the right to take out a procession in the streets and perform a ceremony called matam which consisted of stopping and wailing for a short time. The Sunnis objected to this procession passing near a mosque, and the Magistrate had passed orders that there should be no performance of matam within a short distance of the mosque. The Shias claimed a declaration of their right to go in procession without any restrictions. The District Judge granted a declaration of the right of the Shias to go in procession subject to any order that from time to time the Magistrates might make. The High Court in appeal dismissed the suit of the Shias, and their Lordships of the Privy Council granted the declaration in favour of the Shias given by the District Judge, but added that it should be subject "to the Magistrate's" directions and the rights "of the public." On p. 180 their Lordships stated:

> "The case seems to their Lordships to raise for authoritative decision the question as to the right of religious processions to proceed along the roads in India, practising their religious observances; and the decided authorities in India are certainly conflicting. The first question is : Is there a right to conduct a religious procession with its appropriate observances along a highway ? Their Lordships think the answer is in the affirmative."

Following this ruling we consider that the District Judge is not correct in imposing the restrictions which he did on the right of the plaintiffs to take out a procession. Accordingly I would allow the appeal in regard to the procession and grant the plaintiffs a declaration that they have a right to take a procession on the highway subject to the orders of the Magistrate and of the police authorities and the rights of the public.

Now in regard to the other question as to the right of the plaintiffs to play music in their temple, the learned counsel argued that the ruling of their Lordships of the Privy Council which we have quoted should be an authority, and accordingly he argued that it was not legal for the civil Courts to impose any restrictions other than that the right of the plaintiffs should be subject to the directions of the Magistrate and of the police authorities and of the right of the public. But the Magistrate and the police authorities have certain powers under the Police Act (Act 5 of 1861) to regulate processions and music on public streets. Under S. 30, sub-S. (4), the police authorities may regulate the extent to which music may be used in the streets on the occasion of festivals and ceremonies. No such authority is given by the Police Act to either the District Magistrate or the police to regulate the use of music in a temple, whether it is a private building or a public temple. It is true that certain powers exist in the Criminal Procedure Code under which the Magistrate may take action if a breach of the peace were apprehended; but it is obvious that these powers under the Criminal Procedure Code are only to be used for the prevention of a breach of the peace, and that it is not intended under that section that a Magistrate should pass orders to remedy a nuisance which might be caused to private individuals. And Ch. 11, Criminal P. C., is only intended for temporary orders about nuisances.

I consider in a suit like the present, where the plaintiffs have asked for a declaration from the civil Court in regard to their rights to play music in a temple that it is within the jurisdiction of the civil Court to state to what extent the exercise of those rights would prove a nuisance to other persons who have rights in the neighbourhood. For that reason I consider that the appellants are not correct in stating that the lower Court acted illegally in restricting the play of music by the Hindus in the temple. The only question is whether the restriction laid down by the lower Court was a correct restriction in the circumstances or not. That restriction was that the Hindus were not to play music in their temple during the five recognized periods of Muhammadan prayers. Each case must be decided on its merits, and in the present case the particular factors which are apparent are, firstly, that the mosque is within a dozen yards of the temple, or, as stated by the Munsif, the mosque is actually three-quarters of a yard away from the Thakurdwara. Secondly the plaintiffs asked in their plaint for a declaration in regard to the ringing of bells and the sounding of kans and the blowing of conches and the ringing of other religious musical instruments. The kind of music which is mentioned in the plaint is of such a loud nature that in my opinion it would undoubtedly cause an undue interference with the rights of the Mahomedans to say their prayers in the adjoining mosque. Such an interference would, in my opinion, constitute a nuisance at the time of saying prayers by the Mahomedans, and accordingly I consider that the restriction imposed by the District Judge in this particular case is a restriction which is correct, that is, I consider that the plaintiffs cannot make the particular music mentioned in the plaint during the five recognized periods of Mahomedan prayers, as in my opinion this would amount to undue interference with the rights of the Mahomedans to say their prayers at those times. But I consider that it will be open to the Hindus to conduct their worship during those five recognized periods of Mahomedan prayers if they conduct their worship in such a way that they do not make music so loud as to unduly interfere with the prayers of the Mahomedans. Now as regards music in the thakurdwara, there are two points to be considered:

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(1) A.I.R. 1925 P.C. 36=86 I.C. 236=52 I.A. 61=47 All. 151 (P.C.).

(1) Should the plaintiffs receive a declaration of an absolute and unlimited right to conduct their religious services in the thakurdwara with ringing of bells, sounding of kans, blowing of conches, and ringing of other musical instruments, and that no person has any right to object; or should the declaration state that the right is limited by the law of nuisance?

(2) Can this limitation be expressed where the written statements did not specifically plead nuisance?

I shall first state what I believe to be the general law of the right to worship, and I shall then refer to various rulings and lastly I shall deal with this particular case and the pleadings. I consider that the following five propositions sum up the general law in India of religious worship:

(1) Every person has a right to worship. (2) The right is independent of custom. (3) The right is not absolute but is limited by the rights of others. (4) The exercise of the right may be limited by order of the public authorities. Such orders may be passed under S. 144, Criminal P. C., to prevent urgent nuisance or breach of the peace, or under S. 133, Criminal P. C. to prevent a nuisance in a public place, or under S. 30, Act 5, 1861, the Police Act, in the case of public assemblies and processions. (5) The exercise of the right may be limited by the civil Courts on the ground of nuisance, public or private. The last proposition is the one of importance in the present case and the question is whether the ringing of bells, etc., as an accompaniment of worship can constitute a nuisance. In England it has been held that it may amount to a nuisance. In *Soltau* v. *De Held* (2), the plaintiffs stated their case thus:

> "We, the occupiers of dwelling houses in the vicinity (of the Roman Catholic Church) desire to represent that we are subjected to a great inconvenience and annoyance from the loud and frequent ringing (often at unseasonable hours) of the large and harsh-sounding bell some time since erected upon an open frame on the roof of the said house. The practice we complain of is offensive alike to our ears and feelings; disturbs the quiet and comfort of our houses, molests us in our engagements whether of business, amusement, or devotion."

On p. 143 the Court held that

> "a peal of bells may be, and no doubt is an extreme nuisance, and, perhaps, an intolerable nuisance, to a person who lives within a very few feet or yards of them."

On p. 159 the passage on which my learned brother relies on his p. 18 is quoted from *Walter* v. *Selfe* and the Court comes to the conclusion that the ringing of the bells was a nuisance in the terms of this passage:

> "The important point next for decision may properly, I conceive, be thus put: Ought this inconvenience to be considered, in fact, as more than fanciful, or as one of mere delicacy and fastidiousness; as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living; but according to plain, sober and simple notions among the English people?"

That, I think, enunciates distinctly the question which is to be tried upon such an occasion as this; and I must add, in the very words of Vice-Chancellor Knight Bruce, that I am of opinion that this point is against the defendant; that this is such an inconvenience, and such an invasion of the domestic comfort and enjoyment of a man's home, that he is entitled to come and ask this

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(2) 3 Sim N.S. 133=21 L.J. Ch. N.S. 153.

Court to intervene. The form of the injunction should be noted. At p. 161 it is stated:

"The bill asks for an injunction to restrain the ringing of these bells altogether; or in the alternative, to restrain the ringing of them so as to cause or occasion any nuisance or annoyance to the plaintiff or any of the members of his family residing in his house; and it appears to me that the latter is very nearly the form in which the injunction ought to be granted. Therefore I shall order an injunction to issue to restrain the defendant and all persons acting under his direction or by his authority, from tolling or ringing the bells in the plaintiff's bill, or any of them, so as to occasion any nuisance, disturbance and annoyance to the plaintiff and his family residing in the dwellinghouse."

I have quoted this passage because I consider that the declaration to be granted to the plaintiffs should be in similar terms, that is, that the plaintiffs have a right to worship with music in the Thakurdwara, but they must not occasion any nuisance, disturbance or annoyance to the defendants during the five recognized periods of Mahomedan prayer. The ruling of *Soltau* v. *De Held* was quoted with approval by Lord Selborne in *Gaunt* v. *Finney* (3):

"There may of course be such a thing as a legal nuisance from noise in a manufacturing or other populous town, of which the case of *Soltau* v. *De Held* is in example. . . . . . A nuisance by noise, supposing malice to be out of the question, is emphatically a question of degree . . . . . . such things, to offend against the law must be done in a manner which, beyond fair controversy, ought to be regarded as exceptional and unreasonable."

In *Webb* v. *Barker* (4), Hall, V. C. granted an injunction to prevent building operations being proceeded with during the night to the annoyance and discomfort of an adjoining occupier, and limited the working hours to between 6 a. m. and 8 p. m. In *Motion* v. *Mills* (5) Kekewich, J., granted an injunction against the giving of singing lessons in a house adjoining business premises in such a manner as to cause injury and annoyance to the plaintiff in the conduct of his business. Halsbury Laws of England, Vol. 21, p. 531 says:

"Every person is entitled, as against his neighbour, to the comfortable and healthful enjoyment of the premises owned or occupied by him whether for pleasure or business. In deciding whether in any particular case this right has been invaded and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary material comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among the English people."

"The making or causing to be made such a noise or vibration as materially interferes with the comfort of the neighbouring inhabitants, when judged by the standard above stated, is an actionable nuisance, and one for which an injunction will be granted, and it is no excuse to affirm that . . . . the cause of the nuisance is the exercise of a trade in a reasonable and proper manner and in a reasonable place. The question of nuisance or no nuisance is one of degree, and depends upon the circumstances of the case."

A case which is of importance in the present case is *Heath* v. *Mayor of Brighton* (6), as in that case the persons who complained of a nuisance were the incumbent and trustees of a church, and they complained that certain plant for generating electricity made a humming noise such:

"as to cause nuisance and annoyance to the plaintiffs and to other persons using or worshiping in their church, or meeting in or using any of the buildings on the plaintiffs land."

Joyce, J., on p. 720, laid down what were the rights of members of a congregation in regard to nuisance from noise:

"It is not a question of the ordinary comfort and enjoyment of a dwelling house being unreasonably disturbed; no one resides in the church, but still the people who do attend the church come to listen, I suppose, and freedom from external noises is certainly desirable and, I think, I might say, more or less necessary. The plaintiffs however are not because the premises are used as a place of worship entitled to anything more than the ordinary amount of quiet in a town; they have no special rights because of the purposes for which the premises are used."

In this particular case the Court held that the works was about 100 feet from the nearest point of the church, and that the low humming sound was not a loud noise and:

"cannot be heard during the singing or playing of the organ or when anything is going on; in other words when there is any other sound in the church. An ordinary person would not, I think, be really disturbed by it in hearing the sermon or the reading of the lessons, or such parts of the church service as are not choral. In certain parts of the church it cannot be detected by listening, even when there is otherwise perfect silence, and sometimes it cannot be heard at all anywhere in the building . . . . Most ordinary people may, I think, attend this church without experiencing real annoyance from the sound from the works; many would care nothing about it even if they heard it at all."

And as the noise did not amount to a nuisance an injunction was refused.

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(3) [1872] 8 Ch. A. 8=42 L. J. Ch. 122=27 L. T. 569=21 W. R. 129.

(4) [1881] W.N. 158.

(5) [1897] 13 T.L.R. 427.

(6) [1908] 98 L.T. 718=72 J.P. 225=24 T.L.R. 414.

Coming now to Indian cases, I am not able to find any case in which it has been laid down that the above principles which have been established in England would not apply. In *Jafar Hussain Khan* v. *Krishanan Servai* (7) at p. 765 (of 50 *Mad.*) it is stated:

> "So far as the right of Mahomedans to stop the playing of music inside a Hindu temple is concerned, I find no direct authority in point; but it appears to me that that can only be decided not as a proposition of law, but on the stated circumstances in each case. The plaintiffs rely strongly on a sentence from *Muthialu Chetti* v. *Bapun Saib* (8): 'It is on the one hand a right recognized by law that an assembly lawfully engaged in the performance of religious worship or religious ceremonies shall not be disturbed.'' That, no doubt, is a general right, but, obviously, it can be modified by circumstances, so that the exercise by each party of its legal rights shall be reasonable and with due regard to the rights of others: see *Sundram* v. *The Queen* (9). If, for example, two places of worship of different sects have been existing side by side from time immemorial, then each, no doubt, must exercise its rights of worship with due regard to the rights of the other and submit to curtail its own rights in consideration of the other party also curtailing its rights. The modus vivendi is a compromise of competing rights and the Courts will enforce, as the real civil rights of each party, the mutual compromise, instead of putting both parties in an impossible position by declaring the formal civil rights of both."

This exposition of law appears to me to be sound, and its value does not become less because in dealing with the particular facts of the case before it the Court held that:

> "But where, for example, a new sect or body of worshippers invades a locality already occupied by another religious body, it is not reasonable that it should, in the name of ensuring quietness for its own worship, claim to curtail the service or worship which had been customary long before it invaded the locality."

I think however that the fact that one party has newly come to the locality and is starting religious worship in close proximity to an existing religious institution, so close as to disturb it, is a matter to be taken into consideration along with other matters. The Madras High Court was dealing with the converse case of the plaintiff coming to the nuisance, and as Underhill, Law of Torts, 1914, p. 268 states on the authority of *Bliss* v. *Hall* (10):

> "It is no answer to an action for nuisance, that the plaintiff knew that there was a nuisance, and yet went and lived near it."

The case before the Madras High Court might have been decided in the manner in which it was decided on a different principle. As Underhill says at p. 270, the right to commit a private nuisance may be acquired by grant or prescription., and at p. 271:

> "It must be noted that the period of twenty years only begins to run from the time when the acts complained of begin to be a nuisance. So when the defendant had for more than twenty years made a noise which did not amount to an actionable nuisance to his neighbour, because the neighbour's land was not built on, he acquired no easement by so doing; and accordingly when the plaintiff built a consultation room on the land affected by the noise, and the noise then began to be a nuisance, it was held that the defendant had not acquired a right under the Prescription Act: *Sturges* v. *Bridgman* (11)."

On this principle of easement a temple which had been established in a village, as in the Madras case, for the period of prescription would acquire the right to make any degree of noise, and persons who established a mosque in close proximity to the temple after the right had been acquired would have no status to complain of nuisance. But the facts in the present case as found by the lower appellate Court, in agreement with the Court of first instance, are that the use of music in this building by the Hindus was an "innovation." That is a finding of fact and I do not consider that it is open to this Court to reverse it on second appeal on the ground that the lower appellate Court was wrong in stating:

> "there seems to be no doubt that in a private place of Hindu worship music is not required by the Hindu scriptures."

But before going further into the findings in this case, I shall refer to one other Indian ruling on the subject of noise, *Jawand Singh* v. *Muhammad Din* (12). This was a single Judge case, and an injunction was granted to certain Mahomedans restraining certain Hindus from interfering with the calling out of the azan and praying in a mosque. It was found that the conches had not been blown in connexion with any religious ceremony of the Hindus, but solely to stop the call of the azan. But in the Lahore case there was no question of a mosque adjoining a Thakurdwara, and

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(7) A.I.R. 1930 Mad. 701=125 I.C. 554=53 Mad. 761.

(8) [1880] 2 Mad. 140.

(9) [1883] 6 Mad. 203=2 Weir 77 (F.B.).

(10) [1838] 4 Bing N. C. 183=5 Scott 500=6 D. P.C. 442=1 R. 19=7 L.J.C.P. 122=2 Jur. 110.

(11) [1879] 11 Ch. D. 852=48 L.J. Ch. 785=41 L.T. 219=25 W.R. 200.

(12) [1920] 1 Lah. 140=51 I.C. 728.

I do not think that the passage in the injunction referring to religous ceremonies was intended to refer to religious ceremonies in a thakurdwara. For one thing the injunction refers to "religious ceremonies, social events or other necessary temporary causes" and the use of the word "other" shows that temporary must apply to the preceding words "religious ceremonies." It was therefore temporary religious ceremonies which the learned Judge had in contemplation or temporary social events, such as weddings, which are celebrated with music. What he meant was that the injunction was not to restrain Hindus from having music at wedding processions or at wedding parties in their houses. But when we come to deal with a thakurdwara adjoining a mosque we come to a situation which is not temporary but permanent and of daily recurrence. The Judge also probably meant that his injunction was not intended to prevent a religious procession from making music as it passed by the mosque. Such processions would be temporary ones and the interruption would be as the injunction says in the last clause "on occasions." For these reasons I do not think that the fact that the injunction was limited in and was not to apply to music at religious ceremonies, social events or other necessary temporary occasions is any reason why an injunction should not be granted if music in a thakurdwara does amount to a nuisance.

We now come to the second point, as to whether the limitation in regard to nuisance can be made in a declaration where the written statements did not specifically plead nuisance. In para. 2 the plaint stated that the thakurdwara and dharamshala had been in existence in the enclosure of Lala Gendan Lal for a long time as a public place of worship with the blowing of conches, ringing gongs, (sankh and gharyal) but the ghantas and other religious musical instruments are not mentioned as having been in use. This para. 2 was denied in the two written statements of contesting defendants, who further pleaded:

> "The place which the plaintiffs allege as the public place of worship of the Hindus and regarding which they state the practice, etc., neither was ever nor is a public place of worship. It is the house of plaintiff 1 and the other plaintiffs have nothing to do with it. Regard being had to this also the suit is not entertainable."

The pleading was not therefore that the bells and conches, etc., had been a nuisance, but that such noises had not been made and that the plaintiffs wanted a new thing. The Munsif states on p. 18 of the paper book:

> "The plaintiffs come into Court on the allegation that the Thakurdwara is of a very old age. They are confronted by the defendants saying that up till now there has been nothing of the like. It is practically admitted by the plaintiffs that Ghanta, Gharyal and Sukh are the requisites only in case the Thakurdwara is a public institution, and nothing of the like is necessary in a private Thakurdwara . . . . Now the point is to see whether this Thakurdwara is a public institution of some long standing or only a recent conversion of a private dwelling house into a Thakurdwara."

On p. 21 the Munsif stated:

> "In my opinion it is a perfectly private residential enclosure, with a residential house, now turned to the Thakurdwara"

and that sankh had not been sounded in the abadi, and that the relief of sounding bells, conches, gongs, etc., could not be granted. The finding was that these noises had not been made hitherto. The appeal raised various points about the temple and Thakurdwara being public and that bells etc. are sounded in private Thakurdwaras, but it was not definitely stated in the grounds of appeal that as a fact the bells, etc., had been sounded for a period of time, though it was stated in argument. The District Judge found:

> "I agree with the lower Court that it is not proved that this temple was used by the general public, at any rate until very recently, and there seems to be no doubt that in a private place of Hindu worship music is not required by the Hindu scriptures. On the other hand I do not see how the Mahomedans can object to the Hindus turning a private place of worship into a public place, and if this is done the Hindus will naturally want to carry on their religious observances with the accompaniment of music. It is admitted that the temple is within a few yards of the mosque and that the music accompaniment will make a great noise, and as the Mahomedans in every country object to music as part of their religious observances, it is only reasonable that the Hindus should not play music in this temple at the time of Mahomedan prayers."

The learned District Judge is not correct in referring to dislike of music during prayers as a reason. But the quotations above show that the question of whether the music had been a nuisance did not arise because the case for the defence, which was accepted by the lower Courts, was that there had hitherto been no music. It is also to be noted that the plaintiffs do not come to Court for a declaration in regard to their right to music because of interference by the defendants in the making of music by the plaintiffs, but the case is based on an order of a Subdivisional Magistrate. Now when the plaintiffs ask for a declaration of their right to sound musical instruments and bells etc. is it correct that they should get an absolute declaration or that there should be a reference to the rights of the defendants against whom the plaintiffs ask for the declaration? There is no doubt that the declaration of the right of the plaintiffs to sound bells etc. cannot deprive the defendants of their legal remedy of injunction if those noises when made do amount to a nuisance. Then why not refer to the rights of the defendants in the declaration? Otherwise the declaration will be misleading. I consider it all the more necessary to make a clear declaration of the limitations on the right of the plaintiffs because they ask in their relief that the declaration should state "no person has any right to throw obstacles". If this expression means that no person has a right to object no matter how great a nuisance is caused by the plaintiffs. then in my opinion a declaration in these terms would be contrary to law. The District Judge has come to a finding of fact that the music in question will make a great noise, and that the temple is within a few yards of the mosque, and the result naturally follows that the Mahomedans will be disturbed in their prayers. In my opinion this amounts to a finding that there would be a nuisance caused to the Mahomedans.

Finally I would refer to a decision of a Bench of this Court in *Mohammad Jalil Khan* v. *Ram Nath Katwa* (13) decided by Sulaiman and Young, JJ., in which the Hindu plaintiffs sued for a declaration of their rights to take out processions with music past mosques. The learned Judges have carefully interpreted the ruling of their Lordships of the Privy Council in *Mansur Hasan* v. *Muhammad Zamman* (1) and state:

> "It may be noted that in that case there was no question as to the right to play music, nor was there any suggestion that such music amounted to a nuisance. When such a question arises it would obviously be covered by the reservation subject to the rights of the public."

As to nuisance it was stated:

> "There is no right to commit a nuisance on a highway, nor is there any absolute right to commit a private nuisance against a particular defendant. But all music however bad, cannot amount either to a public nuisance or a private nuisance, evén though it may annoy occupiers of a dwelling house situated on the road. But a noise may become a nuisance, public or private. There is no definite legal measure for a noise becoming a nuisance. It is purely a question depending on the facts of each case, including the degree of its intensity, its place, the time, the mode of committing it, its duration and all the surrounding circumstances."

I do not think that the plaintiffs should receive relief (b), that is an injunction to restrain the defendants from interfering with the exercise by the plaintiffs of their rights, because the defendants have a right to claim that the plaintiffs should not commit a nuisance. And I note that in F. A. No. 245 of 1927 the plaint asked for a declaration that defendants had no right to offer obstruction, etc., but this was not embodied in the declaration granted. I would adopt the form of declaration granted in that case, introducing words relating to the thakurdwara as follows:

> "That the plaintiffs both in their individual capacities and as members of the Hindu community have (a) a right to take out religious and social processions accompanied by mnsic along public roads even while passing mosques, and (b) a right to perform worship in the thakurdwara in Senthal accompanied by music, subject in both (a) and (b) to any orders or directions issued by the Magistrate or the police for preventing breaches of the peace or obstruction of the thoroughfares or for other matters mentioned in S. 144, Criminal P. C., or under other statutory provisions or for regulation of traffic, provided that the exercise of such rights (a) or (b) do not amount to a nuisance recognized by law.".

Mukerji, J.—This appeal raises a difficult point of law and it is a pity that nobody appeared on behalf of the respondent in support of the decree of the lower Court. The plaintiffs who claim to represent the Hindus of a village Senthal in the district of Bareilly instituted a suit out of which this appeal has arisen for a declaration and a perpetual injunction in the following terms:

> (a) It may be declared that the plaintiffs and the other Hindus are competent to perform the pujapath (worship) of Sri Thakurju Maharaj and the other deities installed in the thakurdwara situate in qasba Senthal, pargana and tahsil Nawabganj, bounded as below, by ringing ghantas, gharyal, by blowing sankh and by ringing other religious musical instruments

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(13) A. I. R. 1931 All. 341=131 I. C. 40.

without restrictions of time and to perform kirtan, gayan, ras lila on Monday and Ekadashi (11th day) day according to the rite, custom and belief observed by Sanatandharm Hindus and to do Utshab on Janam Asthami, and the other festivals according to the old practice and rite, mentioned in para. 2 of this plaint, and that no person has any right to throw obstacles. Laid at Rs. 500."

"(b) A perpetual injunction may be issued to the defendants restraining them from interfering, at any time, with the plaintiffs' prayer made in relief (a). Laid at Rs. 10."

The plaintiffs' case is that there is a temple (and attached to it a dharamshala or rest house) which is a public place of worship for the Hindus of the town of Senthal and the neighbouring places and that the worship is performed in the orthodox method of blowing of conch shells and by ringing of gongs and by reciting and singing the praises of the idols and the deities represented by the idols. In the year in which the suit was instituted certain Mahommedans in collusion with one another made an application, on 3rd March 1926, in the name of defendant 3 Naqsh Ali, to the criminal authorities against the performance of the worship in the way mentioned. On the said application, after summary inquiry the authorities arbitrarily fixed the times of worship by the Hindus and thus interfered with their right to perform the worship in their own way. The plaintiffs accordingly asked for a declaration of their right and a perpetual injunction restraining the defendants from interfering with the plaintiffs' prayer.

Originally there were six defendants, but three more were added at their own request.

Defendants 5 and 6 admitted the claim and said that they never contested the plaintiffs' right to worship in their own fashion and said that the Shiahs of the town were quarrelsome people and they, through defendant 3 Naqsh Ali, put in the application complained of and that, as a matter of fact, the mosque, which is near to the temple and on account of the worship in which the Shiahs want to interfere with the plaintiffs' rights, is a mosque in which Shiahs have no right to say their prayers.

Defendants 1 and 4 filed one written statement and defendants 3 and 7 to 10 filed another written statement. They are virtually the real defendants in the case and we have to consider the pleas raised by them.

Defendants 1 and 4 generally denied the allegations made in the plaint and then said that in former days the village of Senthal was owned by a Mahomedan and after him by his descendants, and for a long time there were no Hindu zamindars; that all the lands in the village, including the paths and ways belonged to the Mahomedan zamindar, and neither the British Government nor the Hindus had any interest in those ways; that accordingly the Hindus had never any right to take any procession through these routes and village paths; that the temple in question was the private property of plaintiff 1 only; that the suit was not maintainable; that there was an agreement between the Hindus and Mahomedans once that the Mahomedans would sacrifice cows only in their houses and not in the public ways and the Hindus would not take out any processions; that the routes were narrow and on either side of them there were mosques and residential houses of Mussalmans and therefore the plaintiffs could not be allowed to have the reliefs claimed by them without fixation of time and without certain restrictions mentioned in the written statement, including abstention from taking processions before mosques at the five usual hours of prayer, in a way which was likely to disturb the Mussalmans congregating for saying their prayers. It will be noticed that defendants 1 and 4 do not say anything in their written statement as to why the plaintiffs should not perform their worship with music at the temple. All the objections of defendants 1 to 4 are directed against the taking out of a procession.

In their joint written statement defendants 3 and 7 to 10, in a general way, do not admit the statements made in the plaint and repeat the allegations of defendants 1 and 4 that the village was in the olden days owned by a Mahomedan zamindar; and say that the temple is the private property of only one of the plaintiffs, that the plaintiffs were not suing in a representative capacity, that the suit was not maintainable; and that the plaintiffs' suit could not be decreed without some restrictions being placed on the rights claimed by them.

The learned Munsif framed 11 issues and they are as follows:

1. Whether Senthal was even (sic. ever?) a village owned by zamindars.

2. Whether the streets in Senthal are public ones or only private owned streets with limited dedication to public user. To what extent?

3. What has been the custom in Senthal with regard to public processions, and what effect it has on the present suit.

4. Is the present suit maintainable without proving special damage?

5. Is the Thakurdwara, alleged in the plaint, a public institution; and if not, is the suit maintainable?

6. Whether, by virtue of a custom or otherwise, the plaintiffs have a right to carry through their processions without any restriction, as prayed for in the plaint.

7. Whether in view of the alleged surrender of rights by the Mahomedans, the plaintiffs can still maintain the present suit.

8. Whether any and what conditions and restrictions should be imposed on the declaration sought by the plaintiffs.

9. Is the court-fee insufficient?

10. Whether there is an old custom of holding the mela at the talab. If not, how does it affect the case?

11. To what relief, if any, are the plaintiffs entitled?

It will be noticed that none of the issues involve a denial of the right of the plaintiffs to worship in the temple with an accompaniment of music. The learned Munsif found on issue 1 that the residential area of the village Senthal had acquired the character of a town. On issue 2 he found that the streets were no longer the exclusive property of the zamindars, but belonged to the Government; and all the inhabitants of the town Senthal, Hindu and Mahomedan alike, could use them. On issues 3 and 6 the learned Munsif held that the plaintiffs had not been taking out processions for a long time, that they had no claim to pass by specific routes, that the plaintiffs were taking out processions for not more than 12 years, and that mosques and tombs of saints have existed for a much longer time. The learned Judge came to the conclusion that:

> "The plaintiffs may therefore take out their procession. . . . and perform all their religious functions. . . . but they are to avoid the front of the mosques and the imambaras standing on this route and elsewhere."

He further held that if the plaintiffs were keen on going over the particular route by which they wanted to proceed, they must stop all music within a radius of one furlong in front of the imambara and mosque. The learned Munsif remarked:

> "The plaintiffs fail to give a valid reason why they of 50 years standing or more in this village should be allowed to disturb the defendants of 200 years standing."
>
> "That is why I suggest to the plaintiffs to enjoy their processions in all its details with band and music and so forth, if they only avoid the front of the imambaras and the mosques. If not, they shall have to suspend the music generally as said above which in the first 10 days of Muharram and on the 40th day there will be absolutely no music at all."

On issue 4 the learned Munsif held that the suit was maintainable without proving any special damage. On issue 5 the Munsif held that the thakurdwara was strictly a private place of worship of plaintiff 1

> "and therefore the relief of sounding ghanta, ghariwal, bijay ghant and sankh, etc., cannot be granted."

On issue 7 the learned Munsif found that

> "the defendants' evidence on the point. . . . . is not impressive to me."

On issue 3 the learned Judge held that as the result of his observations on issue 5, the plaintiffs were not entitled to relief No. 1, namely, carrying on worship with music at the temple and as to the procession he held that it could be taken out subject to the restrictions already mentioned by him. The objection as to the court-fee was not pressed before the Munsif and issue 9 was decided in plaintiffs' favour. Issue 10 was decided in favour of the plaintiffs, although it was observed that the fair held at the tank had been held for 14 or 15 years, the tank being plaintiffs' property, the Hindus could hold their fair on their own land so long as they did not trespass on the land belonging to Mahommedans. On issue 11, the learned Munsif repeated the results of his finding.

There was an appeal to the District Judge and the learned Judge found that although the temple might be a private one, it was open to plaintiff 1 to let other Hindus congregate in the temple and worship there, and he held that the Mahomedans could not object to a private Hindu place of worship being turned into a public place of worship. The learned Judge was also of opinion, that, in a private temple, music was not required, under the Hindu scriptures, at the time of worship but it was required in a public place of worship. Having expressed the opinion that the Mahomedans could not object to the sounding of music in the temple except when the music is sounded at the time of prayers in the mosque which stood close to the temple, he held that

> "it is only reasonable that Hindus should not play music in the temple during the time of Mahomedan prayers. The mosque is an old building and the temple is comparatively a new one. Therefore, in my opinion, the Hindus should respect the rights of the Mahomedans regarding music during the time of prayers, but I do not consider that the Mahomedans have a right to prevent the Hindus from their musical observances at all times of the day."

The learned Judge therefore modified the decree of the Court of first instance by allowing the Hindus to play music in their temple whether it be a private or public place of worship at any time "except during the five recognized periods of Mahomedan prayer." The Judge did not define what these "periods" were.

Coming to the question of processions, the learned Judge, upheld the order of the Court of first instance on the ground that

> "this town was originally built and inhabited by Mahomedans and therefore the Hindus should not play music in front of mosques and imambaras during Mahomedan prayers and if Jana Mashtmi and Dadkandan coincide with Muharrum, it is only reasonable that they should, as new comers, respect the religious susceptibilities of Mahomedans and not play music on the first ten days of Muhurram or on the 40th day."

The plaintiffs being dissatisfied with the judgment of the lower appellate Court have come in second appeal.

I have already expressed my regret that in a case like this the respondents were not represented by counsel. I have however given the case my best consideration and have tried to find out, if possible, the principles on which a suit like this ought to be decided. I am clearly of opinion that the judgment of the two learned Judges of the Courts below are based more or less on what they consider to be "expedient" and "fair play." These may be good grounds for a compromise or for an executive order but they can certainly not be the basis of a judicial order, based on a clear recognition of the civil rights of the parties.

As regards the procession, the matter is really simple, in view of the Privy Council decision, in the case of *Manzur-Hasan* v. *Mohammad Zaman* (1). That was a dispute between the Shiahs and the Sunnis. The Shiahs claimed a right to take out a procession with music and recital of "matam." The Sunnis, whose mosque stood on the route, claimed a right to stop the music and the recitation of 'matam' when the procession approached the mosque. Their Lordships of the Privy Council held that Shiahs had a right to take out their procession in their own method and the Sunnis had no right to demand a stoppage of music and other accompaniments. Their Lordships say:

> "The first question is, is there a right to conduct a religious procession with its appropriate observances along a highway? Their Lordships think the answer is in the affirmative."

Their Lordships approved of the Madras case of *Sundaram Chetty* v. *The Queen* (9), which held that the right to take out processions existed in a community and that

> "the worship in a mosque or temple which abutted on a high road could not compel the processionists to interrupt their worship while passing near the mosque or temple on the ground that there was continuous worship there."

Their Lordships put certain restrictions over and above what had been imposed by the first Court on the processions by saying that the processions were to be subject to the Magistrate's directions and the rights of the public, besides being subject to orders of local authorities regulating the traffic; (the last mentioned restriction had been imposed by the first Court).

Applying this decision of the Privy Council to the case before me, the plaintiffs are entitled to take out their procession subject to the orders of the Magistrate regulating the traffic and making such lawful orders as he as a Magistrate may consider it fit to pass, in view of maintenance of peace, and order, and other similar matters. In passing the orders however it goes without saying, the Magistrate will be guided by the civil rights of the citizens and will interfere with it as little as may be possible.

The question of performing worship at the temple with the accompaniment of loud music presents a little more difficult problem in view of the fact that there are no clearly decided cases bearing exactly on the point. The case of *Manzur Hasan* (1) referred to above however seems to be based on the principle that every subject of the Crown has an equal right of worship, and people of another persuasion cannot interfere with his method of worship on the ground that it clashes with his own ideas of religious proprieties.

We have to remember that the temple is within a few yards of the mosque and at the mosque, we may take it, Mahomedans congregate in order to say their prayer five times in the course of the day and night, though the exact hours of prayers are not defined. No issue was framed as to whether the mosque belonged to Sunnis alone and whether Shiahs had or not any right to say prayers there. I will therefore take it that all Mahomedans, Shiahs or Sunnis were entitled to congregate in the mosque to say their prayers. We may also take it that in their prayer time, the Mahomedans do not like that any music, especially the one used in the temple, where worship of an idol is carried on, should be sounded. On the other hand, we have the fact that Hindu worship is carried on in accompaniment of music and sometimes in accompaniment of loud music, whether the worship be in a private temple or in a public temple. The learned District Judge is certainly wrong when he says that worship in a private Hindu temple is never required to be performed with accompaniment of music. He quotes no authority for this statement. This therefore is a case of conflicting sentiments and religious convictions and the question is what should be the basis of the judgment of a civil Court. Is the suit to be decided on the ground of sentiment and rules of religious observances or whether on the ground of civil rights as they subsist in the subjects of the Crown in general? Religious sentiments and religious observances are very often (as in this particular case) conflicting and unless the parties are reasonable and agree to settle their disputes themselves, it is not possible that both could be pleased and satisfied. The basis of the decision in a Court of law must be the civil rights and civil rights alone and no account can be taken of mere sentiments of a certain section of the subjects of the Crown. The civil right of every subject of the Crown is that he would be entitled to carry on his worship in any method he likes, but only so long as he does not by his performances affect others injuriously. In this view both Hindus and Mahomedans have the right to carry on their worship the Mahomedans in their mosque and the Hindus in their temple, unrestricted each by the other so long as the civil rights of the parties are not encroached upon.

The question therefore is: What are the civil rights of the parties? There can be no doubt that in India there is an absolute freedom of worship for every person living under the protection of the British Crown. A worship of the deity by a single individual or group of individuals according to their own rites can be interfered with only if the act or acts of the aforesaid persons should amount to an infringement of the rights of the public in general or of the private rights of individuals, which in this case would be of the defendants. In order that the act or acts or worship may be interfered with, they must amount either to a public nuisance or to a private nuisance. The difficulty in this case arises from the fact that, as already pointed out, the defendants have not anywhere pointed out by what right or on what principle they propose to interfere with the undoubted right of worship the Hindus may possess in the temple. I have assumed therefore the best case that the defendants could possibly raise and that case can only be one of nuisance.

If the plaintiffs' acts or proposed acts should amount to a public nuisance it is clear that the plaintiffs cannot have the declaration and the injunction they ask for.

"Public nuisance" is defined in S. 268, I. P. C. as:

> " A person is guilty of a public nuisance who does any act or its guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to enjoy any public rights."

The plaintiffs' act is not likely to cause any common injury or danger to the public or to the people who dwell or occupy property in the vicinity. The utmost that can be said is that the plaintiffs' act or acts may amount to an annoyance to the people who occupy the mosque in the vicinity, during the hours of Mahomedan prayer. But if we look to the whole section and read it carefully we shall see that the sort of annoyance which the section aims at is not the kind of annoyance which the religious ideas of a class of people may suffer on account of an otherwise innocent act of another section of the public. If we examine decided cases on this point, we shall see that this is the interpretation which has been put on the section.

In the case of *Queen-Empress* v. *Zakhiuddin* (14) the facts were these. The applicants in revision had killed two cows in another compound and cut up and disposed of the carcasses. The wall of the compound had fallen into ruin and the compound was visible from a high road which passed it. Only one person saw the actual slaughter. A learned Judge of this Court made the following remarks:

> "If a few Hindus passing by a private compound can have the occupants of that compound punished for a public nuisance merely because they have seen the occupants moving about in their compound and imagine that they are engaged in cutting up the carcasses of cows much more could be butchers who in the exercise of their trade carry beef for sale through the streets of almost every station in British India be punished for a public nuisance."

The learned Judge quotes with approval from the cases of *Muttumira* v. *Queen-Empress* (15) the following remarks:

> ". . . . . . It is obvious from the language of the Act that it was not intended to apply to acts or omissions calculated to offend the sentiments of a class. In this country it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds. The scope of the provision we are considering is to protect the public or people in general, as distinguished from the members of a sect from injury, danger, or annoyance in the neighbourhood of places where they dwell or occupy property or when they have occasion to use a public right."

In the result the convictions were set aside. The remarks of Sir Charles Turner, J., which were approved by Broadhurst, J., of this Court, clearly lay down that the mere fact that the sentiments of a section of the public was likely to be hurt by an act will not turn an act, otherwise innocent, into a public nuisance.

In the case of *Queen-Empress* v. *Byramji* (16), the accused cut up on his verandah meat that was to be cooked for a dinner party, and exposed it to the sight of passers by, among whom were some Jainas, whose temple was close by. The Jainas complained to the Magistrate that the accused had made the air offensive and caused nuisance. The Magistrate convicted the accused of committing public nuisance on the ground that he had done an act by which several persons, being Jainas, were much annoyed, it being a well-known fact that they had great repugnance to the killing of animals of every sort. Birdwood and Pearson, JJ., setting aside the conviction and the sentence cited an English case: *Scott* v. *Firth* (17) and remarked:

> "Now it has been held that in order to constitute a nuisance, there must be not merely a nominal but such a sensible and real damage as a sensible person would find injurious . . . . . ."

In the present case no real damage or injury is alleged to have been caused to the public or to the people in general dwelling in the vicinity, but merely an annoyance to those Jainas alone who happened to pass along the road in front of the applicant's house at the time when the meat was being cut up and exposed there. If that was so it was a private rather than a public nuisance and therefore would not fall under the criminal law. The nuisance, moreover, such as it was, neither caused any sensible nor real damage. It was a nuisance merely by reason of its hurting the feelings of the Jainas who have a repugnance to the killing of animals. It was thus of the nature of a sentimental grievance which could be felt only by persons of certain views as to the killing of animals.

Then the learned Judges referred with approval to the case of *Muttumira* v. *Queen-Empress* (14), already mentioned and set aside the conviction and the sentence. This case again lays down that the annoyance to a section of the public based on sentimental grounds cannot be annoyance within the meaning of S. 268, I. P. C.

In the case of *Shahbaz Khan* v. *Umrao Puri* (18) the head-note runs as follows:

> "Under certain limitations, the slaughter of kine by Mahomedans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that in so doing he does not cause real injury to others or offend against the law, even though

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(14) [1887] 10 All. 44=(1887) A.W.N. 232.

(15) [1884] 7 Mad. 590=1 Weir. 246.

(16) [1888] 12 Bom. 437.

(17) [1864] 4 F. & F. 349=10 L. T. 240.

(18) [1908] 30 All. 181=5 A.L.J. 147=(1908) A.W.N. 64.

he may thereby hurt the susceptibilities of others. The right of Mahomedans to slaughter kine is one to which they are legally entitled irrespective of custom and it is only when they abuse the rights that its exercise can be interfered with."

This summary of the decision of two learned Judges of this Court (Sir John Stanley, C. J., and Sir William Burkitt) really lays down the principle on which the rights of the inhabitants of the country are based. So long as a person exercises his private rights in a proper way, nobody has a right to object to his exercise of his right, simply because it does not suit the objector, according to his own light and training and religious belief, that an act should be done in that way. Every Mahomedan has a right to slaughter kine or other animals for meat or for worship. The Hindu may dislike the idea of killing a cow or a Jain or a Vaishnav may dislike the idea of an animal, whether a cow or not, being at all killed, yet if the man who kills the animal does it in a decent way, in a way which would not appear offensive to a man who does not hold particular beliefs and ideas about the slaughter of cows or other animals, he has every right to exercise his own civil rights. Applying the rule laid down in the case of *Shabaz Khan* v. *Umrao Puri* we find that the Hindus have every right to carry on their worship in their own way, in accompaniment of music and singing and nobody, who holds that this sort of practice is improper, has a right to interfere with it, so long as the exercise of the rights of worship by the Hindus does not come within the provisions of S. 268, I. P. C., by causing common injury or common danger or common nuisance to the public or to the people in general who may occupy property in the vicinity, namely, the mosque near by.

From the cases quoted, it will be noticed that the acts which the plaintiffs claim to have a right to perform cannot be condemned on the ground that they are forbidden by law: S. 268, I. P. C.:

Now the next question is whether the acts of the Hindus come within the definition of "private nuisance" and therefore should be forbidden or restricted at the defendant's instance, and if they are to be restricted, in what way are they to be restricted; Private nuisance is defined in Underhill's Law of Torts (2nd Indian Edition, 1924) as:

> "(1) A private nuisance is some unauthorized user of a man's own property causing damage to the property of another or some unauthorized interference with the property of another causing damage. (2) A private nuisance whereby sensible injury is caused to the property of another or whereby the ordinary physical comfort of human existence in such property is materially interfered with is actionable. (3) Liability for nuisance is independent of negligence. (4) No use of property which would be legal if due to a proper motive can be a nuisance merely because it is prompted by a motive which is improper or even malicious."

The definition shows that a private nuisance to be actionable must either effect another man's property or must affect another man's comfort to a material extent. There is no question here that the property of the defendants is likely to be affected adversely. There is no question here that the physical comfort of the defendants' coming to the mosque is likely to be affected by the acts about which the plaintiffs want a declaration. There is no rule of law ever laid down that mere hurting the sentiments of a neighbour would be a matter of private nuisance.

I have looked for authorities on the point but I have not been able to discover any which may establish that interference with religious observances according to the notions of a particular class of individuals can amount to private nuisance. If the religious observances by the Hindus be carried on with so much annoyance (that can be the only ground for objection) that the neighbours or the people frequenting the mosque find the act to be a cause of physical discomfort to them, the plaintiffs cannot have the declaration they seek for. But it is nowhere said in the written statement that the music that is performed in the temple causes any such physical discomfort. Then, the physical discomfort should be of a nature of sensible inconvenience and not mere small inconvenience. Lord Wensleydale, in *St. Helens Smelting Co.* v. *Tipping* (19), at p. 653, said, in effect:

> "Everything must be looked at from a reasonable point of view; therefore the law does not regard trivial and small inconveniences but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected: Quoted at p 415 in Ratan Lal's Law of Torts, Edn. 10."

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(19) [1865] 11 H.L.C. 642=35 L.J.Q.B. 66=12 L.T. 776=11 Jur. n.s. 785=13 W. R. 1083.

At p. 416 the same learned suthor quotes the following from an English case:

> "Both on principle and authority the important point for decision may be thus put: Ought inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to the elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people."

In considering the rights of the parties, it is immaterial whether the persons whose actions are objected to have come recently, to the neighbourhood or have been occupying the place for a long time. If the man whose acts are objected to is there in a rightful and lawful manner, and if he exercises his rights as a subject of the Crown in a rightful way, and does not infringe the performance of the rights of the others, the infringement being such as would be regarded objectionable under the ordinary law of the land and not according to the particular tenets or religious beliefs held by the person's objection, nobody has a right to interfere with the acts. Again if a person is lawfully engaged in certain acts, nobody else has a right to disturb him, simply because the latter does not like those acts. In the case of *Jawand Singh* v. *Mohamed Din* (12), the Hindus objected to the Mahomedans calling out the azan and when it was called out and at the time of subsequent prayer, the Hindus made noise by blowing conches and beating drums with the sole object of creating a disturbance. It was held that the Mahomedans were entitled to an injunction restraining the Hindus from infringing the exercise of their rights. The last paragraph of the head-note runs as follows:

> "Held further that the plaintiffs were entitled to the injunctions prayed for because the nuisance caused by the defendants was not a reasonable exercise of their rights and was an infringement of the rule of give and take."

It will be noted that, as pointed out in the head-note, the defendants made the noise "for the sole purpose of frustrating the object of the call." The learned Judge (Bevan Petman) passed the following order:

> "For the above reasons I dismiss the appeal on the merits with costs but technically accept the same and amend the decree of the lower appellate Court by granting the plaintiffs an injunction restraining the defendants from playing conches, beating drums and otherwise making noises which interfere with or interrupt the use of the mosque by the plaintiffs as a place of worship according to Mahomedan usage or custom including the calling of the azan. But this injunction shall not restrain the defendants from such acts when done in connexion with their own religious ceremonies, social events or other necessary temporary causes and when the time is not maliciously and intentionally selected to clash with the religious observances and worship of the plaintiffs at the said mosque, though in fact such acts may on occasions interrupt or interfere with such observances and worship."

The order that was passed, in appeal, in this case appears to me to contain the whole law on the subject of worship by different communities.

In the case of *Jaffar Hussain* v. *Krishnan Servai* (7) the decision of the case was based on a principle which would probably not be approved. It appears that certain representative Mahomedans sued for a declaration that they were entitled to carry on public worship in a mosque at hours stated by them undisturbed by Hindu processions of music or playing of music in the adjoining temple and they asked for an injunction against certain representative Hindus. The suit was dismissed by the Court of first instance and the decree was upheld by the High Court. The ground on which the suit was dismissed was this. The Hindus were performing their religious ceremonies for a long time. The Mahomedans deliberately built their mosque cheek by jowl with the Hindu temple and in such a case the new comer must respect the religious ceremonies and services of the older inhabitant. It was found that the services in the temple did not amount to a public nuisance and no such case has been put forward. In my opinion the principle of expediency was hardly sufficient. By exercising their worship for a long time the Hindus did not acquire any prescriptive right and therefore there was no question of the Mahomedan being "newcomers." At p. 765 of the report there are certain remarks which would go to suggest that the civil rights of parties like Hindus and Mahomedans might be curtailed where their places of worship were close by so that both might be accommodated. But this can be done only by mutual consent or not at all. If the result of each party exercising its rights leads to breaking of heads or riot, the authorities responsible for the peace of the land may bind the parties down till they are brought to their senses and either they stop all the exercise of their rights or come to reasonable terms with one another. That would be a matter with which a civil Court has no concern: but where parties insist on the full exercise of their rights and they are prepared to act within their rights, a civil Court has no alternative but to declare those rights and stop an interference if there be any, with the exercise of those rights. In this view of the case I would allow the appeal, modify the decrees of the Courts below and give the plaintiffs a declaration in the terms proposed by my learned brother.

By the Court.— The appeal is allowed, the decrees of the Courts below are modified and the plaintiffs are given the following declaration:

That the plaintiffs both in their individual capacities and as members of the Hindu community have (a) a right to take out religious and social processions accompanied by music along public roads even while passing mosques and (b) a right to perform worship in the Thakurdwara in Senthal accompanied by music subject to in both (a) and (b) to any orders or directions issued by the Magistrate or the police for preventing breaches of the peace or obstruction of the thoroughfares or for other matters mentioned in S. 144, Criminal P. C. or under other statutory provisions or for regulation of traffic, provided that the exercise of such rights (a) or (b) do not amount to a nuisance recognized by law.

B.V./R.K. *Appeal allowed.*

A. I. R. 1931 Allahabad 689

SULAIMAN, AG. C. J. AND
NIAMATULLAH, J.

Sheo Tahal Ram — Decree-holder — Appellant.

v.

Binaek Shukul — Judgment-debtor — Respondent.

Execution Second Appeal No. 1928 of 1929, Decided on 19th March 1931, against decision of Sub-Judge, Mirzapur, D/- 18th July 1929.

(a) Execution — Jurisdiction — Decree by Native State—Judgment-debtor can object to its validity on ground of want of jurisdiction—He need not ask for review of order in Court of Native State—His remedy is to object to execution in executing Court.

It is open to a judgment-debtor against whom a decree has been passed by a Native State Court to object to its validity on the ground of want of jurisdiction in the Court to which the execution has been transferred. If the decree passed is without jurisdiction and therefore a nullity he can certainly claim that he is not bound by it. It is not incumbent upon him to go to the Court of the Native State and ask that Court to review its order. By doing so he may be said in one sense to subject himself to the jurisdiction of that Court and bind himself by an adverse order in case it is passed. His remedy obviously is to object to the execution in the Court to which the decree has been transferred and which is now executing it. [P 691 C 1]

(b) Civil P. C. (1908), S. 44—British Indian Court has ample jurisdiction to refuse to execute decree passed by Native State Court.

There is nothing in S. 44 which compels a British Indian Court to execute a decree transferred to it by a Native State Court even if it is satisfied that the decree was passed without jurisdiction. It has ample discretion to refuse to execute the decree. [P 691 C 1]

(c) Civil P. C. (1908), O. 21, R. 7—Whether Court to which decree is transferred cannot question validity of decree or question of want of jurisdiction—(*Quaere*).

Quaere.—Whether the omission of the words "or the jurisdiction of the Court" from the section corresponding to the present O. 21, R. 7 necessarily implies that the Court to which a decree has been transferred cannot question the validity of the decree on the ground of want of jurisdiction : 39 *Mad.* 24 and *A. I. R.* 1925 *Cal.* 955, *Rel. on.* [P 691 C 2]

(d) Civil P. C. (1908), S. 44—S. 44 does not override Civil P. C. (1908), S. 13.

Section 44 does not override S. 13. It only confers authority to execute a decree which is in every way a valid and enforceable decree. In a suit on a foreign judgment objection as to conclusiveness of the judgment can be raised on the ground mentioned in S. 13. If the decree is not binding on the judgment-debtor on any of these grounds the execution Court is entitled to take the fact into consideration. [P 691 C 2]

(e) Jurisdiction—Foreign Court — Jurisdiction of foreign Court is territorial and ceases after a person leaves the territory.

The jurisdiction of a foreign Court is territorial and attaches upon all persons, either permanently or temporarily resident within the territory while they are within it, but it does not follow them after they have withdrawn from it, and that even territorial legislation cannot give jurisdiction to a foreign Court against persons not owning allegiance to the legislating authority : 22 *Cal.* 222, *Foll.* [P 691 C 2]

(f) Jurisdiction — Foreign Court — Submission to jurisdiction must be to foreign Court itself and before judgment — Per *Niamatullah, J.*—**Subsequent conduct of defendant is indication of his intention to submit to jurisdiction when suit was pending.**

The submission to a jurisdiction in case of foreign Court must be to the foreign Court itself and probably before the judgment is pronounced for if there is no such submission the judgment is a nullity. [P 692 C 1, 2]

The mere fact that a defendant allows the suit in foreign Court to be heard ex parte and decreed against him does not amount to his submitting to the jurisdiction of the Court. Nor does his subsequent conduct in depositing a certain sum in an executing Court in British India some time later and asking for time is any evidence to show that he had submitted to the jurisdiction of the foreign Court before the decree was passed. [P 692 C 1]

Per *Niamatullah, J.*—There is nothing in law which makes it necessary that the submission to jurisdiction can only be by some overt act in the Court. If the attitude of the defendant as regards the jurisdiction can be established by evidence to have been one of submission to jurisdiction of the Court, the decree will be binding. Subsequent payment towards part satisfaction of the decree is an important circumstance from which submission on his part to the jurisdiction of the Court may be inferred. Much however will depend upon the circumstances under which the payment of the decretal amount is made. In each case it is a piece of evidence entitled to more or less weight. Payment of decretal amount in part is not in itself a submission. If the decree when passed was a nullity for want of jurisdiction in the Court no subsequent act of the defendant can make it otherwise. Subsequent conduct of the defendant may however be an indication of his intention to submit to jurisdiction of the Court at the time when the suit was pending. [P 694 C 1, 2]

(g) Jurisdiction — Foreign Court—Submission—(*Quaere*).

Whether appearance in a Court in British India to which execution has been transferred can amount to submission to jurisdiction of the foreign Court. [P 692 C 2]

(h) Civil P. C. (1908), S. 11—S. 11 does not in terms apply to execution proceedings—Principle of constructive res judicata can be applied only when the point is expressly raised or decided and should be deemed to be decided.

Section 11 does not in terms apply to execution proceedings as they are not in a separate suit. The principle underlying S. 11 though sometimes applied to execution proceedings, the principle of constructive res judicata cannot be applied unless the point is expressly raised and decided and must be deemed to be decided by necessary implication. [P 692 C 2]

(i) Estoppel—Equitable estoppel—It must be shown that there was representation by judgment-debtor which was acted upon by decree-holder as to compromise his position.

In order to amount to an equitable estoppel it must be shown that there was some representation made by the judgment-debtor which was acted upon by the decree-holder and by which his position has been compromised. If the decree-holder has not been prejudiced in any way the judgment-debtor cannot be estopped from raising the question of jurisdiction which goes to the very root of the matter. [P 693 C 1]

(j) Civil P. C. (1908), O. 21, R. 58—Objector can take plea under S. 44, Evidence Act, that decree against him was passed without jurisdiction—It can be raised at any stage of proceedings unless there is bar of res judicata or estoppel—Evidence Act (1872), S. 44.

A plea that the decree was passed against the objector was passed without jurisdiction is open to the objector under S. 44 and can be raised at any stage of the proceedings unless there is a bar of res judicata or any rule of equitable estoppel against him. Mere delay in raising it cannot itself be a fatal objection when a fresh execution is sought and fresh properties are attempted to be seized. Although ignorance of law is no excuse it may explain why the objection is taken at a belated stage. [P 693 C 1]

Ambika Prasad—for Appellant.
A. P. Bagchi—for Respondent.

Sulaiman, Ag. C. J.—This is a decree holder's appeal arising out of execution proceedings consequent upon the transfer of a decree by a Court of a Native State. The decree-holder brought a suit in the Bhadohi Court within the Benares State against three defendants including Binaek Shukul, the present respondent, and his deceased father Persidh Narain. The summonses were served personally, but they did not appear to contest the claim. The plaintiff led some evidence and the suit was decreed on the merits on 27th July 1916. The other execution records are not before us and the whole history of the execution for this long period is not quite clear. Certain facts however have been definitely found by the Courts below and they are as follows: The objector although served personally did not choose to appear in the Court of the Native State, the decree was passed on the merits, the decree-holder executed his decree within British India several times; apparently in 1926 the decree was transferred to the Mirzapur Court for execution, the decree-holder got certain moveable properties of the judgment-debtor attached, the judgment-debtor appeared in the Mirzapur Court, deposited Rs. 100 in part payment and asked for three months more time so that he might pay the whole decretal amount, apparently time was given to him; though it is not clear whether the decree-holder had expressly consented to this arrangement; but it is perfectly clear that up to that time the judgment-debtor raised no objection as to want of jurisdiction; apparently execution was retransferred to Benares.

On an application of the decree-holder the execution of the decree was transferred to the Mirzapur Court a second time. After the receipt of the record the decree-holder applied on 13th November 1928 for the execution of the decree by the attachment and sale of fresh property. On 11th December 1928 the judgment-debtor objected that the Bhadohi Court had no jurisdiction to pass the decree against him when he was not a resident of the Native State and that the said decree is not capable of execution.

The first Court distinctly found that the decree of the foreign Court was pronounced against an absent foreigner and was therefore an absolute nullity unless it could be shown that the defendant had in any way submitted to the jurisdiction of the said Court. In the grounds of appeal before the lower appellate Court the decree-holder did not question the finding that the decree was against an absent defendant, but urged other pleas. The lower appellate Court has agreed with the view of the trial Court and affirmed its decree.

It seems to me that it is open to a judgment-debtor against whom a decree has been passed by a Native State Court to object to its validity on the ground of want of jurisdiction in the Court to which the execution has been transferred. If the decree passed is without jurisdiction and therefore a nullity, he can certainly claim that he is not bound by it. It is not incumbent upon him to go to the Court of the Native State and ask that Court to review its order. By doing so he may be said in one sense to subject himself to the jurisdiction of that Court and bind himself by an adverse order, in case it is passed. His remedy obviously is to object to the execution in the Court to which the decree has been transferred and which is now executing it.

Section 44, Civil P. C., merely lays down the method of procedure for the execution of decrees passed by Courts in certain Native States as to which there is a notification by the Governor-General-in-Council. It does not make a decree of such Court for all purposes a decree by a Court in British India. All that it provides is that the decree "may" be executed as if it were a decree by such Court. There is nothing in the section which compels the British Indian Court to execute a decree transferred to it by a Native State Court even if it is satisfied that the decree was passed without jurisdiction. I am clearly of opinion that it has ample discretion to refuse to execute the decree.

It is doubtful whether the omission of the words "or the jurisdiction of the Court" from the section corresponding to the present O. 21, R. 7, necessarily implies that the Court to which the decree has been transferred cannot question the validity of the decree on the ground of want of jurisdiction. In any case such a contention cannot be urged with regard to a decree of a Native State Court, which is a foreign Court, transferred under S. 44, Civil P.C.

The point is covered by the authority of the Madras and Calcutta High Courts in *Veera Raghava Ayyar* v. *Muga Sait* (1) and *Panchkari Majumdar* v. *Giridharimal Moheshri* (2). I fully agree with the opinions expressed therein on this point.

There can also be no doubt that S. 44 does not override S. 13, Civil P. C. It only confers authority to execute a decree which is in every other way a valid and enforceable decree. In a suit on a foreign judgment objection as to the conclusiveness of the judgment can be raised on the ground mentioned in S. 13, Civil P. C. If the decree is not binding on the judgment-debtor on any of these grounds it seems to me that the execution Court is entitled to take the fact into consideration.

It is now well settled by the pronouncement of their Lordships of the Privy Council in the case of *Gur Dayal Singh* v. *Raja of Faridkot* (3) (at p. 238) that the jurisdiction of a foreign Court is territorial and attaches upon all persons either permanently or temporarily resident within the territory while they are within it, but it does not follow them after they have withdrawn from it, and that even territorial legislation cannot give jurisdiction to a foreign Court against persons not owning allegiance to the legislating authority. To quote the words of their Lordships:

> "In a personal action to which none of these causes of jurisdiction apply, a decree pronouced in absentem by a foreign Court, to the jurisdiction of which the defendant has in no way submitted himself, is by international law an alsolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except in the country of the forum by which it was pronounced."

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(1) [1916] 39 Mad. 24=26 I. C. 287.

(2) A. I. R. 1925 Cal. 955=89 I. C. 347.

(3) [1895] 22 Cal. 222=21 I. A. 171 (P. C.).

It is not disputed that the defendants were not residents of Bhadohi and were not in the Native State when the suit was instituted. It follows that the Bhadohi Court had no jurisdiction to pass a decree against the defendants. Both the Courts below have found this point in favour of the judgment-debtor, and that finding is not challenged in the grounds of appeal.

The rule regarding jurisdiction in actions in personam has been clearly stated by Dicey in his Conflict of Laws, Chap. 13, as follows:

> "In an action in personam in respect of any cause of action, the Courts of a foreign country have, jurisdiction in the following cases:
>
> Case 1. Where, at the time of the commencement of the action the defendant was resident (or present) in such country, so as to have the benefit, and be under the protection, of the laws thereof.
>
> Case 2. Where the defendant is, at the time of the judgment in the action, a subject of the sovereign of such country.
>
> Case 3. Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, submitted to such jurisdiction, i. e., has precluded himself from objecting thereto: (a) by appearing as plaintiff in the action, or (b) by voluntarily appearing as defendant in such action without protest, or (c) by having expressly or implicitly contracted to submit to the jurisdiction of such Court."

The rule is stated in the same way in Halsbury's Laws of England, Vol. 6, Conflict of Laws, Part 10.

The present case does not come under the first two heads. The only question for consideration is whether the defendant by his own conduct submitted to such jurisdiction and has therefore precluded himself from objecting.

While the suit was pending in the Bhadohi Court the defendant-respondent, in spite of personal service on him, did not appear. The mere fact that he allowed the suit to be heard ex-parte and decreed against him would not amount to his submitting to the jurisdiction of the Bhadohi Court. Nor do I think that his subsequent conduct in depositing Rs. 100 in the Mirzapur Court some years afterwards and asking for further time would be any evidence to show that he had submitted to the jurisdiction of the Bhadohi Court before the decree was passed. I cannot give to his subsequent conduct such a retrospective significance.

As the rule has been stated by Dicey it would seem that the submission to the jurisdiction must be to the foreign Court itself and probably before the judgment is pronounced; for if there was no such submission the judgment is a nullity. The illustrations given by Dicey of submission to jurisdiction by voluntarily appearing as defendant in such action without protest, all relate to appearance in the foreign Court itself.

I have accordingly grave doubt as to whether any appearance in a Court in British India to which the execution has been transferred can amount to a submission to the jurisdiction of the foreign Court within the meaning of the rule cited above. But of course there may possibly be a waiver amounting to an estoppel independently of that rule.

There is no doubt that when on the previous occasion the decree was transferred to the Mirzapur Court, and his moveable properties were attached, the judgment-debtor appeared before the Mirzapur Court, deposited Rs. 100 and took three months' time. On that occasion he did not object to the validity of the decree.

The learned advocate for the decree-holder contends that his omission to do so brings in the operation of the principles of both res judicata and estoppel. As to res judicata I am clearly of opinion that there is no such bar. S. 11, Civil P. C., does not in terms apply to execution proceedings as they are not in a separate suit. The principle underlying that section has no doubt been applied to execution proceedings, but the principle of constructive res judicata has not been applied unless the point was expressly raised and decided or must be deemed to have been decided by necessary implication. If any property had been sold and the sale had been confirmed by an order of the Court, one might have said that there was a decision on the question of the validity of the decree by necessary implication. But the mere fact that Rs. 100 deposited in part payment of the decree or that three months' time was taken for the payment of the balance would not amount to an adjudication of the rights of the parties by the Court so as to operate as res judicata against the judgment-debtor in all subsequent proceedings, even though they arise out of a fresh transfer of the execution and relate to an entirely different set of properties. I accordingly overrule this plea.

The next question is as to estoppel. Had there been anything on the record to show that the extension of time was a result of an agreement between the decree-holder and the judgment-debtor, I might possibly have been inclined to hold that such an agreement was for consideration and was binding on the parties. The record however does not show any compromise with the decree-holder. In order to amount to an equitable estoppel, it must be shown that there was some representation made by the judgment-debtor which was acted upon by the decree-holder and by which his position has been compromised. If the decree holder has not been prejudiced in any way the judgment-debtor cannot be estopped from raising the question of jurisdiction which goes to the very root of the matter.

The decree was of the year 1916. A fresh suit in a British Indian Court was already barred by time. Even a suit on the basis of the foreign judgment had become barred after the lapse of six years. If the payment of Rs. 100 on 24th August 1926 gave a fresh start for the limitation then the decree-holder's remedy had not become barred by time when the judgment-debtor on 11th December 1928 took the objection that there was want of jurisdiction. It is therefore obvious that the decree-holder did not suffer in any way by the fact that Rs. 100 were paid to him and the execution was postponed for three months. The decree being a nullity he was lucky in getting even this amount.

The plea that the decree passed against the objector was passed without jurisdiction is open to him under S. 44, Evidence Act, and can be raised at any stage of the proceedings unless there is a bar of res judicata or any rule of equitable estoppel against him. Mere delay in raising it cannot itself be a fatal objection when a fresh execution is sought and fresh properties are attempted to be seized and an additional amount by way of interest also is claimed. Although the ignorance of law is no excuse, yet it may explain the reason why the objection is taken at a belated stage. I am therefore of opinion that there is nothing to prevent the judgment-debtor from raising the objection much less is there anything to prevent the Courts below from going into that matter suo motu and refusing to execute the decree.

I would accordingly dismiss the appeal.

Niamatullah, J.—The facts of the case are fully stated in the judgment of my learned colleague, and I do not consider it necessary to recapitulate them. It is sufficient to say that the decree in question was passed by a Court in the Benares State as far back as 27th July 1916 and several attempts were made to execute it by obtaining transfer certificates to the Courts in Mirzapur and Benares. On one occasion in 1926, Rs. 100 part of the decretal amount, was paid by one of the judgment-debtors and time was obtained for payment of the rest. It does not appear quite clearly from the record as to whether the present objector made the payment. The Court of first instance mentions the fact as if it were he who did it, and so does the lower appellate Court. It should therefore be accepted for the purpose of this case that the objector satisfied the decree in part some time in 1926. Subsequently, in 1928, when execution was taken out, he took objection to attachment of his property on the ground that he was a British Indian subject residing in the Mirzapur District and the Court in the Benares State which had passed the decree had no jurisdiction to pass it. It should be mentioned that the suit which resulted in the aforesaid decree was based on a claim in personam against the defendant.

I agree with my learned colleague for the reasons given by him that the objection is not barred by res judicata.

The most important question is whether the decree sought to be executed was passed by a Court which had no jurisdiction. S. 14, Civil P. C., provides that the Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record. Such presumption however can be displaced by proving want of jurisdiction. It was not disputed in the Courts below that the defendants were residents of the Mirzapur District. There is no suggestion, much less evidence, that they resided temporarily in the Benares State at the time the suit was brought. Therefore the presumption raised by S. 14 is prima facie rebutted, and as held by their Lordships of the Privy Council in *Gurdyal Singh* v. *Raja of Faridkot* (3), the decree passed by the foreign Court should be considered to be a nullity, having been passed by a Court having no jurisdiction. In the leading judgment delivered by my learned colleague, copious reference has been made to the law bearing on the subject. It is clear that even a judgment of a foreign Court will be considered to be binding if the defendant submitted to the jurisdiction of such Court. What amounts to a submission to the jurisdiction of a foreign Court is a question of some nicety in many cases. Where in answer to a summons issued by a foreign Court the defendant appears and contests the suit, without raising any question as to jurisdiction, there is no doubt that he submits to the jurisdiction of that Court. Again, where he so appears and repudiates the jurisdiction of a Court without entering into his defence, it is clear that he does not submit to the jurisdiction of that Court. Between these two extremes is the case where on receipt of the summons he puts in no appearance and an ex parte decree, otherwise open to no objection, is passed against him. His conduct in such circumstances is accountable on two hypotheses. He might have refrained from putting in an appearance because he was sanguine that the decree, if passed, would be ineffective for want of jurisdiction of the Court passing it; or he might have submitted to the jurisdiction of the Court in the belief that the plaintiff's claim was a just one and he did not object to the decree being passed by the foreign Court. I find nothing in law which makes it necessary that the submission to jurisdiction can only be by some overt act in Court. If his attitude as regards the jurisdiction of the Court in which a suit is brought against him can be established by evidence to have been one of submission to the jurisdiction of the Court, the decree will be binding. Subsequent payment towards part satisfaction of the decree is, in my opinion an important circumstance from which submission on his part to the jurisdiction of the Court may be inferred. Much however will depend on the circumstances under which the payment of the decretal amount is made. In each case it is a piece of evidence entitled to more or less weight. I should not be understood as implying that payment of decretal amount in part is itself a submission and acts retrospectively. If the decree when passed was a nullity for want of jurisdiction in the Court which passed it no subsequent act of the defendant can make it otherwise. Subsequent conduct of the defendant may however be an indication of his intention to submit to the jurisdiction of the Court at the time when the suit was pending. As already stated, it is only a piece of evidence bearing on the question whether the defendant submitted to the jurisdiction of a foreign Court. The lower appellate Court has categorically stated facts which were found established by evidence. The fact that the objector paid Rs. 100 in 1926 is one of them. The learned Subordinate Judge thereafter recorded a clear finding that the objector did not submit to the jurisdiction of the Court. This in my opinion is a finding of fact in arriving at which no error of law can be attributed to him. I would content myself with deciding that part of the case on that finding.

Another question which requires consideration is whether the objector having once made payment was estopped from questioning the jurisdiction of the Court which passed the decree. No such question was raised in either of the two Courts below. The plea of estoppel ordinarily rests on a question of fact, namely, whether the person sought to be estopped

> "intentionally caused or permitted another person to believe a thing to be true and to act upon such belief."

In general the person pleading estoppel has to establish that in consequence of the representation or conduct of the person against whom estoppel is pleaded he was induced to act in a particular manner. In the absence of any plea and the evidence of the decree-holder it is not permissible to disallow the objection taken by the judgment-debtor to the jurisdiction of the Court passing the decree.

With the foregoing observations I concur with my learned colleague in dismissing the appeal.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 695 (1)

SULAIMAN, AG. C. J. AND BAJPAI, J.

Sheotahal Dube— Defendant— Appellant.

v.

Lal Narain Prasad Chand and *another* — Plaintiff and Defendant — Respondents.

Letters Patent Appeals Nos. 25 and 24 of 1930, Decided on 10th April 1931, against the decree of Sen, J., D/- 27th January 1930; *Reported in A. I. R.* 1931 *All.* 208.

Cosharer—One cosharer alone can eject trespasser where suit land is not zamindari.

Where the suit property is not a zamindari, a cosharer has a joint interest in all the entire plots, and has a right to eject a trespasser who is holding them without any right and title. For the purpose of ejecting a trespasser from such plots it is not necessary that all the cosharers should join in the suit: (1901) *A. W. N.* 86 and *A. I. R.* 1922 *All.* 408, *Rel. on*; 17 *I. C.* 469, *not Foll.* [P 695 C 2]

Haribans Sahai—for Appellant.

Shiva Prasad Sinha—for Respondents.

Sulaiman, Ag. C. J.—This is a defendant's appeal arising out of a suit for possession. The plaintiff claimed to be one of the owners entitled to a number of plots. The other owners did not join in the suit. The defendant who was in possession claimed to have acquired these plots under a sale deed from the plaintiff's mother. He took the plea of protection under S. 41, T. P. Act, and also a denial of the right of one co-owner to get possession of the entire plots. The plea under S. 41 was not pressed in the Court below and has been disposed of by us in the connected appeal, it being found that it has no force.

A sale-deed was executed by the plaintiff's mother not as his guardian but in her own right. The lower appellate Court has found that she was a mere benamidar and had no right to the land. In the absence of any question of estoppel a transfer by her would confer no right on the defendant. The lower appellate Court has found and this finding has been accepted by a learned Judge of this Court that the defendant-appellant was no more than a trespasser.

The only other point pressed before us is that one co-owner cannot obtain possession of the entire plots. Reliance is placed on the case of *Rohan Singh* v. *Ahsan Begam* (1). On the other hand there is clear authority in the cases of *Mannu* v. *Nasrat Ullah* (2) and *Sri Thakurji* v. *Hira Lal* (3) to the effect that one cosharer can sue to eject a trespasser from the joint land. It seems to us that if the property in dispute had been the zamindari share it might have been possible to argue that the plaintiff should be given a decree of the share to which he himself was entitled and should not get a decree for the shares to which the other co-owners would be entitled. In such a case definite shares can be enjoyed separately. But the property in dispute in the present case consists of entire plots which may be cultivated. A cosharer has a joint interest in all the entire plots, and has a right to eject a trespasser who is holding them without any right and title. We think that for the purpose of ejecting a trespasser from such plots it is not necessary that all the cosharers should join in the suit.

The appeal is accordingly dismissed with costs.

B.V./R.K. *Appeal dismissed.*

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(1) [1912] 17 I. C. 469.

(2) [1901] A. W. N. 36.

(3) A. I. R. 1922 All. 408=75 I. C. 335=44 All. 634.

A. I. R. 1931 Allahabad 695 (2)

SULAIMAN AND YOUNG, JJ.

(*Diwan*) *Pahar Singh* and *others*—Defendants— Appellants.

v.

Shamsher Jang Bijai Bahadur Singh and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 58 of 1927, Decided on 13th May 1930, against decision of Sub-Judge, Jhansi, D/- 15th November 1926.

(a) Hindu Law—Adoption—Jains.

Among Jains there can be no prohibition against the adoption of a daughter's son: 1 *All.* 688 (*P. C.*), *Foll.* [P 697 C 1]

(b) Civil P. C. (1908), S. 11—Jain widow after death of adopted son alienating properties—Remote reversioner suing widow and transferees adding immediate reversioners as pro forma defendants alleging that they had colluded with widow—Collusion denied—Adoption held unproved—Suit dismissed as plaintiff being remote reversioner had no right to sue—Immediate reversioners not appealing—After widow's death immediate reversioners suing for possession of alienated properties—Suit held not barred by res judicata.

A, a deceased Jain had adopted his daughter's son as his heir. On the death of the adopted son *A*'s widow succeeded to the estate and effected transfers in favour of certain transferees.

B a remote reversioner sued the widow and the transferees challenging the validity of the adoption and of the alienations made by the widow and added the nearer reversioners as pro-forma defendants alleging that they had colluded with the widow. They however denied any collusion on their part. The adoption was held to be not proved and the suit was dismissed on the ground that the plaintiff being a very remote heir was not entitled to maintain the suit. After the death of the widow the immediate reversioners sued the transferees for possession of the properties transferred on the ground that the widow had no absolute interest in the properties transferred.

Held: that the dismissal of the previous suit did not operate as res judicata against the subsequent suit of the immediate reversioners although they had not appealed against the decision in the previous suit. [P 698 C 2]

(c) Hindu Law—Widow—Jain widow does not acquire absolute estate in property acquired from ancestral nucleus unless special custom to that effect is proved.

The widow of a Jain does not acquire an absolute estate acquired by her husband from the income of the business which grew out of the ancestral nucleus, unless a special custom to that effect is established by the evidence. Such a custom held not established on the evidence adduced : 1 *All.* 688 (*P.C.*) and 16 *All.* 379, *Dist.* 27 *Cal.* 379, *not Appl.*; 4 *Cal.* 744 (*P. C.*) and *A. I. R.* 1926 *All.* 586, *Rel. on.* [P 700 C 1]

K. N. Katju, Haribans Sahai and *Sri Narain Sahai*—for Appellants.

P. L. Banerji, Ambika Prasad and *Saheb Bahadur*—for Respondents.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for recovery of possession of certain immovable properties. There are a large number of defendants who are transferees under various documents. It appears that Bhola Nath was admittedly the full owner of these properties about 1906 or 1907. He died on 7th March 1907, leaving a widow, Mt. Sughar Dulaiya, and a daughter, Mt. Raja Beti, who was married to Girdhari Lal, defendant 4. Raja Beti had a son, Harakh Chand, who died after Bhola Nath while he was a child of about three years of age. Admittedly before his death Bhola Nath signed a document which is called a deed of adoption, in which there was reference to Harakh Chand being the owner of his property along with his wife. On the death of Bhola Nath the name of Harakh Chand was entered against the zamindari properties in the revenue papers, and after his death the name of Mt. Sughar Dulaiya was entered. We may note that Raja Beti had died in 1908 before the death of Harakh Chand. Mt. Sughar Dulaiya died on 24th October 1914, and the present plaintiff the Raja of Katera Estate, acquired the interest in this estate under a sale deed, dated 26th April 1924, executed by Daulat and Satauley.

The plaintiff's case was that the deceased, Bhola Nath, had adopted his daughter's son, Harakh Chand, who became the last male owner, and that on his death his adoptive mother, Mt. Sughar Dulaiya, acquired a limited Hindu widow's estate in the property which devolved on Daulat and Satauley when the succession opened to them on her death. The plaintiff asserted that the various defendants, who were in possession of these properties, were transferees either from Mt. Sughar Dulaiya or from Girdhari Lal, who had no rights himself, and these transfers being without legal necessity were invalid and were not binding on the plaintiff.

The suit was resisted by the various defendants on the following grounds : Firstly, the fact of the adoption was disputed, secondly, it was pleaded that even if there was any adoption, it was legally invalid ; thirdly, that the present claim was barred by the principle of res judicata on account of the decision in Suit No. 599 of 1913, fourthly, that under the deed executed by Bhola Nath an absolute estate was acquired by Harakh Chand, which went to his natural family after his death and did not devolve on the plaintiff's vendors and, fifthly, that even if Bhola Nath died intestate, his widow succeeded as absolute owner to the entire estate and could dispose of it even without any legal necessity. The learned Subordinate Judge has overruled these pleas and has decreed the claim. The defendants accordingly have appealed to this Court and challenge the findings of the learned Subordinate Judge.

It will be convenient to take up those pleas first which can be disposed of briefly. The fourth point mentioned above depends on an interpretation of the deed executed by Bhola Nath, which is printed on p. 79. This document, as translated officially, shows that Bhola Nath admitted that he had taken his daughter's son in adoption and that he was the owner of his moveable and immovable properties and so was his wife. It is the present tense which is used throughout this document and there is no passage which would justify an inference that a bequest was being made in favour of his daughter's son which was to take effect after the death of Bhola Nath. Reading the document as a whole we agree with the Court below that it is an acknowledgment of the adoption by Bhola Nath and not a will by Bhola Nath in favour of Harakh Chand conferring upon the latter an absolute estate after the death of Bhola Nath. It is therefore quite clear that this document is wholly inoperative as a testamentary bequest and no title can be based upon it.

The second point was that the adoption, even if it took place, was illegal. It is conceded by the learned advocate for the appellants that among Jains adoption is not associated with any particular religious sanctity, but it is a purely secular matter. It follows that there can be no prohibition against the adoption of a daughter's son. As a matter of fact, there was no plea taken in the written statements that any such adoption would be legally invalid. In the case of *Sheo Singh Rai* v. *Dakho* (1) their Lordships of the Privy Council held that a Jain may adopt a daughter's son who on the adoption takes the place of a son begotten. It was not suggested that there was any legal bar to such an adoption.

The next point urged is a plea of res judicata. So far as this plea is based on an alleged compromise decree entered into in a suit brought by Rajdhar against the widow and some transferees, the main difficulty in the way of the defendants, is that the compromise decree is not before us and we do not know what were the terms agreed upon. It is therefore difficult to see how it can operate as an estoppel by judgment. It is however contended that the judgment in Suit No. 599 of 1913, between Rajdhar on the one hand and Mt. Sughar Dulaiya and some of the defendants as well as Girdhari Lal on the other, operates as res judicata between the representatives of Daulat and Satauley. That suit was brought by Rajdhar who was not the next reversioner at the time. There were Daulat, Satauley and a son of Satauley who were nearer reversioners and who were not impleaded in the array of the defendants. Daulat and Satauley were however made pro forma defendants. The plaintiff, Rajdhar, alleged that the nearer reversioners had colluded with the widow and had accordingly not been joined in the suit. He challenged certain alienations made by the widow, on the ground that they were without any legal necessity. So far as the plaintiff was concerned he admitted the adoption of Harakh Chand and put forward the case that Mt. Sughar Dulaiya was his adoptive mother. Mt. Sughar Dulaiya, as well as her transferees, all pleaded that there was a valid adoption of Harakh Chand. They resisted the claim on the ground that she had acquired absolute title to the property and could make the transfers without any legal necessity. The defendants, Daulat and Satauley, pleaded that they were the next reversioners and they denied that they were in collusion with the widow. They also did not deny the adoption of Harakh Chand. The only person who denied the plaintiff's allegation that there had been an adoption was Girdhari, who was defendant 7 in that suit. These facts are quite clear from the summary of the pleadings given in the judgment on p. 98.

It may be noted that no relief had been claimed by the plaintiff against Girdhari Lal, who was stated to have been impleaded on the ground that, though as a son-in-law he had no right to the property of Bhola Nath ; he had nevertheless instituted a suit and did claim the property. It is also quite clear that Girdhari Lal was neither claiming as a member of the reversionary body, nor as a representative of the Hindu widow in whom the estate was vested for the time being. He was setting up an independent title of his own adversely both as against the reversioners and the widow. The defendants, who rely upon this judgment, have not cared to produce the pleadings of that suit, nor have they even produced a copy of the deposition of Daulat Ram to which there is a reference in the body of the judgment and on which admission they wish to rely. There is a recital in the judgment that Daulat Ram stated that he did not want Bhola Nath's property and that he had no objection to the plaintiff's suit. It is doubtful how far a recital in the judgment of this admission of Daulat Ram can by itself be evidence of his admission. It is however clear that there was no such admission on the part of Satauley. Daulat and Satauley appear to have taken no further steps in the litigation, and the contest was mainly between Rajdhar, plaintiff, and Girdhari Lal and the other defendants. The learned Subordinate Judge recorded a finding that no adoption was proved and he also was of the opinion that a proper interpretation of the deed of adoption referred to by us above amounted to a will in favour of Harakh Chand. He however held that no collusion between the widow and the nearest reversioners had been established, and that therefore the plaintiff had no locus standi to sue in the presence of the other nearer reversioners. His actual finding was in the following terms :

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(1) [1876] 1 All. 688=5 I. A. 87=3 Sar. 807 (P.C.).

> "I find therefore that the plaintiff has failed to prove the alleged collusion and further that he has utterly failed to establish consent or waiver on the part of the nearest reversioners or any other fact to show that they are precluded from suing. He has thus failed to establish the ground which would give him, a remote reversioner that he is, a right to bring the suit. I find against him."

He further held that the relief for a declaration was merely discretionary, and having regard to the remoteness of the plaintiff's relationship, he did not think it would be quite proper to grant him the relief, even assuming that he could maintain his suit, as there were no less than three immediate reversioners one after the other between him and the estate. He also found that the custom to inherit the estate absolutely was not established. He accordingly dismissed the suit.

As the admission of Daulat is not before us it is not possible to say whether his admission that he had no objection to the suit was in any way limited. The contest in that litigation was not between the reversioners, on the one hand, and the widow representing the estate, on the other, so far as the question of adoption was concerned. As a matter of fact, both these sets of parties were admitting both the validity and the factum of adoption. The adoption was not admitted by Girdhari Lal against whom no specific relief had been claimed and whose title was not admitted, and who had been impleaded merely because he had instituted a rival suit. If therefore Rajdhar failed to adduce sufficient evidence to satisfy the Court that there had been an adoption, we do not think that Daulat and Satauley should be prejudiced by the result of that litigation. So far as the claim against Girdhari Lal was concerned, Daulat and Satauley cannot be said to have been represented by Rajdhar. On the date of the suit there was apparently no alienation in favour of Girdhari Lal at all, and the main object of the suit was to avoid the transfers which had taken place in favour of the other defendants. In these circumstances, although in one sense there was something in common between Rajdhar and Daulat and Satauley, we cannot hold that the dismissal of the suit brought by Rajdhar should absolutely prejudice Daulat and Satauley, who were arrayed on the side of the defendants and who could not very conveniently appeal from the dismissal, particularly when they were denying that there was any collusion between them and the widow. We therefore agree with the Court below that the judgment does not operate as res judicata. (Here the judgment discussed evidence on the question of adoption and proceeded as follows): The Subordinate Judge, who heard the entire oral evidence produced by both the parties, after considering it along with the documentary and circumstantial evidence, came to the conclusion that Bhola Nath had adopted Harakh Chand. We accept his finding and agree with his conclusion on this point.

On our finding that Harakh Chand was the adopted son it would follow that Mt. Sughar Dulaiya succeeded to the estate as his adoptive mother. There is absolutely no evidence on the record and no reported decision by which any custom has been established under which a mother acquires absolute estate in the property left by her son. It therefore necessarily follows that Mt. Sughar Dulaiya only acquired a Hindu widow's limited estate, which came to an end on her death, and in the absence of any proof of legal necessity for the transfers, the estate passed to the next reversioners.

As however the appeal is of a high valuation and there is a question of law, namely, that of res judicata, involved in it, we think it necessary to record a finding on the question of custom also. All the properties were acquired by Bhola

Nath during his lifetime. Exs. B-K are the title deeds. Those printed on pp. 55, 57, 61, 65 and 69 show that part, if not the whole, of the consideration came out of the amount due under account. The evidence falls short of showing exactly up to what period those accounts had extended. But not only the plaintiff's witnesses, but even two of the witnesses for the defendants admit that Bhola Nath's father, Maluke was carrying on business which after his death was developed by Bhola Nath. The plaintiff's witnesses are as follows: Basore, who stated that Maluke did money-lending business, and Bhola Nath and his father were joint till the death of Maluke (p. 19); Bhola Nath, who stated that Maluke carried on money-lending business and obtained a decree against him and later Bhola Nath increased the business very much; and Halku, who also stated that he knew Maluke who carried on money-lending business (p. 24). The witnesses for the defendants who have made similar admissions, are Udaijit, who said that Maluke did money-lending business. The witness had seen his Bahi, and he might have been carrying on money-lending business to the extent of Rs. 4,000 or Rs. 6,000 (p. 27), and Girdhari Lal, who said that Bhola Nath's father did ghee business and sold salt, etc. and also did money-lending business, but on a very small scale, and Bhola Nath increased the whole business very much (p. 30). The decree printed at p. 43 shows that a suit was instituted jointly by Maluke and Bhola Nath, which resulted in a decree for a small amount.

The sale deed at p. 41 was taken jointly in the names of Maluke and Bhola Nath and so was the bond on p. 47. The receipt on p. 53 shows the same thing. All this evidence goes .to show that there was business, including money-lending, which was carried on by Maluke alone and then jointly with Bhola Nath which Bhola Nath later on developed considerably. There is no suggestion in the evidence that Bhola Nath had any other independent source of income. The plaintiff has thus succeeded in establishing an ancestral nucleus from which Bhola Nath might have acquired the various properties. If Bhola Nath had a son alive, he would have no absolute power of disposal over such property when the nucleus was established, unless he showed that it was his separate and self-acquired property. It would therefore follow that even if Mt. Sughar Dulaiya succeeded to the estate of Bhola Nath as his widow, and not as the adoptive mother of Harakh Chand, she would not acquire absolute estate in the properties acquired from the income of the business which grew out of the ancestral nucleus unless a special custom to that effect were established by the evidence.

The oral evidence produced by the defendants to prove such a custom is by no means weighty. It consists of the statement of Girdhari Lal (p. 25) who in cross-examination was unable to answer the question how he knew that a Jain widow gets an absolute right in her husband's property, and of the statement of Udaijit (p. 27), who in cross-examination had to admit that he could not give any reason for his saying that a Jain widow is entitled to deal with her husband's estate as full owner. The plaintiff also relied on a judgment dated 19th September 1925 (p. 119), in which the Subordinate Judge of Jhansi had found that there was sufficient evidence to establish the right of a Jain widow whose husband lived separate from the other members of his family, to make a gift of her husband's property for religious and charitable purposes, and that accordingly she had a right to make the will. The learned Subordinate Judge relied on a Calcutta case in preference to a judgment of the Allahabad High Court to which he was subordinate, on the sole ground that the Calcutta ruling was of a later date. It is therefore obvious that his judgment is not of very great value. As against this one might say that there is the judgment in the suit instituted by Raj Dhar, in which the Subordinate Judge relying on the Allahabad case found that the custom was not established by the evidence. Although the finding cannot operate as res judicata, it is of more value because it was arrived at in a suit inter partes.

There is however evidence furnished by various reported cases in which custom entitling a Jain widow to succeed to the self-acquired property of her deceased husband has been established. We may refer to the case of *Sheo Singh Rai* v. *Dakhu* (1) and the case of *Shambhu Nath* v. *Gayan Chand* (2). The custom found to exist in the case of *Harnath Prasad* v.

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(2) [1894] 16 All. 379=(1894) A. W. N. 123.

Mandil Dass (3) did not relate to this province. The judgment was based on the ground that

> "there is in the evidence no reason for drawing any distinction between ancestral and self-acquired property, and we see no ground for such distinction (p. 393)."

It is noteworthy that in the case of *Sheo Singh Rai* (1) their Lordships of the Privy Council approved of the findings of the High Court which was careful to hold that

> "she took an absolute interest at least in the self-acquired property of her husband, and as we have said, it is not necessary for us to go further in this suit, for the property in suit was purchased by the widow out of the self-acquired property of her husband (p. 704)."

A distinction was thus at least recognized.

It seems to us that, as remarked by their Lordships of the Privy Council in *Chotay Lall* v. *Chunnu Lal* (4), in the absence of proof of special custom varying the ordinary Hindu law of inheritance, that law is to be applied to Jains. This principle has of course been followed by the High Court in the case of *Nekram Singh* v. *Sriniwas* (5).

In order to succeed, the defendants must establish a custom that a Jain widow acquires an absolute right in properties left by her husband which were acquired from the income of a business which had grown out of an ancestral nucleus. There is absolutely no evidence to prove the custom to this extent and there is absolutely no instance given. The reported judicial decisions only go to the length of holding this custom proved so far as the self-acquired property is concerned, but do not go further. In the absence of any evidence we must therefore hold that such a custom has not been established. When there is no proof that Bhola Nath had any independent source of income other than his ancestral business, the presumption of law is that the property acquired by him was out of the ancestral nucleus. Although the property was acquired by him during his lifetime, it would not strictly speaking have been his self-acquired property if there were a contest between him and any born son. As against his son he would not be able to claim absolute power of disposal. We therefore think that his widow cannot claim any such right. We accept the finding of the Court below on this issue also and hold that Mt. Sughar Dulaiya had only a life-interest in the property and was not the absolute owner of the estate, even if it could be held that there was no valid adoption. This disposes of all the points raised before us in appeal. We accordingly dismiss it with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 700

SULAIMAN, AG. C. J., AND SMITH, J.

Jones, A. E.—Decree-holder—Appellant.

v.

Ram Charan and *another*—Judgment-debtors—Respondents.

Execution First Appeal No. 359 of 1930, Decided on 8th May 1931, against decision of Sub-Judge, Jhansi, D/- 26th May 1930.

Civil P. C. (1908), Sch. 3, Para. 9 (1)—Phrase " hold the balance at the disposal of the Court " means Collector has no power to dispose of balance as he likes without instructions from civil Court—Execution of mortgage decree—Omission to claim future interest allowed by decree—Collector without instructions from civil Court paying balance of sale proceeds to judgment-debtor—Charge which mortgagee has over mortgaged property attaches to substituted security in the form of sale proceeds—Mortgagee should apply for execution for interest against balance of sale proceeds.

Under para. 9 (1), the Collector is bound to " hold the balance at the disposal of the Court" that is to say, Collector has no power to dispose of the balance as he likes without instructions from the civil Court. Where the mortgagee decree-holder omits from his application for execution of decree interest which had accrued subsequent to the date of the decree though decree had awarded future interest, and the Collector to whom the execution was transferred sends the amount out of the sale proceeds for which execution was taken out for paying to the mortgagee and the balance is paid to the judgment-debtor without instructions from the civil Court, the charge which the mortgagee has on the mortgaged property attaches to the substituted security in the form of the sale proceeds which are realized by the sale of that property, and the proper course for the mortgagee whose remedy under O. 34, R. 6 is also barred is to apply for execution of his decree for the balance of the interest still outstanding against the judgment-debtor who has taken out the balance of the sale proceeds which was the substituted security for the mortgaged property. [P 701 C 2]

N. C. Vaish—for Appellant.

Nanak Chand—for Respondents.

Sulaiman, Ag. C. J.—This is a decree-holder's appeal arising out of an execution proceeding under rather peculiar circumstances. A final mortgage decree was obtained by the appellant decree-holder against the mortgagor on 9th April 1927. The decree awarded interest up to date and also gave to the decree-holder future interest.

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(3) [1900] 27 Cal. 379.

(4) [1879] 4 Cal. 744=6 I. A. 15=3 Sar. 880 (P.C.).

(5) A. I. R. 1926 All. 586=96 I. C. 639.

The decree-holder filed an application for execution of the final decree, calculating interest which had been entered in the decree up to the date of the decree but omitted from his application the interest which had accrued subsequently. As the mortgaged property was ancestral the execution was transferred to the Collector under Sch. 3, Civil P. C. The mortgaged property was sold, and about Rs. 12,000 were realized. Out of this Rs. 8,845 were sent to the civil Court by the Collector in order to pay up the amount for which execution had been sought. Unfortunately the Collector disposed of the balance of the amount without any express instructions from the civil Court by paying Rs. 1,300 to an attaching creditor, Ram Charan and the balance of Rs. 1,700 to the judgment-debtor himself.

The mortgage suit had been brought more than six years after the mortgage and it is therefore not open to the mortgagee decree-holder to apply for a simple money decree under O. 34, R. 6 and recover the balance of the amount from other properties of the mortgagor. There is one more complication, namely, that while the suit of Ram Charan against the mortgagor was pending in the Court of the Munsif, he applied for attachment before judgment of the sale proceeds in the hands of the Collector. The present decree-holder appellant intervened and objected to the attachment. His objection was disallowed; but Ram Charan undertook not to take out the money from the collectorate for some time so as to allow the mortgagee to have the Munsif's order set aside by a higher Court. No application was apparently made to get that order reconsidered. The result was that Ram Charan took out Rs. 1,300 and did not object to the payment of Rs. 1,700 to the judgment-debtor.

It seems to us that under Sch. 3, para. 9 (1) the Collector was bound to "hold the balance at the disposal of the Court," that is to say, he had no power to dispose of the balance as he liked without instructions from the civil Court. Unfortunately a mistake was committed and the amount was disbursed.

If the decree-holder is entitled to an order against Ram Charan for the refund of the amount taken out by him, he would be equally entitled to a similar order for the refund of the amount taken out by the judgment-debtor. The mortgagee had a charge on the mortgaged property, and that charge would attach to the substituted security in the form of the sale proceeds which were realized by the sale of that property. There are however equities in favour of Ram Charan, who successfully resisted the objection raised by the mortgagee in the Court of the Munsif, where Ram Charan's application was pending. There are no such equities in favour of the mortgagor himself. It is also doubtful whether after what has happened the mortgagee can be allowed to follow the sale proceeds in the hands of the attaching creditor, who has taken them away after the civil Court held that he was entitled to do so. We think that the proper course open to the mortgagee decree-holder is to apply for execution of his decree for the balance of the interest still outstanding against the judgment-debtor, who has taken away Rs. 1,700 which was the substituted security for the mortgaged property. The amount has been taken away by him in the course of the execution proceedings, and the decree-holder has a remedy against him subject of course, to any other legal objection that there may be. This matter can be disposed of on the application for execution made by the decree-holder against Bhagwan Gir the mortgagor. The order of the Court below relates to the application of the decree-holder to get the attachment by Ram Charan set aside. We must accordingly uphold this order. The appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 701

YOUNG, J.

In re *the U. P. Oil Mills, Co. Ltd. in liquidation.*

Misc. Case No. 369 of 1928, Decided on 6th May 1931.

Companies Act (1913), S. 158—Subscriber remains member of company till his shares

are validly transferred or company accepts surrender of shares.

A subscriber to the memorandum of association remains a member of the company until such time as either the company which of course must be authorized to do so by the Articles of Association accepts a surrender of the shares for valid reason, or the subscriber himself pays for the shares and validly transfers them to somebody else. [P 702 C 2]

Hazari Lal Kapoor (Official Liquidator)—for Applicant Company.

S. K. Dar and *Baleshwari Prasad*—for Opposite Party.

Judgment.— This is an application under Ss. 184 and 160, Companies Act. The Official Liquidator of the U. P. Oil Mills Co., Ltd. seeks to place upon the list of contributors of the company the heirs of one Syed Alay Nabi who, the liquidator alleges was a signatory to the Memorandum of Association of the company and a subscriber thereunder to the extent of 50 shares in the company.

The Memorandum of Association was signed by Syed Alay Nabi and others on 23rd June 1920. It is admitted that he did so sign the memorandum, and that he subscribed thereunder for 50 shares. On the same day he signed the prospectus and later on signed a consent to become a director of the company. On 17th July 1920, the managing agents of the company Paras Ram & Co., wrote to Syed Alay Nabi a letter of that date asking him to remit at his early convenience the application money which was due. Syed Alay Nabi never even answered this letter, and apparently paid no attention to it whatever. Six weeks later on 3rd September 1920, the managing agents again wrote to Syed Alay Nabi demanding again the money due on application. Again there is no record in the company's books that Syed Alay Nabi paid up any attention to this demand. Consequently, on 23rd November 1920, the managing agents wrote to the Registrar, Joint Stock Companies, a letter informing him that because of the failure of Syed Alay Nabi to pay for his shares he had in law ceased to be a director, and asking the Registrar to strike his name off the list of directors. Previously to this however the company had informed Syed Alay Nabi himself on 5th November 1920 by a letter of that date that he was no longer a director. The next item of evidence in the case is a letter of 20th June 1921, in which the managing agents wrote to the Registrar, Joint Stock Companies, that not only had Syed Alay Nabi ceased to be a director, but he had also ceased to be a member of the company. Mr. Dar, who appears on behalf of the minors in this case, asks me to draw an inference from the facts I have related that Syed Alay Nabi had repudiated the whole contract to take shares and that the company had accepted that repudiation and in effect had accepted a surrender of the shares. I regret I am totally unble to accept Mr. Dar's view. The evidence is clearly to the contrary. There was no repudiation at all. There was merely a failure to pay for the shares, and a consequent legal position arising from the fact. If I am to assume anything or infer anything in this case, I think the only inference I can possibly arrive at is that Syed Alay Nabi had subscribed 50 shares, which according to the Articles of Association subsequently adopted by the company was the qualification for a director solely for the reason that he was being made a director. When he was struck off the list of contributors owing to his default he no doubt may have thought, and no doubt the managing agents who on matters of this sort were undoubtedly ignorant may have thought that he thereby ceased to be a member of the company.

In thinking this however they were entirely wrong in law. The position is clear. A subscriber to the Memorandum of Association remains a member of the company, until such time as either the company which of course must be authorized to do so by the Articles of Association accepts a surrender of the shares for valid reason, or the subscriber himself pays for the shares and validly transfers them to somebody else. There is no doubt that had Syed Alay Nabi still been alive his name would have been placed on the list of contributories. It is clear therefore that I have no alternative but to order that Syed Alay Nabi being dead his heirs should be included in the list of contributories and I order accordingly. However this is a hard case. Syed Alay Nabi undoubtedly thought that he had ceased to be a member. The managing agents undoubtedly thought the same. There was no demand after the letters to which I have alluded made upon him to contribute to the company the price of his shares or any part of it, and there was therefore no refusal or neglect by him to comply with the lawful demand of the company. The question therefore arises as to whether I should order interest to be paid on the amounts outstanding. I do not think that this is a case where interest should either be asked for by the liquidator or granted by the Court. The application under Ss. 184 and 160 is granted.

B.V./R.K. *Application granted.*

A. I. R. 1931 Allahabad 703 (1)

SULAIMAN, AG. C. J. AND BAJPAI, J.

Gulab Chand Chotey Lal—Applicant.

v.

Kishen Narain and *others*—Opposite Parties.

Civil Revn. No. 67 of 1930, Decided on 11th March 1931, against order of Small Cause Court Judge, Cawnpore, D/- 28th January 1930.

U. P. Arbitration Amendment Act (1912)—Every submission to arbitration must be under Arbitration Act.

In places in the United Provinces where the Arbitration Act is applicable there cannot be any submission to arbitration except under the Arbitration Act. [P 703 C 2]

S. N. Seth—for Applicant.

S. N. Verma—for Opposite Parties.

Sulaiman, Ag. C. J.—This is a civil revision from a decree of the Court of Small Causes dismissing the suit. The plaintiff claimed the return of the money advanced on account of a contract for the supply of foreign cloth. The main defence to the suit was that under Cl. 6 of the agreement the dispute had to be referred to arbitration and could not be heard by the Court. This plea had found favour with the Court below. Cl. 6, is somewhat unhappily worded; but it cannot be said that the Court below has committed an obvious error in interpreting it as meaning that all disputes are to be referred to arbitration The condition that no dispute shall be raised or claim made unless notice of difference, whatsoever, is given to the opposite party within eight days from delivering the shipment samples, if any, and invoice, might well have been intended merely to prevent belated disputes from being raised, with the object of putting a time limit beyond which the claimants should not wait. In any case we are unable to hold that this is a fit case for interference in revision.

The learned advocate for the appellant has raised a further question that the agreement signed by only one of the partners was not valid. This point was not raised at the trial, for aught one knows the partner who signed it, might have had general authority to do so. We cannot allow this point to be raised.

Lastly it is contended that in view of the United Provinces Arbitration Amendment Act, 1912 there can be no valid submission to arbitration at all unless the agreement of reference contains, in express terms, the statement that the reference was being made under the Arbitration Act. This argument is untenable. The object of defining "submission" as meaning a written agreement to submit present or future disputes to arbitration under the Arbitration Act 1899, was to make it clear that every submission to arbitration, whether it professes to be under the Arbitration Act or not, must of necessity be under the Act. The object was just contrary to what is contended before us. The result is that in places in the United Provinces where the Arbitration Act is applicable there cannot be any submission to arbitration except under the Arbitration Act. The point therefore has no force. We dismiss the revision with costs which will include in this Court-fees on the higher scale.

S.N./R.K. *Revision dismissed.*

A. I. R. 1931 Allahabad 703 (2)

SULAIMAN, AG. C. J. AND BAJPAI, J.

(*Chaudhari*) *Baldeo Singh*—Defendant—Applicant.

v.

Chhaju Singh and *others*—Opposite Parties.

Civil Revn. No. 27 of 1930, Decided on 12th March 1931, against order of First Sub-Judge, Saharanpur, D/- 15th July 1929.

Civil P. C. (5 of 1908), O. 9, R. 6—Pleader engaged by defendant merely to apply for adjournment, making that application—Court refusing adjournment and decreeing suit ex parte—Court's decision was decree and defendant's remedy was by appeal—Civil P. C. (5 of 1908), O. 17, R. 2 (All.) Expl.

Having regard to the explanation added by the Allahabad High Court to O. 17, R. 2, a defendant cannot be deemed to have failed to appear if he was represented by a pleader, although the pleader was engaged only to apply for adjournment. Where such a pleader appears and applies for adjournment but the Court refuses to grant adjournment and orders "defendant absent . . . . suit decreed ex parte" the decision of the Court is on merits and a decree. The proper remedy of the defendant, therefore, is by appeal and not by application for restoration of case. [P 704 C 1]

K. C. Mital—for Applicant.

S. N. Verma—for Opposite Parties.

Bajpai, J.—It appears that on 11th June 1928, which was an adjourned date of hearing, the defendant was not personally present, but a pleader appeared on his behalf who applied for a further postponement of the case. This application was refused, upon which he retired inasmuch as he had no further instructions to proceed with the case. The Court then after having stated the facts of the case said: "The defendants are absent, claim proved. Suit is therefore decreed ex parte with costs". Having regard to the explanation added by this Court to O. 17, R. 2, it is clear that the defendant cannot be deemed to have failed to appear inasmuch as he was represented by a pleader although the pleader was engaged only for the purposes of making an application. The order of 11th June 1928 must therefore be construed to be an order on the merits and therefore a decree against which an appeal lay. The defendant instead of filing an appeal as against the said decree applied to the Court for the restoration of the case interpreting the order as an ex parte order. This he was not justified in doing, for it cannot be said that he had failed to appear, and when the learned Judge of the trial Court refused to grant that application, he came up in appeal as against that order. The learned Judge of the lower appellate Court is perfectly justified in saying that the defendant has misconceived his remedy and his proper remedy was to appeal against the order of 11th June 1928. He therefore refused to entertain the appeal which had been filed before him. The revision as against the appellate order of the learned District Judge has therefore no force and we dismiss it with costs including in this Court-fees on the higher scale.

S.N./R.K. *Revision dismissed.*

A. I. R. 1931 Allahabad 704

SULAIMAN, AG. C. J. AND SMITH, J.

Sheo Balak Singh—Applicant.

v.

Mahabir Singh and *another*—Opposite Parties.

Civil Revn. No. 286 of 1930, Decided on 23rd April 1931, against decree of Sub-Judge, Fatehpur, D/- 17th April 1930.

Civil P. C. (1908), O. 47, R. 1—Decree affirmed by the High Court—No review can be allowed.

Once a decree is affirmed by the High Court it merges into the decree of the High Court and it is no longer open to the lower Court to vary that decree by way of review: 54 *I. C.* 764; and *A.I.R.* 1922 *Bom.* 130, *Ref.* [P 704 C 2]

Shiva Prasad Sinha—for Applicant.

K. N. Katju and *R. N. Gurtu*—for Opposite Parties.

Smith, J.—This is a revision from an order refusing to entertain an application for review of judgment. The application was based on the ground that the lower appellate Court had taken a wrong view of the facts. A second appeal had been prepared against the order of the lower appellate Court and the appeal was dismissed under O. 41, R. 11, before the application for review had been disposed of. The Subordinate Judge of Fatehpur, who in the end dealt with it has held that inasmuch as the order of the lower appellate Court had been affirmed on appeal by the High Court he could not entertain the application for review. In our opinion, the view taken by the Court below is perfectly correct. Once a decree was affirmed by the High Court it merged into the decree of the High Court, and it was no longer open to the lower appellate Court to vary that decree. We may refer to the cases of *Ram Prasad Upadhya* v. *Nageshar Pande* (1) and *Shivappa* v. *Ram Chandra* (2). It is also clear that there were no sufficient grounds for granting the review. The application is accordingly dismissed with costs.

B.V./R.K. *Revision disallowed.*

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(1) [1920] 54 I.C. 764.
(2) A. I. R. 1922 Bom. 130=63 I. C. 910=46 Bom. 1.

A. I. R. 1931 Allahabad 705

PULLAN, J.

Bohra Raghubar Dayal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 65 of 1931, Decided on 5th May 1931, against order of Sess. Judge, Agra, D/- 19-12-1930.

(a) Prevention of Adulteration Act (1912), S. 15—Provisions of S. 15 are mandatory.

The provisions of S. 15 of the Act are mandatory and the failure to state the particulars of the offence charged is fatal to the prosecution : *A. I. R.* 1930 *All.* 595, *Foll.* [P 705 C 2]

(b) Criminal P. C. (1898), S. 233— Misjoinder of charges is fatal to prosecution.

Where there is misjoinder of charges becoming prejudicial to the accused in every way, such misjoinder is fatal to the prosecution despite anything that may be contained in S. 537. [P 706 C 1]

Kumuda Prasad and *V. D. Bhargava*—for Applicant.

Assistant Government Advocate — for the Crown.

Judgment.—This application arises from the conviction of one Raghubar Dayal for an offence under S. 4/5, Act 6 of 1912. S. 4 of this Act, renders any person who sells to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance or quality of the article or drug demanded by such purchaser or sells or offers or exposes for sale or manufactures for sale any article of food or any drug which is not of the nature, substance or quality which it purports to be, liable to a fine of Rs. 100. S. 5 brings within the scope of S. 4 the case of any person who on a demand for ghee or butter supplies an article which is not exclusively derived from milk. The case against the accused is that a food inspector of the Agra Municipal Board saw some substance at the accused's place of business and offered to purchase it. He purchased a small quantity apparently under the impression that it was ghee, but the accused has consistently stated that it was not ghee but cocoanut oil and that it was not intended for food but for manufacture into soap. Chemical analysis proved that the substance was adulterated coconut oil, and as there is nothing to show that ghee was demanded and this article offered in its place S. 5 of the Act does not apply. S. 4 would only apply if the article sold was an article of food or a drug. The Magistrate who tried the case says that cocoanut oil is a food, and I have no doubt that it is edible, but I have never heard that it is sold as food in any of the bazars of this part of India, and I very much question whether in the opinion of the public of this part of the country cocoanut oil is a food, and certainly there is no evidence that the accused kept this article for sale as food. The charge was clearly based on the assumption that he was selling this mixture of cocoanut oil as ghee, and this has not been proved against him. There is therefore an initial difficulty in the prosecution of this case, namely, that it is uncertain whether the facts which have been proved constitute any offence.

But this is only one of the many objections which have been raised to the conduct of these proceedings. In the first place under S. 15, Act 6 of 1912, it is necessary that every summons issued in a prosecution under S. 4 of the same Act shall specify the particulars of the offence charged and the name of the prosecutor. The summons in this case stated that the King-Emperor through the Municipal Board was the prosecutor and this may possibly be held to be a compliance with the Act. But particulars of the offence were certainly not given. All that was said was that the offence was under Ss. 4 and 5, Act 6 of 1912, together with the bye-laws relating to ghee. This is no description of the offence, and in so far as it does indicate the nature of the prosecution it gives a false impression of the charge brought against the accused. The mandatory nature of the provisions of S. 15, Act 6 of 1912, has been emphasized by a judgment of this Court in the case of *Benarsi Das* v. *Emperor* (1) where it was held that the failure to state the particulars of the offence charged was fatal to the prosecution.

This leads to the second defect which also began with the summons. There was a second charge against the accused that he was keeping a ghee shop without a proper signboard, and the two charges were tried together. There is no connexion whatever between selling adulterated cocoanut oil and failing to expose a signboard over a ghee shop. It is true the Magistrate finding that this was not a ghee shop and no signboard was necessary acquitted the accused of the charge under the ghee bye-law, but clearly the combination of such an offence with that for which the accused was convicted was prejudicial to him in every way. It imported into the case the idea that he was selling adulterated ghee, and this charge was never established against him. It is now accepted law that a misjoinder of charges of this nature is fatal to the prosecution despite anything that may be contained in S. 537, Criminal P. C.

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(1) A. I. R. 1930 All. 595=125 I. C. 503=1930 Cr. C. 817=31 Cr. L. J. 866.

The last objection raised as to the proceeding was that the person who instituted the prosecution was not authorized to do so. The person who signed the complaint was a gentleman named Maha Shankar. Under S. 12 of the Act the Municipal Board authorized this gentleman to institute and conduct prosecutions under the Act on 21st August 1930, but he made his complaint on 15th July 1930, when it does not appear that he was so authorized. Apparently it has been accepted by the Courts below that he was at that time executive officer, and possibly this fact may cure the alleged defect, although it is hardly clear how the Courts below have arrived at their conclusion.

In addition to the numerous irregularities which I have already pointed out the sentence was illegal. The maximum sentence for the offence alleged to have been proved was a fine of Rs. 100, and I am surprised that this fact was not brought to the notice of the learned Sessions Judge. I do not think that the Sessions Judge is right in brushing aside what he called technical illegalities in this trial. I consider that although many of them were technical the accused was prejudiced throughout in that he never had a proper understanding of the case which he was supposed to meet. And I doubt whether he would ever have been prosecuted at all had the inspector accepted his statement at the outset that the article purchased by him was cocoanut oil and not ghee. The prosecution was based on the idea that this substance was sold as ghee, and when this fact was not established the accused was entitled to an acquittal.

I allow this application, and set aside the conviction and sentence. The fine, if paid, will be restored to the applicant.

B.V./R.K. *Revision allowed.*

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* A. I. R. 1931 Allahabad 706

YOUNG AND SEN, JJ.

Mt. Ketki Kunwar—Applicant.

v.

Sheo Narain Jafa and *others* —Opposite Parties.

Misc. Case No. 221 of 1931, Decided on 10th April 1931.

*** (a) Criminal P. C. (1898), S. 195— Offence of perjury committed in trial Court is offence committed in relation to appeal from trial Court's decree.**

A person committing perjury in a trial Court must be held to have intended that his perjury should not only influence the proceedings in the trial Court, but also subsequent proceedings which might take place if either party to the case in the trial Court took the matter to appeal. Therefore the offence must be held to have been committed in relation to the appeal in the appellate Court. [P 707 C 2]

(b) Interpretation of Statutes — To take away existing jurisdiction of Supreme Court language of Act must be clear.

No existing jurisdiction of a Supreme Court can be taken away unless the language used in the enactment which purports to take that jurisdiction away is in the clearest possible terms. [P 707 C 2]

*** (c) Criminal P. C. (1898), S. 195 (b)— S. 195 (b) does not take away High Court's power to order prosecution for perjury in lower Court.**

It cannot possibly be said that S. 195 (b) takes away in clear terms the undoubted jurisdiction which existed in the High Court prior to the passing of the Code of 1898 of ordering the prosecutions for perjury in the lower Courts. Therefore the High Court still has jurisdiction to make the orders. [P 707 C 2]

Mr. Shankar Saran—for the Crown.

Saila Nath Mukerji, A. Sanyal and *N. C. Ganguli*—for Applicant.

Iqbal Ahmad, S.S. Sastry, K.D. Malaviya, Durga Charan Singh and *P. M. L. Verma*—for Opposite Parties.

Young, J.—Notices have been issued to Sheo Narain Jafa, an advocate of Budaun, Ghasa Singh and Nathu Lal to show cause why a complaint should not be filed against them in a criminal Court charging them with having committed offences under Ss. 193, 120 (b) and 209, read with S. 109, I. P. C. Notice was also issued to Makhan Singh to show cause why he should not be prosecuted for having committed offences punishable under Ss. 120 (b) and 209, read with S. 109, I. P. C.

These applications arose out of F. A. No. 147 of 1927, which was heard and decided by a Bench of this Court on 22nd January 1931. That Bench made very strong observations against all the four respondents. The Court found in the civil appeal that there had been a conspiracy by all of them to deprive one Manohar Singh of his property, and in accordance with that finding, avoided a deed of gift executed by Manohar Singh in favour of Nathu Lal and Makhan Singh, and also a sale deed executed by the same parties. The Court also set aside a decree of 12th November 1923 in Suit No. 201 of 1923 which was a suit by Nathu Lal and Makhan Lal, vendees, against Manohar Singh for a declaration that the plaintiffs were entitled to possession of the property compromised in the said sale deed. The facts arising in this case are fully set out in the judgment of this High Court .in First Appeal No. 147 of 1927, and it is unnecessary for us to detail fully those facts again. We have to consider whether there is a prima facie case established against all or any of the respondents which would make it obligatory on us to order their prosecution under S. 476, coupled with S. 195, Criminal P. C. Counsel appearing on behalf of Sheo Narain Jafa did not take any preliminary objection; but counsel on behalf of the others have objected that this Court has no jurisdiction to order the prosecution of their clients. The objection is based upon S. 195, Criminal P. C. That section enacts that

> "no Court shall take cognizance, (sub-Cl. b) of any offence punishable under any of the following sections of the same Code, namely, Ss. 193, 194, 195, 196 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in or in relation to any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate."

With the exception of S. 120 (b) the sections comprised in this notice are included in sub Cl. (b), S. 195. Cl. (4) also brings in Cl. (1) (b), the charge under S. 120 (b). It is clear that the alleged offences were not committed in this Court, and it is contended therefore that this Court has no jurisdiction to order the prosecution of the respondents. It is however, to be noted that the subclauses does not apply merely to offence committed in "such Court" but apply also to offences "committed in relation to any proceeding in any Court." It is obvious that the offence charged under S. 209, read with S. 109, was not committed even in the trial Court. It cannot be denied that that offence was committed in relation to the proceeding in the trial Court. It is therefore in our opinion also clear that the offence under those sections was also committed in relation to the appeal which was heard in this Court. There is no reason to construe narrowly the words "in relation to." Equally the offence of perjury, although it was undoubtedly committed in the trial Court, must in our view, be held to have been committed in relation to the appeal in this Court. A person committing perjury in a trial Court must be held to have intended that his perjury should not only influence the proceedings in the trial Court, but also subsequent proceedings which might take place if either party to the case in the trial Court took the matter to appeal.

Further on this point it is not denied that there was before Act 5 of 1898 was passed a jurisdiction in the High Court to order prosecutions in a matter like this. The equivalent section of Act 10 of 1882 undoubtedly gave jurisdiction to this Court to order prosecutions. The High Court has also directed similar prosecutions even prior to the specific enactment of Act 10 of 1882. There was therefore at the time of the passing of Act 5 of 1898 an existing jurisdiction in the High Court to order such prosecutions. Therefore in construing the material section of Act 5 of 1898 the cardinal rule of construction as to jurisdiction must be taken into account, and that is that no existing jurisdiction of a Supreme Court can be taken away, unless the language used in the enactment which purports to take that jurisdiction away is in the clearest possible terms. There can have been no object in cutting down the jurisdiction of the High Court in such matters and at any rate, it cannot possibly be said that S. 195 (b), takes away in clear terms the undoubted jurisdiction which existed in the High Court prior to the passing of that Act. We hold therefore that this Court has jurisdiction to make the orders.

We have very carefully and anxiously considered the case as against Sheonarain Jafa. He is an officer of this Court and he has been charged in clear terms by a Bench of this Court, of which one of us was a member with conduct seriously reflecting upon him both in his capacity as a private individual, an officer of this Court, and a member of the legal profession. We are of opinion that the observations not only of the Bench of this Court, but of the two lower Courts before whom this matter had come were entirely justified. His action, for example, in filing an application which he knew could not possibly succeed, unless material facts were hidden from the Court for the appointment of Manohar Singh as guardian of his infant children when those infant children had on entirely proper grounds brought an action against him for partition, was an action such as no honest lawyer could possibly have advised his client to take. The fact that in that action Mr. Sheo Narain Jafa was assisted by another practitioner of Budaun named Iqtidar Alam, does not make Mr. Jafa's conduct any the less serious. We have carefully examined all the facts of this case as regards Sheo Narain Jafa. We are satisfied that a consideration of those facts raises the very gravest suspicion against Sheo Narain Jafa of being guilty of the offences with which it is sought to charge him. But as he was not actually a party to the sale deed itself, nor was he at any rate openly, a party to the declaratory suit No. 201 of 1923, we feel that there is not enough evidence which would justify a criminal Court in coming to a conclusion adverse to Sheo Narain Jafa. We therefore discharge the notice as regards him with respect to all these sections of the Indian Penal Code.

The matter however stands on a different footing with regard to the charges against the other three respondents. We do not wish to say anything in this matter to prejudice their trial in the criminal Court. We therefore confine ourselves to saying that, in our view there does exist a prima facie case against them. We therefore record a finding under S. 476 (1), Criminal P. C., that it is expedient in the interest of justice that an inquiry should be made into the said offences, and direct the Registrar of this Court to take the necessary steps for the filing of a complaint against the three respondents charging them with the offences enumerated above with regard to each. With regard to the charges relating to S. 193, I. P. C., we direct the filing of a complaint against Ghasa Singh with respect to the following two statements;

"(a) Makhan Singh has purchased this property for himself (p. 180, line 5 of the paper book in F. A. No. 147 of 1927), (b) Babu Sheo Narain and I are not the owners of the sale in dispute. (p. 155, line 46 of paper book in F. A. No. 147 of 1929.)"

With regard to Nathu Lal we direct a complaint to be made against him for the following statement:

"(a) Out of the money left with me at the time of this sale I spent Rs. 1,400 in the appeal (p. 51 line 17 of paper book in F. A. No. 147 of 1927), (b) I paid the money left with me for Sunder Lal, Sheo Narain, Bhupal Rai and Natra Behari Lal to them. I subsequently took a clear receipt from Manohar. (p. 51 line 20 of paper book in F. A. No. 147 of 1927), (c) Nathu Lal and Makhan Singh are the owners of the property (Supplementary paper book p. 44, line 3)."

The said complaints are to be sent to the District Magistrate of Budaun. Together with the complaints will be sent the original record of suit No. 64 of 1926 the subject-matter of F. A. No. 147 of 1927, a copy of the printed paper book containing the evidence, a copy of the judgment of this Court and a copy of the notices issued to the three respondents.

With regard to costs, we allow no costs to Sheo Narain Jafa. The applicants were abundantly justified in making the application against him. The applicant will have her costs of the application against the other three respondents.

B.V./R K. *Order accordingly.*

✲ A. I. R. 1931 Allahabad 708

BOYS, J.

Deota Misir—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 66 of 1931, Decided on 17th May 1931, against order of Second Addl. Sess. Judge, Gorakhpur, D/- 19th January 1931.

✲ **Penal Code (1860), S, 304—Accident due to rash and negligent driving—Both parties negligent—Party who could by exercise of reasonable care have avoided consequences of other's negligence is legally responsible for accident—Tort, negligence.**

In case of an accident due to rash and negligent driving, the crucial question on which the liability depends is whether either party could, by the exercise of reasonable care, have avoided the consequences of the other's negligence; if he could, then that party is legally responsible for the accident.

Where therefore the driver of motor lorry, accused of causing death of a person by rash and negligent driving alleged that he saw two bullock-carts coming towards him in the middle of the road and that he intended to pass on his own left in the ordinary way but the bullock-cart drivers took their carts one to the right and one to the left and being unable to pass on his own left he swerved in order to try and pass on the right and so struck a tree thus causing the accident which resulted in the death of one of the passengers.

Held : that the accused was guilty as it was his negligence that caused the accident. Although there was negligence on the part of one of the bullock-cart drivers the accused if he had his lorry under proper control would have been able to avoid the consequence of that negligence.

That the accused's responsibility would have been just the same even if he had caused injury to the negligent bullock-cart driver: *Swadling* v. *Cooper*, (1930) *W.N.* 204, *Rel. on.* [P 710 C 1, 2]

Kumuda Prasad—for Applicant.

M. Waliullah—for the Crown.

Judgment.—Deota Misir has upon a complaint by Bishnath Lal of an offence under S. 304, I. P. C. (causing death by doing a rash or negligent act not amounting to culpable homicide) been convicted and sentenced to three months' rigorous imprisonment and a fine of Rs. 50 or in default six months' rigorous imprisonment.

The accused was the driver of a motor lorry, and was charged with having caused the death of a person, in that on the Gagha to Gorakhpur road he was driving his lorry fast as he was trying to outstrip another motor lorry, with the result that the lorry of the accused collided with a tree which stood on the right hand side of the road. The lorry overturned, one of the passengers was killed and some injured. The accused denied that he was driving fast or that he was trying to outstrip any other lorry or that he was guilty of any negligence. His case was that he saw two bullock carts coming towards him in the middle of the road, he intended to pass on his own left in the ordinary way, but the bullock-cart drivers took their carts one to the right and one to the left, and being unable to pass on his own left he swerved in order to try and pass on the right, and so struck the tree. It will be seen therefore that he puts the blame for the accident on the bullock-cart drivers. The Magistrate found that the prosecution witnesses had proved to his satisfaction that the accused was driving the lorry fast as he was trying to outstrip another lorry and that he did not even blow his horn; that he, the Magistrate, was doubtful whether there were any bullock-carts there, but, even if there were, there was sufficient space for the accused to have kept his lorry away from the tree; that the accused had disregarded the rules of the road and taken his lorry on the wrong side; that even assuming that the bullocks of one of the carts shied off there would have been no accident had the accused stopped his lorry.

The second Additional Sessions Judge in appeal found it established that there was another lorry travelling in front of the accused; that the accused was travelling fast; that he was guilty of a negligent act in trying to pass on the right. He does not find that there were bullock-carts as stated by the accused and his witnesses, and the Magistrate, while doubting this point, did not definitely hold that there were no bullock-carts. I should therefore in any case give the accused the benefit of this doubt and deal with the case on the assumption that there were bullock-carts. This is indeed almost certain, for there is no other cause to account for the accused having swerved off to the right so far as to strike a tree on the patri on the right hand side. The facts therefore which must be taken to be found are that the accused saw ahead of him two bullock-carts coming towards him in the middle of the road; that whether because the drivers themselves saw the accused's lorry approaching or because they saw him upon his sounding his horn—and I give him the benefit of the doubt that he sounded his horn as that fact is not found against him—they endeavoured to get out of the way; that instead of both going to their own left from the middle of the road, as they should have done, one went one way and one the other; that finding he could not pass on his own left hand, as he should have done, he made a swerve hoping to get through on the right hand side, and struck the tree. It is found as a fact that there was another lorry going ahead of the accused, but it is not found how far ahead the other lorry was, and the fact is only of importance as suggesting that the accused had a motive for driving too fast. I do not think any importance can be attached to this suggested motive in the state of the evidence. The other lorry must, at any rate, have been some distance ahead, or we should not find the bullock-carts, according to the accused's own statement in the middle of the road. The question, then, is whether the accused brought about the accident by rash and negligent driving. In my opinion no other conclusion is possible. Every driver in India knows that villagers are not sufficiently alive to the rules of traffic. He knows that he may at any moment find drivers of bullock-carts or ekkas on the wrong side of the road, particularly on country roads, and he knows that bullock-cart drivers may turn on to their wrong side of the road when they see traffic approaching. In the circumstances of the present case there is no suggestion whatever that the negligent act of the bullock-cart driver who swung his cart on to the wrong side of the road was so sudden that it was impossible for the accused to avoid an accident. It is manifest that there are cases when a driver cannot possibly be reasonably expected to avoid the consequences of somebody else's negligence. A pedestrian or the driver of another vehicle may be negligent and there may be no sufficient time for another person to avoid the consequences of that negligence. In the present case it is clear that had the accused been driving at a pace at which he had his lorry under proper control he should have been able to stop it at any time to avoid an accident without resorting to the dangerous expedient of swinging his car off to the wrong side of the road. In my opinion therefore while there was negligence undoubtedly on the part of one of the bullock-cart drivers, the accused, if he had had his lorry under proper control, should have been able to avoid the consequences of that negligence. His negligence therefore was the negligence that substantially caused the accident. That he was therefore rightly convicted is in accordance with the principles laid down in the latest and very important case of *Swadling* v. *Cooper* (1). Their Lordships in that case (it was of course a civil case) said:

> "The crucial question on which liability depended, was whether either party could, by the exercise of reasonable care, have avoided the consequences of the other's negligence; if he could, then that party was legally responsible for the accident."

The idea is unfortunately very prevalent in a vague way in the minds of many drivers that it is sufficient to absolve them from the consequences of rash driving merely to show that the person to whom or to whose property they have caused injury was himself negligent. It is not so and the sooner rash drivers appreciate the fact the better.

In the present case the injury was actually caused to persons who were in no way negligent; but the accused's responsibility would have been just the same if he had caused the injury to the negligent bullock cart driver.

I see no reason to interfere with the conviction and sentence, and the application is dismissed.

The applicant will surrender to his bail.

R.M./R.K. *Application dismissed.*

A. I. R. 1931 Allahabad 710

BAJPAI, J.

Ram Naresh Rai and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 132 of 1931, Decided on 15th June 1931, from order of Sess.-Judge, Ghazipur, D/- 19th December 1930.

Penal Code (1860), S. 215—Restoring lost property on payment of remuneration—Property not lost by commission of offence and restorer not shown to be screening offender—There is no offence under S. 215.

Where the accused merely undertakes to endeavour to trace out and restore the lost property on payment of some remuneration then upon this circumstance alone the accused cannot be said to be guilty of an offence under S. 215, unless over and above that the prosecution proves that the property has been lost by the commission of an offence and that the accused is endeavouring to screen the offender from justice and is not using all means in his power to cause the offender to be apprehended and convicted of the offence which he has committed: 6 *I. C.* 250 and *A. I. R.* 1928 *All.* 22, *Ref. A. I. R.* 1924 *All.* 783, *Dist.* [P 711 C 1]

Kumuda Prasad—for Applicants.

Asst. Govt. Advocte—for the Crown.

Order.—The three applicants before me have been convicted of an offence under S. 215, I. P. C. It appears that on the night of the 23rd and 24th April the complainant Hari Ram lost two of his bullocks and therefore on 24th April 1930, he informed the police in the following terms:

> "On Wednesday in the evening my four oxen were fed and then tied to pegs. When everybody was asleep two of them began to fight with one another and broke the tying strings and strayed away."

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(1) [1930] W. N. 204=46 T. L. R. 597=143 L. T. 732=74 Sol. Jo. 536.

It is clear therefore that when the bullocks were lost to the complainant, they were lost not by reason of the commission of any offence but by sheer accident. About six days later, on the 1st May there was a transaction between the complainant and the accused by which the accused took Rs. 50 and restored the bullocks to the complainant. I must accept the finding of the Court below that the money was demanded and received by the accused, but that alone is not sufficient to bring the conduct of the accused within the purview of S. 215, I. P. C. On behalf of the applicants the case of *In re Hemraj* v. *Emperor* (1) and the case of *Emperor* v. *Mangu* (2) has been cited. The Assistant Government Advocate has cited the case of *Emperor* v. *Mukhtara* (3). This last case is distinguishable because in that case there was a finding that the bullocks had been stolen. In the case before me there is no evidence that the bullocks were stolen. Indeed the first information report would go to show that the bullocks had simply strayed away and it is not fair to presume that later on somebody finding the bullocks committed an act of criminal misappropriation in the absence of any evidence on that point. There is also no evidence and no finding in this case that the accused knew the offender, and therefore it is obvious that he cannot be said to have failed in his efforts to cause the offender to be apprehended and convicted of an offence which he might have committed. Where the accused merely undertakes to endeavour to trace out and restore the lost property on payment of some remuneration then upon this circumstance alone the accused cannot be said to be guilty of an offence under S. 215, I. P. C., unless over and above that the prosecution proves that the property has been lost by the commission of an offence and that the accused is endeavouring to screen the offender from justice and is not using all means in his power to cause the offender to be apprehended and convicted of the offence which he has committed. I am therefore of the opinion that the conviction of the applicants is illegal.

I therefore set aside the conviction and sentence and direct that the fine or any portion of it if paid be refunded. The bail bonds should be discharged.

V.B./R.K. *Conviction set aside.*

A. I. R. 1931 Allahabad 711

SULAIMAN, AG. C. J. AND BAJPAI, J.

Ram Phal—Applicant.

v.

Emperor—Opposite Party.

Civil Revn. No. 393 of 1930, Decided on 17th July 1931, against order of Collector and Dist. Magistrate, Basti, D/- 12th August 1930.

(a) Legal Practitioners Act (1879), S. 36—Resolution based on general repute or hearsay evidence is not ineffective.

There is nothing in the language of explanation to S. 36 which would make a resolution based on general repute or hearsay ineffective. [P 712 C 1]

(b) Legal Practitioners Act (1879), S. 36—Resolution based on general repute though of less weight is legally admissible in evidence.

If a resolution is based on general repute the Court may attach less weight to it, but it cannot be said that such a resolution is legally inadmissible in evidence and cannot be taken into consideration by the Court. [P 712 C 1]

P. L. Banerji and *R. K. Malaviya*—for Applicant.

Sankar Saran—for the Crown.

Sulaiman, Ag. C. J.—This is an application in revision from an order of the District Magistrate of Basti, declaring Ram Phal applicant to be a tout.

There are precedents for the exercise of the power of superintendence by this Court when an order passed by a subordinate officer is against natural justice.

The learned advocate for the applicant urges before us that there is no legal evidence whatsoever on which the District Magistrate could have legally acted. It appears that apart from certain oral evidence which has not been relied upon by the District Magistrate there were two resolutions of the Bar Associations of Mukhtars and Vakils in the following terms :

> (1) " That the meeting . . . . is of opinion that Ram Phal stamp vendor of the place is by general repute a tout.
>
> (2) It is resolved that Ram Phal stamp vendor of Bansi is a tout on the strength of general repute."

The District Magistrate had power to act upon the evidence of general repute under S. 36, Legal Practitioners Act, as amended. The explanation added to the section makes the passing of a resolution declaring a person to be a tout by a majority of the members present at a meeting specially convened for the purpose of an association of persons entitled to practise as legal practitioners as evidence of the general repute of such person for the purpose of that section. It cannot therefore be denied that if the resolution substantially is one declaring Ram Phal to be a tout then it was legally admissible as evidence of general repute, even though the basis of that resolution may be hearsay evidence. On the other hand, if there is no resolution declaring him to be a tout, but there is a simple statement of fact that there was such evidence before the Association, then possibly it would not come under the explanation.

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(1) [1910] 11 Cr. L. J. 295=6 I. C. 250.

(2) A. I. R. 1928 All. 22=106 I. C. 437=50 All. 186.

(3) A. I. R. 1924 All. 783=85 I. C. 225=26 Cr. L. J. 481=46 All. 915.

There seems to be nothing in the language of S. 36 of the explanation which would make a resolution based on general repute or hearsay evidence ineffective.

The language of the first resolution was somewhat ambiguous, but the second resolution undoubtedly shows that the members recorded their conclusion and declared that Ram Phal was a tout although they also indicated that their conclusion was based on the strength of general repute. We think that the words "on the strength of general repute" merely indicate the basis of the resolution declaring him to be a tout and does not destroy its effectiveness.

If a resolution is based on general repute the Court may attach less weight to it, but it cannot be said that such a resolution is legally inadmissible in evidence and cannot be taken into consideration by the Court.

We are accordingly unable to interfere with the order passed in the case. The application is dismissed with costs.

R.M./R.K. *Application dismissed.*

A. I. R. 1931 Allahabad 712

YOUNG AND SEN, JJ.

Emperor

v.

Baldeo Koeri and *others*—Respondents.

Criminal Appeal No. 930 of 1930, (connected with Appeal No. 701 of 1930), Decided on 9th April 1931, against order of Sess. Judge, Jaunpur, D/- 11th August 1930.

(a) Criminal P. C. (1898), Ss. 417, 418 and 423—Acquittal—Appeal from—Principles to guide Court stated—Presumption is in favour of accused—Onus is on prosecution to prove that finding of lower Court is not justified.

In an appeal from an order of acquittal it ought to be remembered that there is always a presumption in favour of innocence of the accused. This presumption very materially affects the question of onus, which except within a limited range of cases lies upon the Crown, and where the finding of subordinate tribunal is in favour of the accused, the burden lies upon the prosecution to prove that the finding reached by the Court below, was not justified by the evidence. Where the evidence against the accused is too scanty or insufficient to support the charge, the finding of the Court below cannot be displaced. Again, where the case is somewhere on the border line or very near it, and it was possible for the Court, upon a balance of probabilities to hold a person guilty, the reversal of the order of acquittal is not only undesirable and inexpedient, but is calculated to cause a miscarriage of justice. Where however the balance of evidence is distinctly against the accused or where material evidence has been misappreciated, overlooked or ignored, the High Court is bound to step in as much in the interest of the administration of justice as of the public generally. [P 715 C 2]

In considering an appeal by Government against an order of acquittal, it is not for the High Court to say whether, if it had been trying the case it might have taken a view opposed to that of the lower Court. That is not the test to be applied to determine such an appeal. While the High Court recognizes the necessity for the existence of such powers in the Local Government in this country, it is equally clear that those powers should be most sparingly enforced; and in respect to pure question of fact only in those cases where, through the incompetence, stupidity or perversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from evidence as to produce a positive miscarriage of justice. [P 716 C 1]

(b) Penal Code (1860), Ss. 302, 307, 148 and 149—Riot—Evidence conflicting—Parties producing perjured evidence — Procedure stated.

Where the evidence is entirely conflicting where both the parties have consciously produced before the Court perjured evidence and where the real motives which led to the fight between the parties cannot be known nor can it be ascertained with anything like reasonable certainty as to whose lathis or spear struck whom, the one sure ground upon which the Sessions Judge could have proceeded is by the marks of injury upon the persons of those who were charged with the offence. In the midst of uncertainties this was one certain factor to go upon. The Sessions Judge was therefore justified in giving proper weight to this one important circumstance. [P 716 C 1, 2]

Sankar Saran—for the Crown.

K. O. Carleton—for Respondents.

Judgment.—Baldeo Koeri, Bisheshar, Sahadeo, Hemraj, Lurkhur, Ramdeo, Munnu, Deoraj, Sukhraj, Khurkhur, Jaisri, Jhullar, Girja Dasaundhi, and Ramadhar were committed to the Court of Session at Jaunpur to take their trial under Ss. 307/149 and 148, I. P. C. Of the above persons Baldeo was also charged of an offence under S. 302, I. P. C.

Twelve of these persons are residents of Pindri ; they are Koeris by caste and are related. Two of the accused, namely, Girja and Ramadhar are Dasaundhis by caste. They have got no interest in Mauza Pindri. They are residents of Mauza Nageshra.

The learned Sessions Judge acquitted Baldeo under S. 302, I. P. C. He acquitted all the 14 accused persons of the offence under Ss. 307/149, I. P. C. He also acquitted Baldeo, Jaisri, Jhullar, Girja and Ramadhar of the offence under S. 148, I. P. C., but convicted Bisheshar, Sahedeo, Hemraj alias Hannu, Lurkhur, Ramdeo, Munnu, Deoraj, Sukhraj and Khurkhur under S. 148, I. P. C., and sentenced them to various terms of imprisonment.

The Local Government has appealed from the order of the Sessions Judge : (1) acquitting Baldeo under Ss. 302, 307/149 and 148, I.P.C., (2) acquitting the remaining 13 persons of the offence under S. 307/149, I. P. C., and (3) acquitting Jaisri, Jhullar, Girja and Ram Adhar of offences under S. 148, I. P. C. This is Criminal Appeal No. 930 of 1930.

Bisheshar and eight others, who have been convicted under S. 148, I. P. C., and sentenced to various terms of imprisonment, have also appealed to this Court. Their appeal is No. 701 of 1930.

There is yet another appeal. This is Criminal Appeal No. 656 of 1930. A counter-charge under S. 148 was preferred against certain Thakurs who were residents of Patti Kiratrai. The learned Sessions Judge convicted five of the Thakurs, namely, Ramadhin Singh, Bindeshwari Singh, Parsidhi Singh, Chulbul Singh and Ram Lal Singh and sentenced them to various terms of imprisonment. These five persons have challenged the legality and correctness of the conviction.

On 21st March 1930, a serious riot undoubtedly took place in Mauza Pindri, which is 18 miles from the city of Jaunpur. In the course of this riot, one Murao Singh, Thakur, of Patti Kiratrai, was killed. Two other Thakurs, Bindeshri Singh and Chulbul Singh, who were related to Murao Singh, were injured, on 22nd March 1930 ; a post mortem examination was held on the corpse of Murao Singh and it was found that he had received a penetrating wound 2/3" x 1/4" in the third intercostal space, near sternum. The Civil Surgeon was of opinion that the cause of death was the penetrating wound of the heart. Bindeshri Singh had received two injuries and Chulbul Singh had received no less than eight injuries, two of which have been described to be dangerous.

The charge of murder was brought against Baldeo and it was alleged that he was responsible for the fatal injury caused to Murao Singh. The charge of attempt to commit murder was brought against the 14 accused upon the ground that the injury sustained by Chulbul Singh was so very serious as was likely to cause death and that the said injury had been caused in pursuance of a common object.

The evidence on the record proves to our satisfaction that there has been in the past considerable strained relations between the Thakurs of Patti Kiratrai and the Koeris of Mauza Pindri. It is very difficult to say as to what was the exact cause which led up to the riot. The evidence produced by the parties assigns different reasons as to the origin of the fight. We find it extremely difficult to believe the evidence of one party or the other. The result is that the origin of the quarrel must remain for ever shrouded up in mystery.

There can however be no doubt that there was a fight between the Thakurs and the Koeris. Amongst the Koeris, the persons who were hurt were Hemraj, Sahdeo, Munnu, Bisheshar, Khurkur Sukhraj and Lurkhur. Amongst the Thakurs, the persons who received hurt were Murao Singh, the deceased, Bindeshri Singh and Chulbul Singh.

The Thakurs lodged a police report at the Rampur Thana on the day of the occurrence, but this report was made after unusual delay and the cause for the delay has not been accounted for. This is a suspicious circumstance. In such cases there is always a strong temptation to conceal the truth, to exaggerate matters and to drag the names of as many opponents as possible into the net. This appears to have been done in this case. Bindeshri Singh did not go to the police station in person. He sent a written note through Sarju Dharkar. The report was made against nine persons and the persons alleged to have taken part in the riot are Baldeo Koeri, Lurkhur Koeri, Sukhraj, Hannu, Bisheshar, Khurkhur, Girja Dasaundhi and Ram Dhar Dasaundhi. It was not alleged that Sahdeo Ramdeo, Munnu, Jaisri and Jhullar had taken part in the riot. When the case came up before the Magistrate it appears that the case had gathered embroidery and five additional names were introduced and the last five mentioned persons were also alleged to have taken part in the riot from the side of the Koeris.

Mauza Pindri appears to be a hamlet of Mauza patti Kiratrai. The village appears to be torn by factions which are led by the chief of the Koeris and the head of the Thakurs. An attempt has been made in this case to involve in the riot almost all the members belonging to the family of Baldeo Koeri.

Upon the evidence which has been produced in this case it is very difficult to find out either the cause of quarrel or the fact as to which of the two parties was the aggressor in the fight. We are convinced however that there was a free fight between the Koeris and the Thakurs and it is not unlikely that the Koeris outnumbered the Thakurs. The learned Sessions Judge did not believe that the two Dasaundhis, Girja and Ram Adhar, had taken part in the fight. They were persons belonging to a different caste. They belong to different village and they had no intreast in the dispute between the Koeris and the Thakurs. In agreement with the Sessions Judge, we hold that no case has been made out against the two asaundhis. One of the witnesses for the prosecution states that these two Dasaundhis were on terms of intimacy with Baldeo, but this statement is evidently based on hearsay.

In the fight the Thakurs and the Koeris appear to have been armed with lathis and a few spears. Puchai Ahir, one of the witnesses for the prosecution states:

> "I do not know which of the accused persons had spears and which lathis, . . . I do not know if Lurkhur, Deoraj, Bisheshar, Sahdeo, Ramdeo, Girja and Ram Adhar used spears or lahis."

It is doubtful if Baldeo Koeri was present at the riot at all. He is a fairly old man. There are no marks of injury on his person. Murao Singh was a pahalwan and an expert lathi fighter. Baldeo could not seriously think of engaging himself in a fight with Murao Singh. The Sub-Inspector in the course of the investigation in this case is alleged to have discovered a spear-stick from a stack of bhusa in Baldeo's house. Curiously enough, this discovery was not followed up to its legitimate conclusion. The spear was not sent to the Chemical Examiner and the Imperial Serologist. There is no evidence that the spear had any marks of blood which it was bound to have, if this spear had been used in killing one man and seriously injuring another as alleged by the prosecution.

We have no doubt, that on the evidence as it stands, it was extremely unsafe to convict Baldeo of an offence under S. 302, I. P. C., or of any other offence with which he stood charged.

Baldeo produced in this case a considerable mass of evidence to prove that, at the time of the riot, he was actually engaged with his pleader at Jaunpur. An application was presented in the Court of the Judge of Small Causes at Jaunpur on 21st March 1930, in which it was prayed that, a suit, which had been dismissed for default of appearance, might be restored.

The time of the riot was early in the morning between the hours of 6 and 7. The affidavit which purports to have been sworn by Baldeo, discloses that it was presented before the Commissioner of Oaths between the hours of 7 and 8. We have not the slightest doubt that the time given in the affidavit is wrong, and that the document has been tampered with and written over. Four witnesses have been examined in support of the alibi. These are Pandit Jagannath Pande, Vakil, Babu Tilakdhari Singh, Vakil, Thakur Chhatar Dhari Singh, Vakil, and Sat Narain Lal. We do not think it necessary to discuss this evidence in detail. We are convinced that these witnesses are not witnesses of truth and that the story of Baldeo's presence at Jaunpur, on 21st March 1930, between the hours of 7 and 8 in the morning is absolutely false. We want to have it clearly understood that it does not follow from the fact that this evidence is false either that Baldeo was present in Pindri about the time of the riot or that he was not or could not have been present at Jaunpur some time in the morning. It is not necessary however to canvass this matter any further.

The case for the prosecution rests mainly upon the statements of six eyewitnesses. Two of them, Bindeshri Singh and Chulbul Singh, are highly interested witnesses. The remaining four are men of no status or position: one of them, Munnu is a chamar by caste and is resident of a hamlet close to the residence of the Thakurs. The other three witnesses are Ram Kishore, barber, Kihirodhar Lohar and Phuchai, Ahir. All these witnesses are residents of patti Kiratrai. Ram Kishore and Phuchai are the parjas of the Thakurs. Bindeshri Singh is the mukhia of the village. These witnesses are clearly amenable to the influences of the Thakurs.

It appears from the statements of the prosecution witnesses that at the time of the riot, people other than those, who were residents of patti Kiratrai, were also present. It has not been explained why these witnesses have not been produced by the prosecution. We are of opinion that we should not interfere with the order of acquittal. The offences under Ss. 307/149 have not been brought home to any of the respondents. The case against Baldeo has not been proved under any of the three sections under which he stood charged. Upon the evidence on the record, it will be extremely unsafe to interfere with the finding of acquittal recorded by the Sessions Judge with reference to Jaisri, Jhullar, Girja and Ram Adhar. We would therefore dismiss this appeal (Criminal Appeal No. 930 of 1930).

In *Criminal Appeal No.* 817 *of* 1928 which was decided by the learned Chief Justice and one of us on 25th November 1929, the principles which should guide this Court in entertaining an appeal from acquittal by the Local Government, have been discussed at some length. We would reproduce the following passage from the judgment:

> "An appeal from an acquittal is an extraordinary remedy and the right to appeal received a statutory recognition for the first time in the year 1872. Certain conditions peculiar to this country called for this provision of law. The rules and the limitations affecting appeals from acquittals are on a par with those relating to appeals from convictions: see *Empress* v. *Pragdut* (1), and the plain language of S. 423, Criminal P. C., clearly indicates that the legislature never intended to recognize any difference between the two."

An appeal from the verdict of the jury stands upon a different basis. In an appeal from an order of acquittal it ought to be remembered that there is always a presumption in favour of the innocence of the accused. This presumption very materially affects the question of onus, which except within a limited range of cases lies upon the Crown, and where the finding of the subordinate tribunal is in favour of the accused, the burden lies upon the prosecution to prove that the finding reached by the Court below, was not justified by the evidence. Where the evidence against the accused is too scanty or insufficient to support the charge, the finding of the Court below cannot be displaced. Again, where the case is somewhere on the border line or very near it and it was possible for the Court, upon a balance of probabilities, to hold a person guilty or not guilty, the reversal of the order of acquittal is not only undesirable and inexpedient, but is calculated to cause a miscarriage of justice. Where however the balance of evidence is distinctly against the accused or where material evidence has been misappreciated, overlooked or ignored, this Court is bound to step in as much in the interest of the administration of justice as of the public generally. Certain principles therefore have been laid down by this Court indicating the course which should be followed for the adjudication of the Government appeals. In *Empress* v. *Gayadin* (2), Straight, J., is reported to have observed:

> "It is not because a Judge or a Magistrate has taken a view of a case in which Government does not coincide, and has acquitted accused persons, that an appeal from his decision must necessarily prevail, or that this Court should be called upon to disturb the ordinary course of justice, by putting in force the arbitrary powers conferred on it by S. 272. The doing so should be limited to those instances in which the lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interest of the public."

We accept this statement of law with a slight variation. If the lower Court has obviously blundered, we have a clear duty to interfere. It is not necessary that the lower Court should have "obstinately blundered" or erred in its conclusion "egregiously and foolishly." The aforesaid decision was followed in *Empress* v. *Gobardhan* (3). In *Empress* v. *Robinson* (4), Tyrrell and Blair, JJ., have adopted with approval the following view which was expressed in *Gayadin's* case (2):

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(1) [1898] 20 All. 459=(1898) A.W.N. 117.
(2) [1881] 4 All. 148=(1881) A.W.N. 159.

> "In considering an appeal by Government against an order of acquittal, it is not for the High Court to say whether, if it had been trying the case, it might not have taken a view opposed to that of the lower Court. That is not the test to be applied to determine such an appeal. While the High Court recognizes the necessity for the existence of such powers in the Local Government in this country, it is equally clear that those powers should be most sparingly enforced; and, in respect to pure questions of fact, only in those cases where, through the incompetence, stupidity or perversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from evidence as to produce a positive miscarriage of justice.

In *Empress* v. *Timmal*(5), Knox, Ag.C.J., and Banerji, J., emphasized upon the proposition that

> "the right vested in the Local Government is a right which should be advanced with care and caution. At the same time it should undoubtedly be exercised when the need for it is apparent."

We approve of what has been said above. Applying the canons laid down in the decided cases of this Court, we are clearly of opinion that the appeal filed by the Local Government could not be supported. If we were sitting in this case as a Court of first instance, it might have been possible for us to take a view of the evidence in certain aspects different from that of the Court below. We are not however in a position to state that the view of the learned Sessions Judge was not a possible view or that his judgment is perverse. In a case like the present where the evidence is entirely conflicting, where both the parties have consciously produced before the Court perjured evidence and where the real motives, which led to the fight between the Thakurs and Koeris, cannot be known nor can it be ascertained with anything like reasonable certainty as to whose lathi or spear struck whom, the one sure ground upon which the learned Sessions Judge could have proceeded is by the marks of injury upon the persons of those, who were charged with the offence. In the midst of uncertainties this was the one certain factor to go upon. The learned Sessions Judge was therefore justified in giving proper weight to this one important circumstance.

We have already noticed that he has convicted nine of the Koeris of an offence under S. 148, I. P. C. The learned Sessions Judge has not however taken into consideration the fact that two of these persons, namely, Ram Deo and Deoraj, had no marks of injury. We are of opinion that it could not be said about these two persons with anything like reasonable certainty that they had taken part in the riot. We would therefore give them the benefit of the doubt. We accordingly allow the appeals of Ramdeo and Deoraj. As to Bisheshar, we are of opinion that he is also entitled to the benefit of the doubt. The learned Sessions Judge observes about him that he is an old man of 60 and is nearly blind. We do not think that it could be at all probable for Bisheshar to have taken part in the riot. It is true that he had some marks of injury upon his person. It is not improbable that he might have been made a victim of the assault on the part of the Thakurs, and the marks of injury were due to this fact and to the fact that he had himself taken part in the assault. We would accordingly allow his appeal, set aside his conviction and sentence and direct his release. We dismiss the appeals of Sahdeo, Hemraj alias Hannu, Lurkhur, Munnu, Sukhraj and Kurkhur. We are informed that these persons are on their bail. We direct that they must surrender to their bails. Sahdeo Singh has not been admitted to bail and has already served his sentence imposed upon him of six months' imprisonment. Let him be released forthwith, provided he is not required for any other offence.

Lastly, we come to the appeal of the Thakurs. Upon the evidence, there can be no reasonable doubt that the Thakurs took part in the riot. The origin of the quarrel not being known, it could not be said that one or other of the party had the right of private defence. It is true that there is no evidence to show that the fight was either pre-arranged or premeditated. At the same time there can be no doubt judging from the manner in which the attacks were made by one party upon the other that the fight was deliberate. We are convinced that Bindheshri Singh and Chulbul Singh had taken part in the fight. The marks of injury upon their persons are sufficient proof of the fact that they were participators in the assault. The learned Sessions Judge was not justified in convicting Parsidhi Singh and Ram Lal Singh. Their case is on the same footing as those of Ramdeo and Deoraj Keori. They had no marks of injury on their persons and are entitled to the benefit of the doubt. We accordingly allow their appeals and set aside their convictions and sentence under S. 148, I. P. C.

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(3) [1887] 9 All. 528.
(4) [1894] 16 All. 212.
(5) [1899] 21 All. 122.

The only mark of injury upon the person of Ramadhin Singh is a very minute scratch near his eyelid measuring no more than 3-10 of an inch by 1-10 of an inch. The explanation of Ram Adhin Singh is that the scratch was caused by a child whom he was carrying in his arms. There is nothing improbable in this explanation. The trivial injury might have been caused by anything. It would be absurd and preposterous to hold that a scratch of this description is proof of the fact that Ram Adhin Singh had taken part in the riot. There is no other evidence against him on which we could rely. We accordingly allow his appeal and set aside the conviction and sentence passed against him. The result is that we dismiss Appeal No. 930 of 1930 and allow Appeals Nos. 656 and 701 of 1930 to the extent indicated above, and we dismiss the rest of the appeals.

K.N./R.K. *Order accordingly.*

A. I. R. 1931 Allahabad 717

SEN AND NIAMATULLAH, JJ.

Gunni and *others* — Defendants—Appellants.

v.

Dal Chand—Plaintiff—Respondent.

Second Appeal No. 1564 of 1928, Decided on 22nd April 1931, against decision of Sub-Judge, Bulandshahr, D/- 3rd May 1928.

Hindu Law—Joint family—Karta cannot alienate joint family property to pay time-barred debts.

Where a joint Hindu family consists of major and minor brothers, the alienation of the joint ancestral property during the minority of some of the members of the family for payment of a time barred debt due from the deceased father is unjustified as being neither for the benefit of the family nor supported by legal necessity: *A.I.R.* 1926 *All.* 243; *A.I.R.* 1921 *Pat.* 99 and 5 *Mad.* 169 (*F.B.*), *Rel. on.*; 14 *Beng. L. R.* 21; 25 *All.* 407; *A. I. R.* 1922 *P. C.* 69; *A. I. R.* 1917 *P. C.* 188; *A. I. R.* 1917 *P. C.* 41; 6 *M. I. A.* 393 (*P.C.*); 3 *P.R.* 1915; *A.I.R.* 1924 *All.* 551 (*F.B.*), *Ref.* [P 720 C 1, 2]

G. Agarwala—for Appellants.

N. C. Vaish—for Respondent.

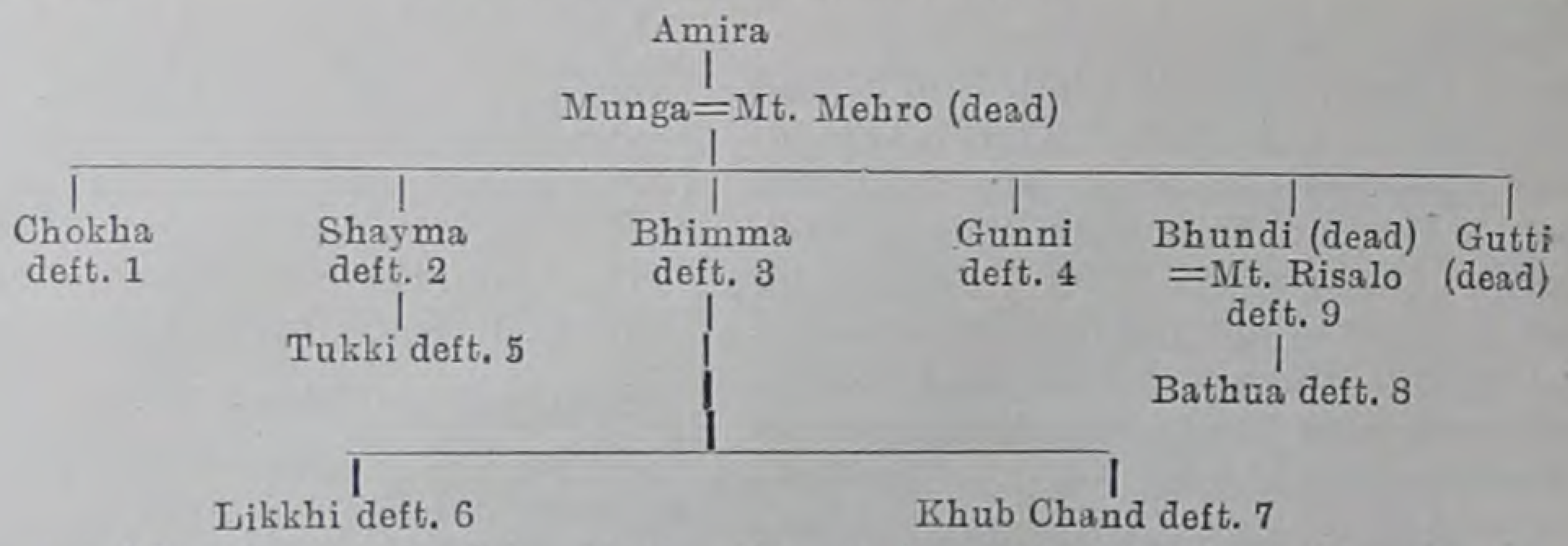
Sen, J. — This is an appeal by 7 out of 9 defendants against whom an auction was lodged by Dal Chand, mortgagee for enforcement of a mortgage by sale of the property. The property in dispute belonged to a joint family consisting of Munga Gujar and his sons. We have abstracted the following genealogical table, which may be referred to for the elucidation of the facts of the case:

[*For genealogical table see* p. 718]

After the death of Munga, his surviving sons continued as members of a joint family. On 1st June 1915, the mortgage in suit was executed by Chokga, Shyama, Bhimma and Bhundi, adults, and by Mt. Mehro, their mother, for self, and, as mutual guardian of her minor sons, Gutti and Gunni. The mortgage was for Rs. 400 and the stipulated rate of interest was one rupee per cent per mensem compoundable half-yearly.

The details of consideration were as follows: (a) Rs. 327, due on a mortgage bond, dated 28th May 1915, which was executed by Munga for Rs. 180 in favour of Dal Chand; (b) Rs. 73, received prior to the execution of the document. In the account annexed to the plaint, the mortgagee admitted that he had received Rs. 203 from the mortgagors some time about the year 1921. The balance sought to be recovered by this suit was Rs. 1,200.

Various defences were raised by defendants 2, 4, 8 and 9. Most of these pleas are not material for the purposes of this appeal. The pleas, which call for decision, are that the sum of Rs. 73 said to have been paid, prior to the execution of the document in suit, was not supported by legal necessity, and was not obtained for the benefit of the joint family, that there was no bond executed by Munga in favour of Dal Chand, on 28th May 1915, that, as a matter of fact, a simple money bond had been executed by him in favour of the plaintiff for Rs. 180 on 28th May 1912, that, on 1st June 1915, this debt had become time barred and that the executants of the bond were not legally competent to bind the joint ancestral



estate in consideration of this time barred debt.

The Court of first instance sustained the aforesaid defence in its entirety, and dismissed the suit. The lower appellate Court by its judgment, dated 3rd May 1928, which is neither clear nor convincing, has reversed the decision of the trial Court, and decreed the plaintiff's suit in its entirety; hence this appeal.

The mortgage bond in suit contains no recitals as to the necessity for borrowing Rs. 73 which was said to have been taken prior to the execution of the document. There is not a scintilla of evidence on the record to show that this money was borrowed either for legal necessity, or for the benefit of the joint family. The executants of the document therefore were not competent to charge the joint ancestral estate with this amount.

The next question, which emerges for decision, is whether Chokga, Bhundi, Shyama, Bhimma and Mt. Mehro were entitled to hypothecate the joint ancestral property in consideration of Rs. 327 due on the bond, dated 28th May 1912, which was executed by Munga in favour of Dal Chand, plaintiff. There is no bond on the record, dated 28th May 1915, alleged to have been executed by Munga in favour of Dal Chand. It has been alleged by the plaintiff that, as a matter of fact, no bond of this date has ever been in existence. The defendants to this action and executants of the bond in suit are illiterate rustics. The Court of first instance was of opinion that the mortgagee had recourse to trickery and had deliberately imposed upon the executants of the document by representing to them that there was a debt due from Munga, under a bond of the year 1915 which was not time barred. The lower appellate Court took a more charitable view of the situation, and was of opinion that, by a clerical error on the part of the scribe, the date of the bond was wrongly written as 28th May 1915, while, as a matter of fact, the correct date was 28th May 1912. The transaction is not free from suspicion, and even if we take the same view as the lower appellate Court, this does not in any way advance the case of the plaintiff. The bond, dated 28th May 1912, was a simple money bond and the claim, on the basis of this bond, was manifestly time barred, on 1st June 1915.

It has been strenuously contended on behalf of the defendants-appellants that the executants of the bond were not competent to charge a time barred debt upon the joint ancestral property. It may be conceded that a written promise to pay a debt, which is barred by the statute of limitation, is a good consideration under S. 25 (3), Contract Act. The principle, which underlies this rule is obvious: A person, who is master of his own actions, is competent to voluntarily resign the benefit of a law made for his own protection. The rule formulated in S. 25, Contract Act, is one of general application. If the executants of the bond were by themselves the exclusive owners of the joint ancestral property, there was no legal bar to their executing the mortgage bond in suit in consideration of their father's debt which had become time barred. Where a Hindu joint family is possessed of joint ancestral property, and consists of adult male members as also minor members, the powers of the manager to transfer the joint ancestral property are very much restricted. The powers of the father of the family in such cases have to be differentiated and distinguished from those of the manager or karta of the joint family. There may be cases where the father himself is the karta but cases are not rare, and, indeed, are very numerous in which the karta of the family is not the father. In *Gajadhar*

v. *Jagannath*, *A.I.R.* 1924 *All.* at p. 551, (Full Bench) it has been ruled that where a joint family consists of the father, sons and grandsons, the father can revive a time barred debt payable by himself, and transfer joint ancestral property for payment of the said debt. The ratio for the decision has been set out in the judgment of one of the learned Judges in the following terms:

> "If a Hindu widow can validly alienate to pay time barred debts due by her husband, a Hindu father can similarly alienate property to pay the time barred debts due by him in order to release himself from the sin of having left them unpaid, so as to bind his sons and grandsons. In *Shib Nath* v. *Alliance Bank of Simla* (1) it was accordingly held that, under the Hindu law, the payment of a debt due by the father, though time barred, was a pious duty, and such a debt was a good antecedent debt however old it might be. A debt, which was barred by time and has been revived, stands on the same footing as a debt which is not time barred; and if it is enforcible against the father, it is also enforcible against his sons and grandsons, provided it was not taken for an illegal or immoral purpose. An alienation made to pay such a debt is therefore valid, and can bind the interests of the sons and grandsons of the persons making the alienation."

We are bound by this decision. The case of the Hindu father however is clearly distinguishable. The Hindu father has the power to revive a time barred debt and can charge the joint family estate provided that the debt is antecedent or incurred for family necessity; every other consideration must give way before the consideration affecting the pious obligation of the Hindu sons to discharge their father's debt. The manager of the joint family cannot transfer the family property for payment of any antecedent debt due from him. If there is no legal necessity or benefit to the family, the transfer cannot be supported. In *Hunooman Pershad* v. *Mt. Babooee Munraj Koonwaree* (2), the powers of the manager for an infant heir have been defined and described in the following terms, (p. 423):

> "The power of the manager for an infant heir to charge an estate, not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

In *Lachman Prasad* v. *Sarnam Singh* (3) it was held that

> "a mortgage of the joint family property of Mitakshara family by its karta, unless necessity or an antecedent debt is proved, is void and that the transaction itself gives to the mortgagee no rights against the karta's interest in the joint family property."

This is an authoritative pronouncement in support of the proposition that, where the debt has not been incurred for family necessity, and is not an antecedent debt according to its technical meaning, the karta is legally incompetent to bind the joint ancestral estate, even to the extent of his undivided interest therein, for the payment of the said debt. The same principle appears to have been enunciated in *Anant Ram* v. *Collector of Etah* (4) and it was held that

> "where the debt was not incurred for family necessity, the interest of the manager of the family with respect to mortgages in the province governed by the Mitakshara could not be sold in enforcement of the mortgage."

In a converse case, *Venkata Row* v. *Tulja Ram Row* (5) (at p. 98 of 49 *I. A.*) their Lordships observed that

> "If it (the arrangement) failed so far as the infant was concerned their Lordships think that in the events that have happened it must also be regarded as failing wholly to convey any of the joint estates at all. They have arrived at the conclusion for this reason. Raja Ram Row, unless he was attempting to divide the joint family, could only deal with this property with the consent of his son or in his capacity of as manager of the estate. In his capacity as manager of the estate he was only able to deal with it for certain limited purposes, and none of those purposes are, or can be, suggested as the consideration why these considerable sums were released."

We have therefore to bear in mind the following facts: (1) The mortgage bond in suit was substantially executed for payment of a time barred debt due from Munga. (2) Munga, the father, had not in his lifetime revived the aforesaid debt or executed the bond in suit in consideration thereof. (3) The debt was sought to be revived by four of the adult sons, namely, Chokha, Bhundi, Shyama and Bhima and by Mt. Mehro, mother of the two infant sons, Gutti and Gunni.

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(1) [1914] 5 P. R. 1915=25 I. C. 480.

(2) [1854-57] 6 M.I.A. 393=18 W.R. 81=2 Suther 29=1 Sar. 552 (P.C.).

(3) A.I.R. 1917 P.C. 41=40 I.C. 284=44 I.A 163=39 All. 500 (P.C.).

(4) A.I.R. 1917 P.C. 188=44 I.C. 290=40 All. 171 (P.C.).

(5) A.I.R. 1922 P.C. 69=74 I.C. 765=49 I.A. 91=45 Mad. 298 (P.C.).

(4) A guardian of the property of an infant cannot properly be appointed in respect of the infant's interests in the property of an undivided Mitakshara family : vide *Charib Ullah* v. *Khalak Singh* (6). Mt. Mehro, widow of Munga, in her capacity as mother, was the natural guardian of Gutti and Gunni, but she had no locus standi to represent the estate of the minors which was a joint and undivided estate. (5) Assuming that the karta of this joint family is to be found in the person of one of the four adult sons, who joined in the execution of the mortgage bond in suit, the said karta did not support to hypothecate the ancestral property on behalf of the minors. But having joined Mt. Mehro in the execution of the document, he may be taken to have acquiesced in the transfer of the property for payment of the debt in dispute. In *Charib Ullah* v. *Khalak Singh* (6), which has already been referred to, it was held by the Judicial Committee that where the karta of an undivided Mitakshara family with the concurrence of the adult members of the family had mortgaged for necessity, family property, for family purposes, there could be no objection to the validity of the mortgage deeds as against all the members of the family on the mere ground that one of the brothers was a minor and that one of the deeds was executed by his mother as guardian with the sanction of the Court, as required by Act 40 of 1858, S. 18, and Act 8 of 1890, Ss. 29 and 30.

In the present case the mortgage bond in suit was not executed either for legal necessity or for the benefit of the family. The revival of a time barred debt during the minority of Gutti and Gunni did not confer any benefit upon the joint family or upon the estate possessed jointly by the minors and the four adult brothers. Had Munga been alive he could have bound the estate of his sons and grandsons for payment of a time-barred debt which was due from him. But in a joint family which is composed of certain adult and certain minor members, the karta of the family is not competent to charge the ancestral estate with a debt which had become time barred. In *Gopal Narain Maoozamdar* v. *Muddomutty Guptee* (7) Sir Richard Couch is reported to have observed as follows :

> "Having disposed of these minor objections we come to consider whether any of the debts intended to be secured by the mortgage were at that time, barred by the law of limitation. This objection arises on the plaintiff's case ; it is not an objection, which the defendants had to take in their written statements, or by way of defence to the suit. The onus was on the plaintiff to prove that the mortgage was a valid one; and if it appeared upon the evidence that some of the debts were barred, the case would not come within the requirements that the mortgagee should be made to pay off a subsisting charge upon the property."

The principle enunciated herein is applicable mutatis mutandis to the facts of the present case. In *Chinnaya Nayudu* v. *Gurunatham Chetty* (8) it was held by a very strong Court that the manager of a Hindu family had no power without especial authority to revive a claim already barred by limitation against the family. In *Babu Sadhu Saran Prasad Singh* v. *Barahmdeo Prasad Singh* (9) a Bench of the Patna High Court ruled that a manager of a joint Hindu family had no power whatever to enter into any agreement to pay a statute barred debt.

In *Jhabhu Ram* v. *Bahoran Singh* (*A. I. R.* 1926 *All.* 243) Sulaiman and Mukerji, JJ., held that a mere manager of a joint Hindu family, as distinguished from the Hindu father, had no power to alienate the property in lieu of a time barred debt and that an alienation could not be said to be supported by legal necessity where the legal remedy to recover the debt had already become time barred. Both upon principles and upon authority the law seems to us to be perfectly clear. Where a joint Hindu family consists of major and minor brothers, the alienation of the joint ancestral property during the minority of some of the members of the family for payment of a time barred debt due from the deceased father is unjustified as being neither for the benefit of the family nor supported by legal necessity. We accordingly allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs throughout including in this court-fees on the higher scale.

B.V./R.K. *Appeal allowed.*

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(6) [1903] 25 All. 407=30 I.A. 165=8 Sar. 483 (P.C.).

(7) [1875] 14 Beng. L.R. 21.

(8) [1882] 5 Mad. 169 (F.B.).

(9) A.I.R. 1921 Pat. 99=61 I.C. 20=6 Pat. L. J. 256.

A. I. R. 1931 Allahabad 721

SULAIMAN, AG. C. J. AND
NIAMATULLAH, J.

Raja Ram—Applicant.

v.

Gopi Nath and *others*—Opposite Parties.

Civil Revn. No. 226 of 1930, Decided on 2nd April 1931, against order of Munsif, Bijnore, D/- 1st May 1930.

(a) Civil P. C. (1908), S. 115—Revision lies where award is set aside and arbitration proceedings are superseded.

There is no doubt that the setting aside of an award and the supersession of the arbitration proceedings amount to a termination of one proceeding in a suit and therefore under S. 115 revision is entertainable because the case has been decided within the meaning of the section. [P 721 C 2]

(b) Hindu Law—Joint family — Manager can maintain mortgage suit without impleading minor members.

The manager of the family as its karta can maintain a mortgage suit in his own name without impleading the minor members of his family. [P 721 C 2]

Panna Lal and *Vishwa Mitra*—for Applicant.

B. Malik—for Opposite Parties.

Sulaiman, Ag. C. J.—This is a civil revision from an order superseding an arbitration. A suit was brought on the basis of a mortgage deed executed in favour of the deceased father of the plaintiff and certain pro-forma defendants who were minors. They were represented by their mother as their guardian ad litem. Ultimately the plaintiff applied to the Court to exempt these minor defendants from the suit and in concurrence with the defendants submitted the dispute to arbitration. There were controversial questions of fact involved in the case. The arbitrator held that the plaintiff's father was a mere benamidar and that the real owner of the mortgage deed had been paid the amount due on the mortgage. He accordingly dismissed the suit.

An application was filed on behalf of the minor defendants praying that inasmuch as they were necessary parties to the suit they should not have been exempted from the suit and that the award without their consent was invalid. The lower Court has acceded to this contention.

There is no doubt that the setting aside of the award and the supersession of the arbitration proceeding amounted to a termination of one proceeding in the suit, and that revision under S. 115 is entertainable because the case has been decided within the meaning of that section.

It seems to us that the plaintiff had merely by way of precaution impleaded his minor brothers because he was bringing the suit on a certified copy on the last day of limitation. There was neither any express affirmation nor denial that he was the manager of the joint Hindu family, but there was an allegation that they were members of one joint Hindu family. The mortgage deed sued upon was also claimed to be part of the joint family property. The plaintiff is admittedly the sole adult member of the family, the other male members being minors.

The plaintiff being the sole adult member was entitled to act as the manager of the family and as its karta could maintain the suit in his own name without impleading the minor members of his family. Although the family had an interest in the mortgage-deed, the members of the family had no independent and separate interest or any definite share in it. The minors were only pro-forma defendants to the suit. It was therefore open to the plaintiff to exempt them from the suit and take the whole responsibility upon himself. This he did and the Court acceded to his request and passed an order directing that the names of the minors should be struck off from the record. After that the plaintiff was competent to refer the dispute to arbitration. The award is binding on the plaintiff and the Court has acted improperly in superseding it.

The minor defendants are no longer parties to the suit except through the plaintiff and they have no independent right to get the arbitration superseded when the plaintiff, their manager, himself agreed to refer the dispute to arbitration. We accordingly allow this application, and setting aside the order of the Court below pass a decree in terms of the award. The applicant will have his costs from the minor respondents.

B.V./R.K. *Revision allowed.*

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

A. I. R. 1931 Allahabad 722

BOYS, J.

Sudeshwari Prasad Narain Singh—Applicant.

v.

Paljhan Dube—Opposite Party.

Execution First Appeal No. 469 of 1929, Decided on 7th January 1931, from decision of Addl. Sub-Judge, Gorakhpur, D/- 29th May 1929.

(a) Appeal—Opportunities given to party of raising point in trial Court not availed of —Appellate Court will not allow the point to be raised again.

A superior Court will not listen to the contention that there were no mistakes in an execution application when opportunity was given to him to correct mistakes in an application for execution by a litigant who had more than ample opportunity of raising the point to the Court primarily concerned and refused to take advantage of the opportunities given him. [P 723 C 1]

(b) Civil P. C. (1908), O. 21, R. 11 (2)—Application not in accordance with law does not save limitation.

An application which does not comply with the requirements of R. 11 (2), is not an application in conformity with law, and cannot save limitation: *A. I. R.* 1926 *All.* 376; *A. I. R.* 1921 *Nag.* 28 and 37 *I. C.* 916, *Foll.*; 40 *All.* 209 and 47 *I. C.* 993, *Dist.* [P 723 C 1]

S. S. Shastry—for Applicant.

S. C. Das—for Opposite Party.

Judgment.—This is an appeal against an order striking off an application for execution on the ground that it was time barred. At the time the application came up before me for determination as to whether it was a fit application to be admitted for hearing I expressed my grave doubts as to its fitness at the time. I however admitted the application for hearing because it seemed then, though not now, cognate to those cases in which the bona fides of an application for execution has been considered when determining whether a subsequent application was barred by limitation. My own view and that of Banerji, J., as to the propriety of considering the bona fides of a previous application when determining the question of limitation had been overruled by a Bench of three Judges. I was therefore loath to refuse admission to this appeal unless I was satisfied that such refusal would be in no way in conflict with that Full Bench decision.

There can in fact be no doubt but that in this case the previous application for execution was not made bona fide and was allowed to go by default. If that were the only point there can be no doubt that the case would be governed by the Full Bench decision to which I have referred, the bona fides or otherwise of the previous application being of necessity, in view of the Full Bench decision to be held immaterial. I therefore ignore that aspect of the previous application altogether.

The present appeal however must fail on a totally different ground, namely, that the previous application was not in accordance with law, and that cannot now be challenged.

The facts are simple. The decree-holder obtained a decree on 31st June 1920. When limitation was near expiry he filed an application for execution of that decree which he allowed to be dismissed for default. On 28th November 1922 the decree was affirmed by the High Court. On 26th November 1925 again practically on the last day of limitation an application for execution was filed. The office reported that the application was incorrect in its particulars in respect of the entries in Cols. 2, 6 and 8. The decree-holder was ordered to correct the mistakes. He was given several opportunities to do so and eventually as he took no steps and ignored the Court's order the Court was compelled to strike off his application [illegible]out its even being registered. On 22nd November 1928 again, on what he believed to be almost the last day of limitation the decree-holder filed the present application. The trial Court has dismissed that application on two distinct grounds, firstly, that the application was not bona fide, and secondly, that there was never an application in accordance with law. This is clearly the meaning of its reference to the application not being registered, for the Court relies on *Ram Bahadur* v. *Rahat Ali* (1), which was decided on the basis that the application for execution, which it was suggested saved limitation, was not one in accordance with law.

It has been suggested by counsel for the appellant here that there were in fact no mistakes in the application. But that is a question which must be taken to have been finally concluded against him. The execution Court held that the application was not in accordance with law in view of the mistakes made in filling up the columns. It may be that it was wrong in the view that it took, but it gave the decree-holder repeated opportunities of either correcting the alleged mistakes or of pointing out to the Court that it was in error. The decree-holder admittedly ignored the order of the Court altogether. The discourtesy of his action is manifest, but he cannot be penalized for discourtesy of that description, but he can and should be held bound by the view of the Court intimated to him and which by his silence he must be taken to have accepted.

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(1) A. I. R. 1926 All. 376=93 I. C. 369.

It is a very well known and sound principle that a superior Court will not listen to a contention of this sort by a litigant who had more than ample opportunity of raising the point to the Court primarily concerned and refused to take advantage of the opportunities given him. I proceed therefore as I must proceed, on the assumption that there were mistakes in the application for execution which rendered it an application which could not be proceeded with, or in other words, an application that did not comply with the requirements of R. 11 (2) and not an application in conformity with law. It cannot therefore save limitation. For this proposition there is ample authority of this Court in *Ram Bahadur* v. *Rahat Ali* (1), of the Nagpur Court in *Megh Raj* v. *Abdul Majid* (2), and of the Calcutta Court in *Joyanuddin* v. *Jamiruddin* (3).

On the other hand for the applicant I have been only referred to two cases: *Raghunandan Lal* v. *Badan Singh* (4) and *Arjun* v. *Lakhan* (5), neither of which is in point. In both these cases the only question with which the Court had to deal was as to the effect of the failure of the applicant for execution to file a copy of the decree when ordered to do so by the Court. It is true that in the latter of the two cases Court referred to the question of whether there were any mistakes in filling up the form under R. 11; but it is manifest that that reference was only due to some discussion in the High Court itself which found that as a matter of fact there were no mistakes in filling up the form. It is manifest from the rest of the report that there is no suggestion whatever that the trial Court rejected the application for execution for any other reason than that a copy of the decree was not filed; and the High Court had nothing to do but decide the question whether failure to file a copy of the decree rendered the application one not in conformity with the law, and it answered the question in the negative. Neither of those two cases is therefore relevant to the present point. Counsel for the appellant during the course of the delivery of the judgment asked to be allowed to put another point. I cannot however, hear him on that now as the point was not raised before the trial Court and has not been raised in the grounds of appeal to this Court.

The appeal is dismissed and the appellant will bear his own costs and the costs of the other side throughout.

Leave to appeal is asked for but refused.

R.M./R.K. *Appeal dismissed.*

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(2) A. I. R. 1921 Nag. 28=63 I. C. 971=17 N. L. R. 179.

(3) [1917] 37 I. C. 916.

(4) [1918] 40 All. 209=43 I. C. 914.

(5) [1918] 47 I. C. 993.

A. I. R. 1931 Allahabad 723

SULAIMAN, AG. C. J. AND SMITH, J.

David, E. V.—Applicant.

v.

The Judge, Small Cause Court, Cawnpore—Opposite Party.

Civil Revn. No. 206 of 1930, Decided on 27th April 1931, against order of Addl. Dist. Judge, Cawnpore, D/- 16th April 1930.

(a) Provincial Insolvency Act (1920), S. 57 —Court can ask receiver to refund what he has taken without justification, if on examining accounts auditor detects some mistakes and overcharges.

If on an examination of the accounts by an auditor with respect to the receiver's commission charged certain mistakes and overcharges are pointed out, it is open to the Court to re-open the accounts and make the receiver refund what he has taken without justification. [P 724 C 2]

(b) Provincial Insolvency Act (1920), S. 57 —Government Notification of 20th May 1925 —"Gross assets" mean entire sale proceeds of property sold free from incumbrance and not only value of equity of redemption.

The Government Notification of 20th May 1925 should be interpreted as meaning that the receiver is entitled to charge 5 per cent as commission on the gross amount, that is to say, the entire sale proceeds of the property sold free from the prior mortgage and not only on the value of the equity of redemption: *A. I. R.* 1931 *All.* 94, *Foll.* [P 725 C 1]

K. N. Katju and *M. N. Kaul* — for Applicant.

Sankar Saran—for Opposite Party.

Sulaiman, Ag. C. J.—This is a civil revision from an order made by the Court of Small Causes calling upon the Official Receiver to refund certain amounts which he had taken in the course of realising the assets of an insolvent. The insolvent's property was heavily mortgaged and the amount due to a mortgagee was Rs. 32 349. Under an arrangement with the mortgagee the receiver obtained his consent to sell the property free from the incumbrance and to pay him the mortgage money. The property fetched Rs. 33,000 free of the incumbrance. The receiver charged his commission at the rate of 5 per cent on the whole amount of the sale proceeds, namely, Rs. 33,000 and also charged expenses of administration in the form of salaries said to have been paid to the ministerial and clerical staff appointed by him. The mortgagee received Rupees 31,320, that is to say, the balance after 5 per cent on the gross amount as commission had been deducted from the sale proceeds together with an extra sum of Rs. 30 said to cover the expenses of administration. The mortgagee then applied to be entered as a scheduled creditor for his surplus amount of over Rs. 1,000; he was paid Rs. 65 as dividend.

The Court below has come to the conclusion that the receiver was entitled to his commission on the equity of redemption, represented by Rs. 651, only and not on the entire sale proceeds. It has however held that inasmuch as the mortgagee took away another sum of Rs. 65 owing to a mistake of the receiver the latter should be called upon to refund this amount also. The Court has also come to the conclusion that the staff said to have been employed by the receiver had been employed without the previous sanction of the District Judge, and the receiver therefore was not entitled as of right to claim the whole costs of this establishment; but that if he satisfied the trial Court that the expenses had been incurred in good faith and were reasonable, he would be entitled to claim credit for them in connexion with the management of the estate. As regards an item of Rs. 6-3-0, the Court held that it was unaccounted for by the receiver and therefore he should refund it.

We cannot accept the contention of the applicant's learned counsel that because the amount had been passed by the insolvency Court that cannot now be reopened. If on an examination of the accounts by an auditor certain mistakes and overcharges are pointed out, it is open to the Court to reopen the accounts and make the receiver refund what he has taken without justification.

The main question in the case is as to the amount on which the commission of 5 per cent is to be calculated. Under S. 57 (4) the Official Receiver is entitled to receive remuneration out of the fund according to the scale fixed by the Local Government. The Government Notification of 20th May 1925 allows to an Official Receiver remuneration at the rate of 5 per cent of the gross assets coming into his hands subject to a minimum commission of Rs. 5 in each case.

If there were no authority to the contrary I would, speaking personally for myself, have been inclined to think that the assets spoken of in the notification mean the assets of the insolvent and not moneys belonging to other persons. In the case of simple money creditors, who have no charge on the insolvent's estate, the price fetched by the sale of the insolvent's property is part of the gross assets received by the receiver. But where the property of the insolvent had been previously transferred under a mortgage, and the secured creditor is entitled to keep out of the insolvency proceedings and his charge is paramount to the claims of all other creditors, an interest in immovable property has been carved out and has passed to the mortgagee, with the result that only the equity of redemption remains with the debtor mortgagor, which alone can vest in the receiver. It would therefore seem to follow that the assets of the insolvent which come into the hands of the receiver can only be the value of the equity of redemption which remains with the insolvent. I am therefore inclined to hold that the basis of the calculation should be 5 per cent on the gross assets of the insolvent which come into the hands of the receiver. If by some private arrangement with a prior mortgagee who however does not choose to give up his security, the receiver sells the mortgaged property free from the incumbrance and pays off the amount of the incumbrance to the mortgagee, the amount of the mortgage money should not be allowed to be treated as part of the gross assets of the insolvent. In the present case the amount of the commission claimed by the receiver is about three times the value of the insolvent's equity of redemption which he has sold. There is some support for this view in some of the cases of the other High Courts, although the language to be interpreted in those cases was quite different. At the same time I must confess that the language of the notification is somewhat ambiguous, and a Bench of this High Court has interpreted it as meaning that the receiver is entitled to charge 5 per cent as commission on the gross amount that, is to say, the entire sale proceeds of the property sold free from the prior mortgage and not only on the value of the equity of redemption. If this interpretation of the Government Notification is not correct it would be open to the Government to make the notification clear. I therefore do not think that it will be proper to take a different view on the question of interpretation. Following the ruling *In re The Official Receiver* (1) I would hold that the receiver was not wrong in charging commission on the whole amount of the sale proceeds.

Once this point is settled, it is quite obvious that the amount left after deducting the commission was less than the amount of the mortgage money. If therefore the receiver has taken any money in excess, he has done so out of what ought to have gone to the mortgagee and the insolvent's estate has in no way suffered.

The receiver therefore cannot be called upon to refund any part of his commission.

The order of the Court below as regards the expenses of management in addition to his commission seems to be right. The staff was employed without the previous sanction of the District Judge and therefore the receiver was not entitled to claim expenses. If however he satisfied the Court that any part of the expenses was reasonably incurred and was incurred in good faith he would be entitled to claim credit for the same.

The learned advocate for the applicant does not seriously press the item of Rs. 6-3-0. I would accordingly allow this revision and modifying the order of the Court below and reduce the amount ordered to be refunded to Rs. 6-3-0. I would further maintain the order directing the trial Court to enquire into the propriety of item No. 3 relating to the expenses of establishment.

Smith, J.—I agree.

By the Court.—We accordingly allow this revision and modifying the order of the Court below reduce the amount ordered to be refunded to Rs. 6-3-0. We further maintain the order directing the trial Court to inquire into the propriety of item No. 3 relating to the expenses of establishment.

B.V./R.K. *Revision allowed.*

A. I. R. 1931 Allahabad 725

SULAIMAN, AG. C.J. AND BAJPAI, J.

Mangal Sen and *another*—Applicants.

v.

Prag Das and *another* — Opposite Parties.

First Appeal No. 89 of 1930 Decided on 13th April 1931, against order of Sub-Judge, Farrukhabad, D/- 15th January 1930.

Limitation Act (1908), S. 22—For S. 22 application for filing of award falls short of suit—Transfer of name of one party from one side to other is not fresh application to create bar of limitation.

An application for filing an award is required by Sch. 2, para. 20, Civil P. C., to be registered as a suit, and the parties to be treated as plaintiff and defendant. Although for all practical purposes the application is a suit, nevertheless it just falls short of being a suit so as to make S. 22, Limitation Act, applicable. At the same time there is no provision of law which requires that transfer of names of parties necessarily amounts to the filing of a fresh application. Hence in the absence of any express provision of law laying down the contrary rule, the mere transfer of the name of a party from one side to the other does not amount to the filing of a fresh application so as to create a bar of limitation against him. *A. I. R.* 1923 *Pat.* 88, *Dist.* [P 726 C 2]

S. N. Verma—for Applicants.

B. Malik—for Opposite Parties.

Sulaiman, Ag. C. J.—This is a first appeal from an order filing an award. The parties who had referred their dispute to arbitration out of Court were Mt. Sarju Dei, the widow of Jawala Prasad, her sons Mangal Sen and Ram Bharose and a stepson Prag Das. The award was made on 14th September

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(1) A. I. R. 1931 All. 94=130 I. C. 695.

1926. An application to file the award was filed on behalf of Mt. Sarju Dei only on 9th March 1927. She made the other parties to the reference as parties to the proceedings. Prag Das filed a written statement alleging that Mt. Sarju Dei had filed the application in collusion with her sons and that it was possible that she might not prosecute it with due diligence. This was followed by an application made on his behalf on 2nd November 1927 in which he prayed that his name may be transferred from the array of the opposite party to that of the applicants. On this Mangal Sen and Ram Bharose took a further objection that the application of Prag Das was barred by time. In their previous written statement Mangal Sen and Ram Bharose had pleaded that one of them was a minor at the time of the reference and that the arbitrators were guilty of legal misconduct. The Court allowed the transfer of the name of Prag Das, but dismissed the application. Later on it retransferred the name of Prag Das to the array of the defendants. The matter came up to the High Court and a Bench of this Court was of opinion that Prag Das should have been given an opportunity to lead evidence. No question of limitation was pressed before the High Court and none was decided. The case was sent back to the Court below for disposal.

We are prepared to assume in favour of the appellants that it is still open to them to plead that the application of Prag Das was barred by time.

The application for the filing of the award had been filed by Mt. Sarju Dei within time. It was obviously a representative-application in the interest of all the persons concerned. Mt. Sarju Dei was not claiming any right in herself independently of the other parties to the award, her prayer being that the award itself be filed. It is therefore clear that if the award were to be filed and a decree passed in terms of it, the benefit of it would go to all the parties in whose favour it stood. The application was accordingly a representative application and must be deemed to have been filed in the interest of all concerned. The application of Prag Das was merely for the transposition of his name from one side to the other in order to prevent the dismissal of the application for default owing to collusion. The original application remained pending and we cannot consider the transfer of the name of the defendant as amounting to a fresh application on behalf of the defendant.

If it were a suit S. 22, Limitation Act, would be applicable and it would expressly exclude the bar of limitation from the case of transposition of names.

An application for filing an award is required by Sch. 2, para. 20, Civil P. C., to be registered as a suit, and the parties to be treated as plaintiff and defendant. We may assume that although for all practical purposes the application is a suit nevertheless it just falls short of being a suit so as to make S. 22, Limitation Act, applicable. At the same time there is no provision of law which requires that transfer of names of parties necessarily amounts to the filing of a fresh application. Following the principle underlying suits, and on their analogy, we have no hesitation in saying that in the absence of any express provision of law laying down the contrary rule, the mere transfer of the name of Prag Das from one side to the other did not amount to the filing of a fresh application so as to create a bar of limitation against him.

It is not necessary for us to express any opinion on the view expressed by the Patna High Court in *Chandrika* v. *Ram Kuer, A. I. R.* 1923 *Pat.* 88, for that case is obviously distinguishable. An application under O. 9, R. 13, Civil P. C., may not necessarily be a representative application. The applicant has to show sufficient cause for his own non-appearance, and there is always a possibility that the decree may be set aside as against the applicant only.

We accordingly overrule the plea of limitation.

Coming to the merits, we think that the appeal has absolutely no force. There are the usual allegations of misconduct and collusion, want of proper opportunity to produce evidence and irregularities in procedure. But the fact remains that the award was pronounced in the presence of all the parties and as deposed to by the umpire, it was signed by both the defendants, and it was afterwards registered. The umpire has stated that no one took any objection to the award. Defendant 2 denied having signed it, but we prefer to believe the evidence of the plaintiff on this point. One of the arbitrator gives evidence in favour of the defendants, but he was a connexion by marriage of theirs. His evidence has been disbelieved by the Court below. Having considered the whole case we are of opinion that the learned Subordinate Judge has taken the right view in holding that all the parties consented to the award and acquiesced in it. The award was therefore not in any way invalid.

The appeal is dismissed with costs.

B.V./R.K. *Appeal dismissed.*

✲ ✲ A. I. R. 1931 Allahabad 727

Full Bench

SULAIMAN, AG. C. J., MUKERJI AND BOYS, JJ.

Ram Bharose—Applicant.

v.

Ganga Singh—Opposite Party.

Civil Revn. No. 359 of 1929, Decided on 9th July 1931, against decree of Munsif, Kanauj, D/- 19th October 1929.

✲ (a) **Civil P. C. (1908), O. 5, R. 20 (2)—Whether substituted service can amount to due service within Art. 164 — Court must consider whether method employed was calculated to effect purpose of informing defendant of institution of suit.**

The rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. But if for no fault of the defendant, a defendant was never put in a position to know that a suit had been instituted against him whatever steps might have been taken for serving the summons on him, these steps can never be taken as amounting to "due service." It is therefore open to the defendant, when he appears to show that the method employed was not calculated to effect the purpose of informing the defendant of the institution of the suit, and in order to see whether there was due service or not, the Court must consider all the circumstances of the case, for example, the place where the defendant was when the summons was issued to him and where and how the summons was served. [P 729 C 2]

✲ ✲ (b) **Provincial Small Cause Courts Act (1887), S. 17, Proviso — Interpretation — All possible methods of complying with S. 17 illustrated.**

A reasonable and practical interpretation of the section is as follows:

(1) The applicant must within 30 days file his application either with cash or with a statement that he is prepared to give security (and in the latter case he may, of course, tender the security he proposes) and ask for the direction of the Court.

(2) In the case where he wants to give security, if the Court refuses to direct security, he must deposit cash within the 30 days, or his application will be rejected.

(3) If the Court agrees to direct security, then: (a) it will consider the security already offered, if it has been so offered; or (b) name security to its satisfaction which must be filed within the 30 days.

(4) If the applicant does not in fact ask for a direction or if, though the applicant does ask for a direction, the Court does not in fact give any direction, but in fact the Court does issue notice, the Court shall be taken to have approved the deposit of cash or the security offered as the case may be.

(5) If filed within the 30 days and accepted by the Court expressly or impliedly by the issue of notice the application is a good application, though it will be open to the decree-holder to challenge the nature and sufficiency of the security and to the Court under O. 9, R. 9 to make such further conditions as it thinks fit.

If the Court delayed in giving its direction or approving expressly or impliedly the security already tendered, so long that the period of limitation had expired before the applicant had fair opportunity of complying with the direction, then in a suitable case it would be open to the Court itself to consider and exercise the inherent powers reserved to it by S. 151. [P 733 C 1]

(c) **Interpretation of Statutes—Object and intention when clear must not be reduced to nullity because of draftsman's unskilfulness or ignorance of law.**

Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity or the absolute intractability of the language used. [P 732 C 2]

B. Malik—for Applicant.

A. P. Bagchi—for Opposite Party.

Order of Reference: Bajpai, J.—This is an application in revision against an order of a Small Cause Court Judge, dated 19th October 1929, restoring a case which was decreed ex parte.

The order of the Court below against which this revision is directed has not been placed upon my paper book, and I direct that a copy of the said order should be placed upon the paper book.

It appears that on 31st July an ex parte decree was passed against the defendant. Attempts had been made to effect personal service, but they were evidently infructuous, and in the last instance service by publications in a local newspaper was ordered. Some time in 1929 the defendant applied to the Court below for setting aside the ex parte decree on the ground that he had no notice whatsoever of the suit, and he came to know of the decree only four days back when execution was levied. The application was accompanied by an affidavit and by a surety bond. On 19th

October 1929, when this application came for hearing, the learned Judge of the Court below was of the opinion that the security was sufficient for the decretal amount and that the ends of justice required that the case should be disposed of on the merits.

As I said in the beginning, the present application in revision is directed against this order, and the points raised are that the provisions of S. 17, Small Cause Courts Act, have not been satisfied and that substituted service in law being sufficient service, the learned Judge had no jurisdiction after three years to set aside the decree. These two points have been developed in argument before me. It is stated that it is necessary to obtain the direction of the Small Cause Court Judge before filing a security bond as to whether such a security bond would be accepted or not, and a failure to obtain such a direction is fatal to the application for setting aside the ex parte decree, and in support of that contention the case of *Jhabboo Misir* v. *Hawaldar Tewari* (1) is cited before me. The learned Judges, who decided that case, although they are not agreed on all the points, are undoubtedly agreed upon one thing, viz., that when anything but cash deposit is sought to be put in, the direction of the Court must be obtained previously, and Niamatullah, J., at the end of his judgment says that an omission to obtain such direction is fatal to the success of the application. Upon the basis of this observation it is argued before me that inasmuch as there was no application for any such direction before the security bond was filed, the Court below had absolutely no jurisdiction to set aside the ex parte decree. On the other hand, it is argued by the opposite party that failure to obtain such a direction does not necessarily oust the jurisdiction of the Court, but the applicant takes the risk of having his application dismissed on that ground alone, but if the Court is not prepared to take that stringent step and considers the security sufficient, the Court has still the jurisdiction to entertain the application. I am inclined to agree with the latter view.

It is desirable that the Court's direction should be obtained by a separate application but if it has not been done and if the other provisions of S. 17 have been complied with, then the Court's jurisdiction to proceed with the application is not ousted, and I do not think the learned Judges, who decided the abovementioned case, have gone to the extent to which the counsel for the applicant says they have gone. As to the other question, that the substituted service must be deemed to be sufficient, I am in some difficulty by reason of the indefinite finding of the Court below. The learned Judge says: "Application supported by affidavit, reasons sufficient." This would mean that the Court below was satisfied with the reasons given by the defendant and was of the opinion that the case should be restored. He later on says: "Service on applicant was affected (sic) by publication." He does not say whether he deems such service as due service, but the trend of his order shows that he did not consider it as sufficient. He however makes the defendant pay Rs. 5 as costs to the plaintiff which goes to show that the defendant was to blame, and the learned counsel for the plaintiff argues that this shows that the learned Judge of the Court below considered the service to be not invalid. There is some force in his argument. Both these points (especially the first one) raise questions of some importance, and I think it desirable that they should be decided by a Bench of two Judges.

I therefore direct that this case be laid before a Bench of two Judges.

Opinion

Mukerji, J.—This reference to the Full Bench has arisen out of an application made by Ganga Singh, the opposite party to this revision, to set aside an ex parte decree made against him on 30th July 1926, in favour of the applicant before us, Ram Bharose.

The application filed on 22nd August 1929 for setting aside the ex parte decree which had been made by a Munsif exercising the powers of a Judge, Small Cause Court, in his Small Cause Court jurisdiction, was accompanied with a security bond furnished by one Sadho Singh for the sum of Rs. 175 which was large enough to cover the decretal amount. The Judge before whom the application was made directed a notice to issue to the plaintiff, Ram Bharose, on the same day that the application was made. The application was heard on 19th October 1929 and was allowed, subject to payment of Rs. 5 costs to the plaintiff.

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(1) A. I. R. 1929 All. 840=122 I. C. 658.

The petition of revision came before a learned single Judge of this Court. He referred it to a Bench of two Judges, and the learned Judges before whom the matter came eventually referred the case to a Full Bench, in order that the law on two points might be settled.

These two points are: (1) relating to the effect of substituted service on an applicant for setting aside an ex parte decree; and (2), what are the rules that a defendant in an ex parte Small Cause Court decree against him must comply with, in order to be able to have the ex parte decree set aside.

It appears that when some attempt had been made to serve Ganga Singh with a summons of the suit, the plaintiff applied that a substituted service should be effected as against him. This was done, and the service having been effected the ex parte decree was made.

It has been urged on behalf of the applicant before us (the plaintiff) that under Art. 164, Sch. 1, Lim. Act, 30 days are allowed for making an application by a defendant for setting aside an ex parte decree, and two dates are furnished from which this period of 30 days runs. These periods are: (1) the date of the decree, and, in certain other circumstances, (2) the date of the knowledge of the applicant of the decree. The circumstance in which the second date is the starting point is "where the summons was not duly served." It is further argued that under O. 5, R. 20, sub-R. (2), Civil P. C.,

> "service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally,"

and therefore where substituted service has been ordered and effected, according to the directions of the Court, there is due service of the summons within the meaning of Art. 164, Lim. Act, and the application for setting aside the decree must be made within 30 days of the decree.

I am unable to accept this argument. The object of issuing a summons is to inform the party, against whom a suit has been instituted, of the fact, that there is a suit against him, and if he so chooses, he may come and defend it. If that be the object of a summons, and if, for no fault of his own, a defendant was never put in a position to know that a suit had been instituted against him, whatever steps may have been taken for serving the summons on him, these steps can never be accepted as amounting to "due service." When an order for substituted service is made by a Court, on the representation of a plaintiff, only one side is present before the Court and it acts on the representation of one party. Obviously it should be open to the defendant, when he appears, to show that the method employed was not calculated to effect the purpose, which the Court had in view, namely, informing the defendant of the institution of the suit. If this is so, the Court has to consider, in view of all the circumstances of the case, for example, the place where the defendant was when the summons was issued to him, where and how the summons was served, and so on, in order to see whether there was due service. For example, if a man has gone to Burma to earn a living and he has relations at home with whom he is in constant touch, and the summons is served on the defendant by affixation of a copy of it on the outer door of his house, it may be open to the Court to infer that the service was good, it being expected that the defendant's close relations, living jointly with him, in the same house, would inform him of the case. Again, where it is found that the defendant knew that a suit was likely to come and, in order that a summons may not be served on him, he leaves the place, it may be open to the Court to hold that there was due service by substitution. On the other hand, if the defendant went, say, to Burma to earn a living and left no one at home, which remained vacant, and at the instance of the plaintiff a substituted service was ordered by publication of the fact of the institution of the suit in a paper published, say, at Aligarh, where the suit was instituted, the Court would be in a position to hold that there was no due service.

The rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant.

The result is that, in my opinion, whether there has been "due service" or not is to be considered by the Court to which an application has been made for setting aside an ex parte decree, having regard to all the circumstances of the case as described above. If the conclusion is that there was due service, then, if the applicant has not come within 30 days of the decree, he is barred by time. If the conclusion is that there was no due service, the limitation would be computed from the date of the applicant's knowledge of the decree. The mere fact that a substituted service had been ordered is immaterial, by itself.

In this particular case before us the Court was satisfied, on the affidavit furnished on behalf of the applicant, that there was no proper service and the ex parte decree should be set aside. It is true that the Judge, Small Cause Court, does not give his reasons in detail ; but that is because his orders are final, subject to the High Court's power of interference in revision, and the learned Judge was not bound to give reasons in extenso for his opinion. I would hold that the application was within time.

Now I come to consider the second point. On a plain reading of S. 17, Provincial Small Cause Courts Act, the applicant for the setting aside of a judgment has to do these things : To start with, he ought to apply to the Court to which he proposes to make an application, to tell him what kind of security, in the circumstances detailed in the applicant's application, the Court would require of him to furnish. Usually the Court would ask for a cash security, but it may be satisfied on the applicant's representation that a cash security may be dispensed with. In rare cases, as in the illustration given by me in my judgment in *Jhabboo Misir's* case (1), cited below, the Court may refuse to take a cash security and may insist on other kind of security being taken and may insist on the moveable property in dispute being itself produced. When the Court gives its direction, namely, whether the applicant is to furnish cash security or is to give some other kind of security, the applicant should present his application for setting aside the decree, together with the security demanded. Then his duties are over. The security filed will then be scrutinized by the Court, and the Court shall see whether the security is to its satisfaction. Then presumably a notice would go to the plaintiff to show cause why the decree should not be set aside. This was also the view which I took in the case of *Jhabboo Misir* v. *Howladar Tewari* (1).

Although the rule (S. 17, Small Cause Court Act), requires that the security is to be furnished at the time of presenting an application for setting an ex parte decree, it has been held in this Court in *Moti Lal Ram Chandar Das* v. *Durga Prasad, A. I. R.* 1930 *All.* 830 that the security may be furnished even after the application has been made provided the security is forthcoming within the period of 30 days of limitation. To this decision I was a party. This view was taken by other High Courts also : see *V. M. Assan Mohamed Sahib* v. *M. E. Rahim Sahib* (2), *Jeun Muchi* v. *Budhiram Muchi* (3) and *Narain* v. *Pudan* (4). The reason of this decision is that the previously made application may be taken as made on the date on which the security was furnished, as the period of limitation has not yet expired, and it would be a mere formality (which may be safely dispensed with) to direct the applicant to file a fresh application on the day when he furnishes the security.

Having regard to the principle of these decisions, it has been urged that the giving of directions by the Court, as required by S. 17, Small Cause Courts Act, may also be postponed to any time within 30 days of the period of limitation allowed by Art. 164, Lim. Act. I think this contention is correct.

Where an applicant, without formally applying for the Court's direction, makes an application for setting aside an ex parte decree and furnishes security with it, and the Court directs a notice to issue to the other side, it must be taken that the Court is cognizant of the fact that the applicant has furnished security as required by S. 17, Small Cause Courts Act. The order that notice should issue may be taken as an approval by the Court of the security furnished, in the circumstances disclosed by the applicant in his application and affidavit (if any). We may also take it that, the Court, by implication, gave the applicant a direction that he should furnish security of the kind actually furnished by him. This is not a mere attempt to get over what may be believed to be rather hard directions of the law. If the Court instead of issuing a notice in the case just mentioned, rejects this application because its direction has not been obtained, and if limitation has not already expired, it would be open to the applicant to make a fresh application and to furnish such security as the Court may direct. A party cannot suffer by the act of a Court, and therefore we must accept the position that the Court has given the direction, according to law to the furnishing of the security actually furnished, where the Court instead of rejecting the application of the defendant directs that a notice should issue.

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(2) [1920] 43 Mad. 579=55 I.C. 977.

(3) [1905] 32 Cal. 339=1 C.L.J. 43.

(4) A.I.R. 1930 Oudh 1=122 I.C. 328=5 Luck. 294.

Where the Court rejects the application because its direction has not been obtained or because it considers that the kind of security furnished is not to its mind, and, if, in the meantime, limitation has expired, the applicant has no remedy. By not complying with the rule of the law he took a risk and he has nothing to complain of.

The Court may and should always exercise its inherent powers to set wrongs committed by itself right, and if, for the fault of the Court, directions are not given at the right time, it will see that a party does not suffer.

The conclusion that I arrive at therefore is that the proper course is for a party to make an application to the Court to obtain its direction as to the nature of the security, and then to apply with the security of the nature directed by the Court for setting aside the ex parte decree. The security furnished must comply with the directions of the Court, and the Court will see that the security is to its satisfaction, i. e., sufficient. But where the Court adopts a security without question and directs a notice to issue, it, by necessary implication, gives a direction that the security should be of the nature directed by it and that the security furnished is sufficient to its mind.

Applying this rule to the present case before me, the procedure adopted by the defendant is within the law.

In the result I would dismiss the application in revision.

Boys, J. — This application under S. 115, Civil P. C. was referred by the single Judge, before whom it first came, to a Bench of two Judges, and at their request it has been referred by the direction of the Acting Chief Justice to the present Full Bench. There are two questions for consideration : the first dealing with the proviso clause to S. 17, Provincial Small Cause Courts Act; and the second with the words "duly served" in Art. 164, Limitation Act.

The facts are simple. The present applicant, Rambharos, filed a suit in the Court of Small Causes against the present opposite party, Ganga Singh. After an endeavour to serve notice personally on Ganga Singh, and notice by registered post, had, as alleged, failed, the Court upon the application of Rambharos directed substituted service, not in the manner provided in the earlier portion of O. 5, R. 20, but by publication in a local newspaper, and (sic) by a further effort to serve the summons by a peon of the Court. There is material even on the present record to show that the notice was published in a paper as directed. There is nothing to show whether or not any endeavour was made to serve the notice personally or otherwise by a peon or, if such effort was made, what was the result. The incident is five years old, and it would appear that many of the papers have been weeded out.

On 31st July 1926, the applicant got a decree ex parte. On 22nd August 1929, i. e., rather more than three years later, Ganga Singh came into the Court of Small Causes with an application under S. 17, Provincial Small Causes Courts Act, asking for an order to set aside the decree. This application was supported by an affidavit of Ranjit, the brother of Ganga Singh, which briefly stated that he and his brother had only learnt of the decree four days previously. Further a bond executed by one Sadho Singh as surety for the payment of the decree, if eventually it was maintained, was also filed. The Court on that same day, 22nd August, ordered notice to issue. Nothing further occurred until 19th October 1929, when the Court set aside the decree on payment by Ganga Singh of Rs. 5 costs. From this order Rambharos has come up in revision.

The points urged by Mr. Malik on his behalf are twofold. He contends that direction of the Court referred to in the last five lines of the proviso to S. 17 should have been taken before security was furnished, and that no direction was in fact given within 30 days of the decree, and therefore the subsequent order was invalid. Secondly, he has contended that Ganga Singh did not in his application under S. 17, or in his affidavit, challenge the power of the Court to order substituted service, nor challenged the details of that order or the facts relating to its execution; nor did the Judge suo motu consider the existence of any such defects, and therefore the service must be regarded as good, and therefore the application was barred by limitation.

These objections on behalf of the applicant Rambharos are not as stated in the memorandum of appeal but as dictated by his counsel in response to a question of the Court at the conclusion of the argument. In substance they amount to this: that the literal directions contained in the proviso to S. 17 were not complied with by Ganga Singh, and that the notice on him must be taken to have been duly served. At this point the immense amount of trouble taken by Mr. Malik with the case may receive full recognition.

He has placed before us a very large number of cases, particularly in reference to the first point. It is not however necessary to enter into a detailed consideration of all these cases. It suffices to say that there is a general consensus of opinion that the proviso to S. 17 is incapable of literal application. Some learned Judges holding the words to be mandatory and some holding the words to be merely directory, none have been able to apply the proviso literally as it stands. No other view is possible. It is incapable of literal application.

According to the proviso as it stands, an applicant for an order to set aside an ex parte decree must, at the time of presenting the application, deposit the amount or give security. The choice is in our view clearly not with him, but, as the Court may direct. Therefore reading the words literally he must get this direction before he makes his application for he must furnish the cash or security at the time of presenting his application and he cannot know which he has to furnish, unless he has got a previous direction. How, then, is he to get his previous direction without making an application? He cannot make an oral application, for manifestly the Court would ask him what it was all about, and to present a written application. He cannot present a written application to get the order set aside without furnishing cash or security, or his application would have to be dismissed. The only course which it would seem distantly possible for him to take to comply with the section, if he desires to be allowed to file security, would seem to be:

(a) To file a preliminary application setting out the facts, not asking for the decree to be set aside but merely stating that he intends to file an application asking for an order to set aside the decree, and asking for the moment only for a direction that he may adopt the course of filing security; (b) having got his direction, to present a second, the principal application with the security bond for an order to set aside the decree, and, in the case of a security bond pledging immovable property, after getting it executed, registered and verified.

And all this he must get done within 30 days. It is impossible to think that this is what the law intended. The matter is a Small Cause Court matter, and the legislature could never have intended to multiply proceedings thus unnecessarily.

> "Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Maxwell, Edn. 7, p. 198."

Now, despite the obscurity of the language used "the main object and intention of the statute are clear."

It is clear (1) that there must be an application for an order to set aside the decree; (2) that the Court must be satisfied either by the deposit of cash or security that the decree-holder will be able to get his money if the decree is upheld; (3) that these matters must be complete before the expiration of the 30 days' limitation provided by Art. 164, Limitation Act.

The first two requisites are essential on the face of the proviso. The third is an inevitable deduction from the use of the words "at the time of presenting his application" and from the fact that this proviso exists at all. If it was not the intention of the legislature to secure promptness by securing a complete and properly supported application before the expiry of the 30 days, it would have been unnecessary to have this proviso at all, and it would have sufficed to rely upon the Civil Procedure Code. In our view, then, it must be held that the application is sufficient if it fulfils the above three conditions.

The conclusion from this, then, is that no initial defects in the making of the application must be allowed to stand in the way of the applicant getting a notice issued to the decree-holder, provided that an application has been filed, and further that cash has been deposited, or, if the Court has so permitted, security has been given, all before the expiry of 30 days. A reasonable and practical interpretation of the section is therefore as follows: (1) the applicant must within 30 days file his application either with cash or with a statement that he is prepared to give security (and in the latter case, he may, of course, tender the security he proposes and ask for the direction of the Court. (2) In the case where he wants to give security, if the Court refuses to direct security, he must deposit cash within the 30 days, or his application will be rejected. (3) If the Court agrees to direct security, then (a) it will consider the security already offered, if it has been so offered; or (b) name security to its satisfaction which must be filed within the 30 days. (4) If the applicant does not in fact ask for a direction or if, though the applicant does ask for a direction, the Court does not in fact give any direction, but in fact the Court does issue notice, the Court shall be taken to have approved the deposit of cash or the security offered as the case may be. (5) If filed within the 30 days and accepted by the Court expressly or impliedly by the issue of notice the application is a good application, though it will be open to the decree-holder to challenge the nature and sufficiency of the security and to the Court under O 9, R. 9 to make such further conditions as it thinks fit. In the course of the argument it has been suggested that difficulty might arise if the Court delayed in giving its direction, or approving expressly or impliedly the security already tendered, so long that the period of limitation had expired before the applicant had fair opportunity of complying with the direction. It is not a case which we have now to consider, but in a suitable case it would be open to the Court itself to consider and exercise its inherent powers reserved to it by S. 151, Civil P. C.

The next question we were invited to consider was the scope of the words "duly served" in Art. 164, Limitation Act. These words appear capable of only one interpretation. It is open to the applicant to satisfy the Court that there was no real ground for allowing substituted service at all; that he was not "keeping out of the way for the purpose of avoiding service;" that there was no reason why the summons should not have been served upon him in the ordinary way; that the order for substituted service was not carried out by affixation in the Court-house and upon any conspicuous part of the defendant's house, etc.; that it was not carried out in any alternative method directed by the Court; that the alternative method directed by the Court was not a proper method such as was reasonably calculated to secure that no notice should reach defendant. etc.

Now, applying what has been said above to the present case, it is clear that rightly or wrongly the learned Judge of the Small Cause Court was satisfied that the notice had not been properly served. The applicant, decree-holder, before us, has not been able to satisfy us either that the method of substituted service which was ordered by the Court was a reasonable and proper method; nor that even such substituted service as was ordered was actually carried out.

Further we are satisfied that the three essential conditions which we have laid down above were fulfilled in reference to the application itself. The application was filed within the 30 days. There was within the 30 days a deposit of security which was approved by the Judge, and all the requisites were complete within the 30 days. This being so, the application should be dismissed with costs.

Sulaiman, Ag. C. J.—I concur in the conclusions.

Under Art. 164, Limitation Act, an application by a defendant for an order to set aside a decree passed ex parte must be made within 30 days of the date of the decree, or where the summons was not duly served, when the applicant has knowledge of the decree. The expression "duly served" obviously means served as required by law. The procedure for the service of summonses is laid down in O. 5, Civil P. C., Where the service is not personal, it may be substituted. Under O. 5, R. 20 (2) service substituted by order of the Court is as effectual as if it had been made on the defendant personally. But as at the time when the substituted service is ordered the proceedings are ex parte, it would be open to the defendant when he appears later to challenge the propriety of the order and ask the Court to re-examine its fitness. If in view of any additional circumstances which he is able to place before the Court he can satisfy it that he was not keeping out of the way and that there was no sufficient reason why the summons could not be served in the ordinary way or that the manner of service decided upon was not fair and just to him, he would have discharged the burden of showing that there was no due service.

As to S. 17, Provincial Small Cause Courts Act, I have no doubt in my mind that its provisions are not merely directory but that they are imperative and mandatory. Discretion to impose terms before setting aside an ex parte decree is given to the Court under O. 9, R. 13, Civil P. C., The procedure prescribed in the Civil Procedure Code has been made applicable to a Court of Small Causes with a proviso. The whole object of the proviso is to introduce a variation in a Small Cause Court suit. If the proviso was not meant by the legislature to be indispensable there would have been no need for the proviso at all, as the Court has ordinarily discretion in the matter.

As Small Cause Court cases are petty cases arising out of mere money claims without any real dispute as to the title to any immovable property, the legislature apparently intended that the procedure regulating the setting aside of an ex parte decree should be strict, and a defendant should not be allowed to harass the decree-holder by such a proceeding without the penalty of furnishing adequate security for the decretal amount which can be conveniently availed of by the decree-holder if the application is dismissed.

Notwithstanding a few cases, there is an overwhelming preponderance of opinion in favour of the view that the proviso is mandatory. Both on the language of the section and on the principle of stare decisis, I would hold that it is not merely directory.

No doubt the language of the proviso is very unhappy and there is some apparent inconsistency between the expression "at the time of presenting his application" and the expression "as the Court may direct." If we take the two expressions literally, the two things cannot happen exactly simultaneously. But the direction of the Court may be obtained before the application is presented or just after presenting the application.

It is quite clear to me that an application cannot be presented after the prescribed period, nor can cash or security be deposited after the expiry of that period. The Court is not given any discretion at all to extend the time. If the security deposited within the time is discovered afterwards to be defective or unsatisfactory in any way, the Court has no power to direct a fresh security to be substituted for it after the expiry of the period.

It also seems to me that the expression "as the Court may direct" does not relate to "to the satisfaction of the Court" but to the nature or character of the security, that is to say, whether it is to be cash or other security. The applicant has no absolute choice as to the kind of the security, but it has to be subject to the direction of the Court.

It however seems to me that if no security is deposited at the time of the presenting of the application or no direction of the Court as to its nature is obtained before or at the time, even then the proviso would be substantially complied with if before the expiry of the fixed period the defect is cured. It is open to an applicant to file a complete application accompanied with the necessary security up to the last day of the period. If previously he filed an application which is either irregular or defective, there is nothing to prevent him from filing within the time a fresh application which is not so defective. There is therefore no justification for not treating the previous application as having been properly presented on the date when it was in every way complete. I have therefore no hesitation in holding that no matter what the defects might have been in the application or in the security or in obtaining the direction of the Court at the time when the application was first presented, if that defect is absolutely cured before the expiry of the fixed period, the application becomes a proper one and fulfils the requirements of the proviso.

I felt somewhat inclined to hold that as the expression used is the present tense viz., " Court may direct " and not the present perfect tense " the Court may have directed " the direction may be given even after the expiry of the period, provided that the security had been deposited in time and was sufficient. In this view the applicant would be bound to file the application and make the deposit in time, taking the risk of the security not being accepted; but there would be nothing to prevent the Court from accepting it afterwards. My learned brethren rightly point out that the word is "direct" and not "approve," and accordingly a subsequent acceptance would not be direction but approval. I therefore do not wish to differ from their opinion.

In the present case although the security was deposited without obtaining any previous direction, the Court ordered notice to issue before the period expired. It must accordingly be deemed to have by implication given the necessary direction.

Of course, the question whether the security is sufficient and satisfactory need not be finally determined during the period of 30 days. Indeed, the plaintiff decree-holder may come in afterwards and challenge its sufficiency. The mere fact that it is found afterwards that the security was sufficient, would not make the deposit of the security within the time in any way defective.

By the Court.—The application in revision is dismissed with costs.

V.B./R.K. *Application dismissed.*

✻ A. I. R. 1931 Allahabad 735

SULAIMAN, AG. C. J. AND SMITH, J.

Bunni Pandy—Applicant.

v.

Brahmdeo Pandy and *another* - Opposite Parties.

Civil Revn. No. 272 of 1930, Decided on 24th April 1931, against decree of Addl. Sub-Judge, Ballia, D/- 21st March 1930.

(a) Agra Tenancy Act (1926), S. 121—Claim for declaration of title against tenants claiming from landlord is cognizable by Revenue Court and not by civil Court.

The claim for declaration of title or joint possession against the defendants, admitting them to be claiming title from the landholder would not be cognizable by the civil Court: *A. I. R.* 1929 *All.* 571, *Foll.*. [P 735 C 2, P 736 C 1]

✻ **(b) Agra Tenancy Act (1926), S. 121—Cause of action accruing before new Act but suit filed after it came into force—New Act will apply.**

The mere fact that the cause of action for a declaratory suit had arisen before the new Tenancy Act came into force on account either of the denial of the plaintiff's title or some order of the revenue Court in the previous proceeding, would not make the new Act inapplicable, when it definitely fixes the jurisdiction of the revenue Court to entertain suits of a particular class. The rule as to the appropriate forum for a particular kind of suits is one of procedure and not of substantive right and a plaintiff cannot claim to have the choice of a forum in spite of an enactment which has come into force on the supposed ground that his cause of action had accrued before the new Act was passed: *A.I.R.* 1930 *All.* 158, *Ref.* [P 736 C 1]

G. S. Pathak—for Applicant.

N. P. Asthana and *Baij Nath Sahai*—for Opposite Parties.

Sulaiman, Ag. C. J.—This is an application in revision by the plaintiff arising out of a suit brought in the Munsif's Court for maintenance of joint possession over a one-third share in certain fixed rate tenancies and for a declaration of the plaintiff's right. In the plaint it was admitted that the defendants were tenants of the plots, but it was said that they were claiming exclusive title and denying the plaintiff's rights. It was alleged that the cause of action for the suit accrued in 1925, when the defendants denied the plaintiff's title and also in February 1926, when the revenue Court declined to correct the jamabandi. It appears that on a previous occasion the plaintiff's application in the revenue Court for correction of jamabandi was disallowed, the Court being of opinion that the dispute was as to title to property which should properly be litigated in a civil Court. The suit was filed on 19th February 1929 long after the new Tenancy Act had come into force. The defendant raised the objection that the suit was not cognizable by the civil Court at all. This objection prevailed with the first Court, and its view was affirmed by the lower appellate Court. So far as the claim for declaration of title or joint possession against the defendants, admitting them to be claiming title from the landholder is concerned, the suit would not be cognizable by the civil Court in view of the pronouncement of the Full Bench in *Sahdeo* v. *Budhai* (1).

The learned advocate for the applicant however contends that inasmuch as the cause of action had accrued while the old Tenancy Act was in force, the plaintiff had the right to come to the civil Court, and that the subsequent passing of the new Act would not take away his right to choose such a forum. Strong reliance is placed on the judgment in *Abdul Hakim* v. *Mukarram Ali* (2). In that case it appears to have been held that where an ejectment from tenancy had taken place before the new Act came into force, there was no ejectment otherwise than in accordance with the provisions of the new Act, and that therefore the plaintiff's case could not fall within the purview of S. 99, and a suit for possession of the holding would still be maintainable in a civil Court. It is not necessary for us to say in this case whether we agree with that view or not, because we are clearly of opinion that S. 99 does not apply to the present case, which is governed by S. 121 of the new Tenancy Act. Much of the reasoning adopted by the learned Judges was based on the peculiar phraseology of S. 99, which cannot be taken into account when we have to consider the language of S. 121.

It seems to us that the mere fact that the cause of action for a declaratory suit had arisen before the new Tenancy Act came into force, on account either of the denial of the plaintiff's title or some order of the Revenue Court in the previous proceeding, would not make the new Act inapplicable, when it definitely fixes the jurisdiction of the revenue Court to entertain suits of a particular class. The rule as to the appropriate forum for a particular kind of suits is one of procedure and not of substantive right, and a plaintiff cannot claim to have the choice of a forum in spite of an enactment which has come into force on the supposed ground that his cause of action had accrued before the new Act was passed. Had he been in time, and instituted his suit before the Act came into force, the position would of course have been different. But having waited till the Act has been altered by the legislature, he is bound by the statutory provisions that have come into force, and he cannot by reason of his previous cause of action confer jurisdiction on a civil Court to entertain his suit, when its jurisdiction has been ousted by the new statute. It seems to us that exclusive jurisdiction having been conferred on the revenue Courts to entertain suits of this nature, it is no longer open to the plaintiff to come to the civil Court to seek his relief.

We are therefore of opinion that the order of the Court below was right. We dismiss the revision with costs.

B.V./R.K. *Revision dismissed.*

* A. I. R. 1931 Allahabad 736

SULAIMAN AND KING, JJ.

Imamuddin—Plaintiff—Appellant.

v.

Mohd. Raisul Islam Hashmi and *another*—Defendants—Respondents.

Second Appeal No. 38 of 1928, Decided on 20th May 1930, against decree of Sub-Judge, Budaun.

Mahomedan Law — Pre-emption — Second demand—Necessary requisite is presence of at least two witnesses who heard demand.

On the occasion of talabe istishhad (second demand) it is not absolutely necessary for the pre-emptor to use words like "Ye witnesses to this" addressed to the witnesses; all that is absolutely necessary is that there must be at least two witnesses present on the occasion who heard the demand and can bear witness to the fact when it is denied by the vendee: *A. I. R.* 1927 *All.* 289; (1893) *A. W. N.* 101; and 19 *All.* 334, *Foll.*; 28 *All.* 24 and (1864) *W. R.* 351 *Civ. Diss. from.* [P 738 C 1]

*** (b) Mahomedan Law — Pre-emption—Proof of fact of demand—Evidence Act (1872), S. 134.**

Mahomedan Law of Evidence has been superseded by the Evidence Act and no particular number of witnesses is now required for the proof of the fact of talabe istishhad. [P 738 C 2]

A. M. Khwaja—for Appellant.

Mushtaq Ahmad and *M. A. Aziz*—for Respondents.

Sulaiman. J.—This is a plaintiff's appeal arising out of a suit for pre-emption under the Mahomedan law. The main plea raised by the defendants which has prevailed with the Courts below is that according to the plaintiff's own evidence the second demand was not performed according to law.

It appears that the plaintiff heard of the sale from one Banwari Lal and made his first demand there and then.

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(1) A. I. R. 1929 All. 571=117 I. C. 337=51 All. 853 (S.B.).

(2) A. I. R. 1930 All. 158=124 I. C. 478.

He then took Banwarilal with him to the vendee who was on the premises and made the second demand to the vendee in the presence of Banwari Lal and a servant of the vendee who was present there at the time. The plaintiff had not brought this witness with him as he had brought Banwarilal. The plaintiff's statement shows that although in making the second demand he referred to the first demand having been made by him promptly,

> "he did not charge them (the witnesses) to bear witness to the demand."

The plaintiff has come up in appeal to this Court and on his behalf it is contended that the omission to ask the witnesses to bear witness was not fatal. We reserved our judgment in order to consider some of the original authorities.

The Mahomedan law of pre-emption, like every other branch consisted of both substantive and adjective laws. So far as the rules of evidence and procedure go they have been superseded in India. But unfortunately in some cases the distinction has not been kept well in mind with the result that the Mahomedan law of pre-emption has in some respects become highly technical.

In the chapter on pre-emption, in Durrul-Mukhtat, Vol. 4, when illustrating how the second demand is to be made the words "Be ye witness thereof" are no doubt quoted, but it is nowhere expressly stated that these words are indispensable. On the other hand, when dealing with the third demand, which is made before the Kazi, that is the suit itself, it is clearly mentioned that the Kazi should inquire from the pre-emptor as to his having made the first demand and then to enquire with regard to the second demand, how it was made in whose presence istishhad was made and whether he in whose presence it was made was nearer than the other.

At that place it is not expressly mentioned that the Kazi should inquire whether he had definitely asked the witnesses to bear testimony. It is also noteworthy that in the same chapter it is stated at two places that the second demand can be made "by means of writing a letter or sending a messenger." Is is obvious that in the case of a letter there may not be an invocation of the witnesses in the sense of asking them expressly to bear witness. Similarly in Fatawai Alamgiri, Vol. 4, Ch. 3, which deals with pre-emption although those words are mentioned when illustrating how the second demand is to be made they are not repeated in the passage mentioning how at the time of third demand the Kazi is to make inquiries from the pre-emptor; there all that he is required to ask is:

> How did he make the second demand, whom he did appoint witnessess and whether in whose presence he appointed witnesses, was nearer than the other."

It is further expressly mentioned that the taking of witnesses is necessary for the purpose of strengthening the claim. In the Hedayah, Vol. 6, on Pre-emption which in Hamilton's English translation is shown as Book 58, Ch. 2, the passages are translated as follows:

> "It is therefore necessary afterwards to make the talabe istishhad or takreer which is done by the shafi taking some person to witness either against the seller if the ground sold be still in his possession or against the purchaser or upon the spot regarding which the dispute has arisen and the shafi thus taking some person to witness his right of shafa which is fully established and affirmed."

It is there pointed out that the second demand is requisite "because evidence is wanted in order to establish proof before the Magistrate." The illustration is in the following words:

> "Such a person has bought such a house of which I am the shafi, I have already claimed by privilege to shafa, and now again claim it; be therefore witness thereof."

Neither in the translation nor in the original is there any passage which clearly states that the omission to use the words "Be therefore witness thereof" would be fatal.

Baillie in his Digest of Mahomedan law, Vol. 1, Book 7, Ch. 2, p. 489, has noted that the invocation of witnesses is not required to give validity to the second demand but only in order that the pre-emptor may be provided with proof in case the purchaser should deny the demand. He has also noted on the strength of Darrul Mukhtar that the second demand may be made by a letter or messenger. In illustrating how the second demand is to be made "Be ye witness to this" are noted. But when dealing with the third demand before the Kazi at p. 492 he also stated that the Kazi ought to inquire in the following words:

> "When this has been explained he is to ask him about the talabe takreer or confirmatory demand, how it was and before whom he made

the demand and whether he was nearer or more remote than another in the manner already mentioned."

Ballie has not stated that the omission of the words "Be ye witness to this" would be fatal.

Mr. Ameer Ali in his Mahomedan law. Vol. 1 (Edn. 4, p. 725) also quotes the method in which the second demand is to be made and he notes on p. 726 that the talabe istishhad may in certain circumstances be made by means of a letter or through a messenger. On the same page he has also stated:

> "It has been sometimes held that the demand must be in the form given in the Hedayah. but that does not seem to be the correct view of the law; what the latter requires is that the demand must be to that effect and no more."

In *Iswar Chandra Saha* v. *Mirza Nisar Hussain* (1) it was held that where after having performed the first demand the pre-emptor expressed his desire to purchase and offered money in the presence of the witnesses but had not called upon these persons to be witnesses to his acts there was no valid istishhad. No authority was quoted for the basis of that decision and probably the learned Judges had nothing before them except Macnaghten's Precedents. The case of *Iswar Chandra Saha* v. *Mirza Nisar Hussain* (1) appears to have been followed in its general terms in some other cases to be found in the Bengal Law Reports and the Weekly Reporter.

The first case in which the point arose in this High Court is that of *Chhotu* v. *Husain Bakhsh* (2). Edge, C. J., and Aikman, J., distinctly laid down that where the two demands were made and although on the occasion of talabe istishhad there was no specific invocation of witnesses yet the witnesses had been provided for the purpose of accompanying the pre-emptor and were present on the occasion of the making of the demand, there was a sufficient invocation in substantial compliance with the requirements of the Mahomedan law. That case was a clear authority for the proposition that it was not absolutely necessary to address the witnesses saying: "Be ye witness to this."

In *Muhammad Yunus Khan* v. *Muhammad Yusuf* (3) the passage in Ballie's Mahomedan Law that

> "invocation of witnesses is not required to give validity to that demand, but only in order that the pre-emptor may be provided with proof in case the purchaser should deny the demand was quoted with approval and made the basis of the decision."

The point arose again in *Ganga Prasad* v. *Ajudhia Prasad* (4) in which another Bench considered that the mere fact that the demands were made in the presence of witnesses taken to the spot, without being asked to be witnesses to the demand, was insufficient. Reliance was placed on the passage in the Hedayah and the case of *Iswar Chandra Saha* (1). Unfortunately the attention of the learned Judges was not drawn to the previous case of *Chhotu* v. *Husain Baksh* (2) nor were any other authorities cited.

The next case of this High Court is that of *Ahmad Hakim* v. *Muhammad Hikamatullah* (5), in which it was held that where the plaintiff had made the first demand in the presence of the witnesses and had asked them to accompany him to the vendee, and made the second demand in their presence, their attention being drawn to it, "the mere omission to ask them in express terms to bear testimony would not be fatal." Although on the facts *Ganga Prasad's* case was distinguished, it is quite clear that if that were considered to be an authority for the proposition that it was absolutely necessary that the witnesses should be specifically called upon to bear witness to the second demand being made, that case was not followed. *Ahmad Hakim's* case (5) is certainly an authority for the view laid down in *Chhotu's* case that the specific invocation of witnesses calling upon them to be witnesses to the demand was not an absolutely necessary and indispensable requisite.

It seems to matter little whether the witnesses are brought by the pre-emptor from his house or are picked up on the way or chosen from those present with the vendee. What is necessary is that in order to have proof that the second demand was duly made there ought to be at least two witnesses available to support the pre-emptor. Their mere presence on the scene, if they were inattentive and did not hear the demand being made, so as to be unable to give evidence in support of it, would of course be insufficient; but so long as they heard the demand being made and can bear testimony to it, there seems to be no defect in the demand. To hold otherwise would be to reduce the law to an absurd technicality.

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(1) [1864] W. R. 351 Civ.

(2) [1893] A. W. N. 101.

(3) [1897] 19 All. 224=(1897) A. W. N. 93.

(4) [1905] 28 All. 24=2 A. L. J. 682=(1905) A. W. N. 167.

(5) A. I. R. 1927 All. 289=100 I. C. 39=49 All. 385.

Following the rule laid down in *Chhotu's* case (2) and *Ahmad Hakim's* case (5), we are of opinion that it was not absolutely necessary for the pre-emptor to use words like "Be ye witness to this," addressed to the witnesses at the time of the second demand; but that it must be fully established that there were at least two witnesses present on the occasion who heard the demand and can bear witness to the fact when it is denied by the vendee. The Mahomedan law of evidence has been superseded by the Evidence Act and no particular number of witnesses are now required for the proof of the fact: S. 134. Although therefore it is not absolutely necessary to produce both these witnesses, the fact that there were such witnesses who can bear testimony must however be satisfactorily proved.

Before disposing of the appeal we accordingly send down the following issue for a finding on the evidence that is already on the record:

> "Was the second demand made in the presence of two witnesses (other than the pre-emptor and the vendee) who heard the demand being made so as to be able to bear witness to it?"

The Court below should return its finding within two months. On return of the finding the usual ten days will be allowed for objections.

V.B./R.K. *Case remanded.*

A. I. R. 1931 Allahabad 739

MUKERJI AND BENNET, JJ.

Ranchhore and *others*—Appellants.

v.

Bansidhar and *others*—Respondents.

Second Appeal No. 196 of 1928, Decided on 4th July 1930.

Bundelkhand Alienation of Land Act (2 of 1903), S. 16—Simple mortgage by agriculturist—Remedy by sale in execution is barred under S. 16.

In cases of simple mortgages by an agriculturist, in favour either of an agriculturist or of non-agriculturist, S. 16 of the Act bars any remedy by sale in execution of a simple mortgage. The only remedy which such mortgagees can avail of, is a simple money decree: *A. I. R.* 1926 *All.* 617 (*F. B.*), *Rel. on.*; *A. I. R.* 1929 *All.* 421, *Ref.* [P 740 C 1]

K. N. Katju—for Appellants.

Iqbal Ahmad and *Shabbir Hassan*—for Respondents.

Bennet, J.—This is a second appeal by three defendants, who are transferees from a mortgagor. The facts are that on 19th February 1926 Mt. Sarawan the mother and guardian of a minor Tunde executed a simple mortgage deed for Rs. 775 in favour of the plaintiff Bansidhar. Tunde died when he was a minor and his widow defendant 1 Mt. Larhai alias Raja Beti, executed a sale deed of her right to redeem in favour of defendants 2 to 5, the appellants before us. The plaintiff has brought a suit to enforce his simple mortgage deed by sale. The Court of first instance granted a preliminary decree under O. 34, R. 4 but stated that a final decree could not be granted because the property could not be sold owing to S. 16, Bundelkhand Land Alienation Act. In first appeal the lower appellate Court has ordered that defendants be given six months' time to pay the decretal amount, and if they do not do so within that period the plaintiff will be entitled to recover the money by getting a temporary alienation of the mortgaged property from the Court. The only point taken in second appeal by the transferee-defendants is that this remedy, granted by the lower appellate Court is opposed to the Bundelkhand Land Alienation Act, and that the suit should have been dismissed because the civil Court cannot grant any decree or give any direction affecting the landed property.

The argument in appeal before us is a very simple one, whether S. 16, Bundelkhand Land Alienation Act does or does not bar the remedy of a simple mortgagee to obtain sale of the mortgaged property. We have been referred to the Full Bench ruling of *Ram Sahai Singh* v. *Debi Din* (1), in which it was held that where a simple mortgage has been executed by one member of an agricultural tribe in Bundelkhand in favour of another member of an agricultural tribe, S. 9 of that Act will not apply. This ruling was decided by a majority of two out of three Judges. The two Judges in the majority both stated that S. 16 of that Act would bar the remedy by sale in execution of the simple mortgage decree. We were also referred to the case of *Kalka Prasad*

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(1) A. I. R. 1926 All. 617=97 I. C. 455 (F.B.)

v. *Ajudhia Prasad* (2). This was a case of a mortgage by conditional sale, and the remedy granted was foreclosure. That however has no direct bearing on the case before us which deals with a simple mortgage. The learned counsel for the plaintiff invited our attention to certain remarks of one of the learned Judges in *Kalka Prasad* v. *Ajudhia Prasad* (2) in which he repeated the view which he had held as a Judge in the minority in the Full Bench ruling mentioned above. The parties in the present case to the mortgage deed are both agriculturists. Some doubt has been raised in argument of the precise meaning and intention of various sections of the Bundelkhand Land Alienation Act. We consider that the scheme of this Act is as follows: Firstly, in regard to usufructuary mortgages and mortgages by conditional sale made by an agriculturist in favour of an agriculturist, no restraint is made on such mortgages by this Act. Secondly, in the case of usufructuary mortgages and mortgages by conditional sale made by an agriculturist in favour of a non-agriculturist, S. 6 of the Act lays down the restriction that the period for which the mortgagee will be entitled to hold possession is restricted to 20 years. Thirdly, in the case of simple mortgages by an agriculturist in favour either of an agriculturist or of non-agriculturist, in both cases S. 16 of the Act bars any remedy by sale in execution of a simple mortgage.

In regard to the view which was urged by the learned counsel for the plaintiffs-respondents that S. 16 only barred a sale in execution in the case in which the mortgagee was a non-agriculturist, we consider that if that had been the intention of the Act, then a restriction on this class of mortgage where the mortgagee was a non-agriculturist would undoubtedly have been entered in S. 6. The fact that there is no such restriction in S. 6 leads us to conclude that S. 16 is a perfectly general section applying both to agriculturists and to non-agriculturists, who are mortgagees on a simple mortgage.

For these reasons we allow this appeal and we set aside the decree of the lower appellate Court, and we dismiss the suit of the plaintiff against defendants 2 to 5, appellants before us with costs in all Courts. The only remedy which we grant to the plaintiff is a simple money decree. As his suit is within time, the due date for payment under the mortgage being Sambat 1980 (1923) and the suit having been brought in 1926, the plaintiff therefore is entitled to this simple money decree and that money decree will be against the assets of Tunde, if any which are in the hands of his widow Mt. Larhai, defendant 1. The costs will also be allowed to the plaintiff against these assets on this simple money decree. Pendente lite interest and interest till the date of realization at the rate of 6 per cent per annum are allowed.

B.V./R.K. *Appeal allowed.*

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(2) A. I. R. 1929 All. 421=121 I. C. 211=51 All. 780.

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* A. I. R. 1931 Allahabad 740

MUKERJI AND BAJPAI, JJ.

Daya Shankar—Plaintiff—Appellant.

v.

B. B. & C. I. Ry. Co.—Defendants—Respondents.

Second Appeal No. 1856 of 1928, Decided on 24th April 1931, against decision of Sub-Judge, Cawnpore, D/- 15th June 1928.

*** Tort—Negligence — Where defendant's negligence makes plaintiff less circumspective plaintiff is not guilty of contributory negligence.**

A person who finds the gates of a level railway crossing open, and is thereby misled into thinking the line safe for crossing, is not bound to minute circumspection, and if he is run over by a train, the company may be liable to him although he did not use his faculties so clearly as he might have done under other circumstances.

There can be no doubt that where the plaintiff is guilty of contributory negligence he is not entitled to lay the whole of the blame on the negligence of the defendant and recover damages. But where the defendant's negligence is such as invites, as it were, the plaintiff to be less circumspect, the defendant cannot put the blame on the plaintiff, if he happened to be less circumspect than he would otherwise have been: 41 *Cal.* 308, *Ref.* [P 741 C 1, 2]

S. N. Verma and *G. S. Misra*—for Appellant.

Ladli Prasad Zutshi—for Respondents.

Mukerji, J.—This is a second appeal by one who was the plaintiff in the Court below. By this suit the plaintiff claimed against the Bombay, Baroda and Central India Railway Company a sum of Rupees 1,300 as damages. The Court of first instance allowed a sum of Rs. 1,200 as damages, but on appeal by the railway company the learned Subordinate Judge who heard the appeal dismissed the suit altogether.

The allegation in which the suit was founded and the facts which have been found established by the lower appellate Court are these. There was a fair at Bithur in the District of Cawnpore. The plaintiff was coming from the fair and was going towards Cawnpore. At a short distance from the Bithur Railway Station the plaintiff had to cross the railway line. There was a pair of gates which was open and permitted the plaintiff to cross the railway line. As the plaintiff arrived on the rails, travelling at a moderate speed of about 7 miles an hour, a railway engine coming from the direction of the railway station at Bithur collided against the plaintiff's car and broke it. On these facts, the learned Subordinate Judge held that the plaintiff was guilty of contributory negligence, inasmuch as it was the duty of the plaintiff to be circumspect and, on arriving near the gate, to look on either side and to see if any train or engine was passing.

In this Court it has been contended that the learned Subordinate Judge drew a wrong inference from the facts found and that there was no contributory negligence.

There can be no doubt that the matter is concluded by English cases and there is at least one Indian case which is against the respondent. The Indian case is *Bengal Provincial Railway Company* v. *Gopi Mohon Singh* (1).

There can be no doubt that where the plaintiff is guilty of contributory negligence he is not entitled to lay the whole of the blame on the negligence of the defendant and recover damages. But there is another rule of law which says that where the defendant's negligence is such as invites, as it were, the plaintiff to be less circumspect, the defendant cannot put the blame on the plaintiff, if he happened to be less circumspect than he would otherwise have been. This is put very clearly in Sir Frederick Pollock's Law of Torts, 13th Edn. at pp. 493 and 494. At p. 493 the learned author puts the proposition like this :

> "There are certain conditions under which the normal standard of a reasonable man's prudence is peculiarly difficult to apply, by reason of one party's choice of alternatives, or opportunities of judgment, being affected by the conduct of the other."

By way of illustration the learned author quotes the case of *The Directors of North-East Railway Company* v. *Wanless* (2) at p. 16. The case decided is put in the following language by the author :

> "A person who finds the gates of a level railway crossing open, and is thereby misled into thinking the line safe for crossing, is not bound to minute circumspection, and if he is run over by a train, the company may be liable to him although he did use his faculties so clearly as he might have done under other circumstances."

The learned author further at p. 494 puts the reason of the decision as follows :

> "One might generalize the rule in some such form as this : not only a man cannot with impunity harm others by his negligence, but his negligence cannot put them in a worse position with regard to the estimation of default. You shall not drive a man into a situation where there is loss or risk every way, and then say that he suffered by his own imprudence. Neither shall you complain that he did not foresee and provide against your negligence."

We are of opinion that the principle laid down in the cases decided and very clearly put by the learned author should be adopted as the basis of our decision, and we do adopt it. In the result we allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance. The plaintiff will have his entire costs throughout.

B.V./R.K. *Appeal allowed.*

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(1) A. I. R. 1914 Cal. 368=41 Cal. 308=23 I. C. 788.

(2) [1874] 7 H. L. 12=43 L. J. Q. B. 185=30 L. T. 275=22 W. R. 561.

A. I. R. 1931 Allahabad 741

SULAIMAN AND KENDALL, JJ.

Bindraban—Plaintiff—Appellant.

v.

Rajpat Singh and *others*—Defendants —Respondents.

Second Appeal No. 2059 of 1927, Decided on 2nd July 1930, from decree of Dist. Judge, Azamgarh, D/- 26th August 1927.

Agra Pre-emption Act (11 of 1922), S. 11 —Transfer of property under a compromise decree is not pre-emptible.

Under the Agra Pre-emption Act sale which is pre-emptible must strictly be a sale as defined in the Transfer of Property Act, which requires the existence of a registered document in case of a transfer of immovable property of the value of Rs. 100 and upwards. A transfer of property effected under a compromise decree of a Court cannot be treated as a sale pre-emptible under the Act : *A. I. R.* 1928 *All.* 67, *Foll.*

[P 742 C 2]

N. Upadhiya—for Appellant.

A. P. Pandey and *M. L. Chaturvedi*—for Respondents.

Sulaiman, J. — This is a plaintiff's appeal arising out of a suit for pre-emption. The vendors first sold the property on 28th August 1923, but before the suit for pre-emption was filed they retransferred the property to the vendors on 24th July 1924. The suit for pre-emption was however filed, but was dismissed on 10th November 1924, on the ground that the property had been resold. Subsequently a brother of the vendees, who had resold the property, brought a suit for cancellation of the resale on the ground that the property had been acquired with joint family funds and could not be retransferred without the consent of all the members. This suit was ultimately compromised on 8th July 1925 and a decree was passed in terms of this compromise to the effect that the property should come back to the families of the vendees. Upon this the plaintiff instituted the present suit for pre-emption, alleging that this was in reality a collusive decree, and the property had in reality been sold for consideration. The findings of the lower appellate Court were not satisfactory, and we had to send down certain issues for fresh determination. The findings that are now returned make it quite clear that the resale of 24th July 1924, was a genuine transaction, but there is also the finding that the compromise of 8th July 1925, was "really a sale for consideration in the form of a compromise, and not a genuine compromise." The learned Judge has further believed the oral evidence to the effect that this compromise was entered into on payment of Rs. 250 to the vendors.

His findings therefore amount to this, that it was not merely a compromise of the suit for cancellation brought by the brother of the vendees, but in reality a consideration of Rs. 250 was accepted and the property was transferred to the family of the vendees by the vendors. But it cannot be denied that this was acquired, not by a registered document, but by means of a compromise decree obtained through a Court of law.

Under S. 11, Pre-emption Act, a right of pre-emption accrues on the sale of a proprietary interest in land. S. 4, sub-S. (10), lays down that a sale means a sale as defined in the Transfer of Property Act of 1882. In S. 54, T. P. Act, a sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards can be made only by a registered instrument.

On the finding of the District Judge there is no doubt that this transaction was a transfer of ownership in exchange for a price paid. But the other condition required by the section, that it should be effected by a registered instrument, was wanting. The Transfer of Property Act, nowhere speaks of a sale of immovable property of the value of Rs. 100 and upwards as being effected without a registered instrument but by means of a compromise decree. It therefore seems to us that although the transaction was a transfer for price it was not such a transfer as is referred to in S. 54, T. P. Act. It was therefore not a sale within the meaning of that section.

In a case of genuine compromise a Bench of this Court in *Paras Ram* v. *Neksai* (1) laid down that a sale which is pre-emptible must be strictly a sale as defined in the Transfer of Property Act, and that a transfer of property effected under a compromise decree of a Court cannot be treated as a sale pre-emptible under the Act. We have pointed out the additional reason that the definition of sale in the Transfer of Property Act requires the existence of a registered document in case of a transfer of property of the value of Rs. 100 and upwards.

We must accordingly hold that the plaintiff has no right to pre-empt this property. In view of the finding that the proceedings in the Court were of a collusive nature we direct that parties should bear their own costs throughout.

K.N./R.K. *Order accordingly.*

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(1) A. I. R. 1928 All. 67=107 I.C. 682=50 All. 454.

A. I. R. 1931 Allahabad 743 (1)

SULAIMAN, AG. C. J. AND BAJPAI, J.

Bhup Singh and *others*—Plaintiffs—Appellants.

v.

Sheo Shanker and *others*—Defendants—Respondents.

Letters Patent Appeal No. 5 of 1930, Decided on 16th March 1931, against decision of Sen, J., D/- 13th December 1929.

Agra Tenancy Act (1926), S.82—Mortgagee put in possession of plots, letting them out to tenants in ordinary course of management—On redemption tenants do not become trespassers and mortgagor has no right to eject through civil Court.

When mortgagees are in possession of certain plots with full authority to let them out to tenants, and they give them to tenants in the ordinary course of their management of the zamindari, the tenants do not become trespassers on the redemption of the mortgage, so as to entitle the mortgagor to eject ·them through the civil Court : 3 *A. L. J.* 517 ; 11 *I. C.* 817, *Ref.* [P 743 C 2]

Baleshwari Prasad—for Appellants.

K. D. Malaviya and *Gopalji Mahrotra*—for Respondents.

Sulaiman, Ag. C. J.—In this case although the original mortgage was simple and the mortgagor was to pay interest to the mortgagee, he executed a subsequent document in favour of the mortgagee putting him in possession of two plots in lieu of interest and authorizing him to cultivate those plots or to let them out to tenants. No question was raised before the learned Judge of this Court that this document was for any reason invalid. In the ordinary course of the management the mortgagee let out these plots to defendants 3 and 4. The plaintiffs redeemed the mortgage out of Court, but instead of suing the tenants in the Revenue Court for their ejectment, in case they had such right, they brought a suit for possession in the civil Court impleading the mortgagees also. The first Court dismissed the suit holding that the tenants could be ejected by the Revenue Court only. The lower appellate Court took a contrary view. A learned Judge of this Court has overruled the view of the lower appellate Court and restored the decree of the first Court.

We are of opinion that the view taken by a learned Judge of this Court is perfectly right. The plaintiffs ·had given authority to the mortgagees either to cultivate the plots themselves or to let them out to tenants. They let them out to tenants. The redemption of the mortgage put an end to the mortgage of the proprietary interest, but that did not make the agricultural tenants trespassers from that date. It is not necessary for us to express any opinion as to whether these tenants can, as the law now stands be or be not ejected by the Revenue Court. It is however obvious that the only remedy, if any, which the plaintiffs have is to eject these tenants through the Revenue Court. The learned advocate for the appellant relies on the case of *Ram Chand* v. *Raj Hans* (1). On the other hand the learned advocate for the respondent relies on the case of the *Collector of Basti* v. *Sarnam Gharak* (2).

We think that when the mortgagees were in possession of these plots and had full authority to let them out to tenants and they gave them to tenants in the ordinary course of their management of the zamindari, these latter tenants did not become trespassers on the redemption of the mortgage so as to entitle the plaintiffs to sue them for ejectment through the civil Court. The appeal is accordingly dismissed with costs.

S.N./R.K *Appeal dismissed.*

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(1) [1906] A.W.N. 241=3 A.L.J. 517.
(2) [1911] 11 I.C. 817.

✻ A. I. R. 1931 Allahabad 743 (2)

SULAIMAN, AG. C. J. AND KING, J.

L. Mahesh Prasad—Plaintiff—Appellant.

v.

Jagannath Choube and *others*—Defendants—Respondents.

Letters Patent Appeal No. 34 of 1930, Decided on 15th May 1931 from judgment of Niamatullah, J., D/- 21st January 1930, in Second Appeal No. 1309 of1928.

✻ Hindu Law—Debts—Manager—Loan for camel for carrying loads for hire to supplement income of family is binding.

Where a karta of a joint Hindu family was compelled to supplement his income and he did so by transporting loads on a camel for hire. The camel for which the loan was incurred was not the first camel which the karta had employed in that manner.

Held : that the karta acted in reasonable and prudent way for the benefit ·of the family ; the loan was legally justified and it was not necessary for binding the joint family property that the loan should have been incurred for the purpose of ancestral business : *A. I. R.* 1928 *All.* 454 (*F.B.*), *Foll.* ; *A. I. R.* 1931 *P. C.* 136, *Ref.* ; *A. I. R.* 1928 *All.* 403 and 447, *Diss. from* [P 744 C 2]

A. Sanyal—for Appellant.

S. B. L. Gane—for Respondents.

King, J.—The only point for determination in this appeal is whether an item of Rs. 85 out of the consideration for a mortgage executed by Sunder on 20th November 1916 is for legal necessity, or for the benefit of the joint Hindu family consisting of Sunder and defendant 3 who was a minor, so as to bind defendant 3.

The mortgage was executed by Sunder, the manager of the joint family, as security for a loan of Rs. 128. Out of this amount the Court below has found that the payment of Rs. 43 has not been proved. The balance of Rs. 85 was recited in the mortgage deed to have been borrowed for purchasing a camel, and the plaintiff and a witness of his deposed that Sunder did in fact buy a camel with the money lent. The only question is whether Sunder was legally justified in creating the mortgage upon the joint family property for the purpose of buying the camel.

This second appeal first came before a single Judge of this Court who stated that the facts found by the lower appellate Court, which must be accepted in deciding the second appeal, are :

> " That Sunder cultivated about 3 or 4 bighas of land and had a camel which was used as a pack animal let out on hire. The slender resources of the family were, to a certain extent, supplemented by what was earned as hire of the camel for carrying loads."

The lower appellate Court took the view that although Sunder may have been carrying on the business of carrying loads on the camel for hire it was necessary for the plaintiff to prove by satisfactory evidence that it was a business which had been carried on by Sunder's father or in the family, and that the plaintiff had failed to prove these facts. In the result the lower appellate Court dismissed the plaintiff's suit altogether.

The learned single Judge of this Court stated that while he was not prepared to endorse the view expressed by the learned Subordinate Judge in its entirety he did not think he should differ in second appeal from the conclusion arrived at by him. He relied upon the cases of *Inspector Singh* v. *Kharak Singh* (1) and *Ratan Chand* v. *Ram Kishan Murarji* (2), as laying down the law that the karta of a joint Hindu family is not justified in starting new ventures by contracting loans even if such ventures are likely to prove of some benefit to the family ; and that the benefit which may make the loan binding on the family should be of a defensive character. Unfortunately the subsequent Full Bench ruling of this Court in *Jagat Narain* v. *Mathura Das* (3) was not brought to the notice of the learned Judge. In that case it was held by the Full Bench that in order to sustain an alienation of joint family property made by the managing member of the family the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available to him at the time. Transactions justifiable on the principle of "benefit to the estate" are not limited to those transactions which are of a defensive nature.

The two rulings mentioned above on which the learned Judge relied, were referred to and not followed. In the present case I think it is clear that Sunder who had only about 3 or 4 bighas of cultivation and a family consisting of 3 or 4 members, was compelled to supplement his income and he did so by transporting loads on a camel for hire. The camel for which the loan in question was incurred was not the first camel which Sunder had employed in this manner. The purchase of the camel on this occasion therefore was not a new venture. Presumably Sunder must have found the business profitable, otherwise he would not have bought another camel after the previous one had died. There is certainly no evidence that the business of carrying loads on camels was an ancestral business but on the principle laid down in the Full Bench ruling it is not necessary for the purpose of binding the joint family property that the loan should be incurred for the purpose of an ancestral business. On the facts of this case it appears to me that Sunder acted in a reasonable and prudent manner for the benefit of the family and that the family must have benefited by his purchase of the camel, and I see no reason why the loan should not be treated as binding upon the family. When the lower appellate Court held that it was not proved that the business had been carried on "by Sunder's father or in the family" we take it to mean that it was not proved that the business was carried on by his father or by other members of his family. There was no doubt about it that Sunder himself was carrying on the business and had been carrying it on for some time before the loan in question.

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(1) A.I.R. 1928 All. 403=112 I.C. 881=50 All. 776.

(2) A.I.R. 1928 All. 447=114 I.C. 743.

(3) A.I.R. 1928 All. 454=116 I.C. 484=50 All. 969 (F.B.).

I would therefore allow the appeal to the extent of finding the mortgage valid and binding as to Rs. 85 as the principal. The first Court has found the rate of interest agreed to in the mortgage-deed to be penal and excessive and has reduced it to 12 per cent per annum simple interest. I consider this rate to be reasonable.

I would accordingly decree the plaintiff's claim for Rs. 85 as principal, and extend the time for payment until one week from today. Simple interest at 12 per cent per annum should be allowed up to the date fixed for payment, and thereafter at 6 per cent per annum until realization. The plaintiff-appellant should get proportionate costs in all Courts.

Sulaiman, Ag. C. J.—I concur and would only like to add that in *Rattan Chand* v. *Sri Thakur Ram Kishen Murarji* (2) I expressed a view contrary to that expressed in *Inspector Singh* v. *Kharak Singh* (1), and at some length gave reasons in support of my view but only agreed to follow the other view for the sake of introducing uniformity (p-781). The subsequent Full Bench ruling in *Jagat Narain* v. *Mathura Das* (3) and perhaps also the Privy Council ruling in *Ram Krishna Murarji* v. *Ratan Chand* (4) have materially altered the position.

By the Court.—We accordingly allow the appeal and decree the plaintiff's claim for Rs. 85 as principal. We extend the time for payment until one week from to-day. Simple interest at 12 per cent per annum is allowed up to the date fixed for payment, and thereafter at 6 per cent per annum until realization. The plaintiff-appellant will get proportionate costs in all Courts.

V.B./R.K. *Appeal allowed.*

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(4) A.I.R. 1931 P.C. 136=132 I.C. 613=58 I.A. 173=53 All. 190.

A. I. R. 1931 Allahabad 745

SULAIMAN, AG. C. J. AND KING, J.

Bishunath Rai—Petitioner.

v.

Sarju Rai and *others*—Opposite Parties.

First Appeal No. 173 of 1930, Decided on 13th May 1931, against order of Dist. Judge, Ghazipur, D/- 26th April 1930.

Probate—Proceeding at first contested—Compromise entered into subsequently cannot be embodied in probate.

Where a proceeding relating to the granting of a probate is at first contested but subsequently is compromised, the terms of the compromise cannot be incorporated in the probate or in the order of the Court: *A. I. R.* 1919 *P. C.* 79; 59 *I. C.* 344 and 1 *I. C.* 573, *Dist.*; 7 *I. C*, 740 and 1 *P. L. J.* 377, *Rel. on.* [P 746 C 1, 2]

Harbans Sahai—for Petitioner.

A. P. Pandey—for Opposite Parties.

Sulaiman, Ag. C. J.—This is an objector's appeal from an order granting probate but not annexing to the probate a copy of a compromise entered into between the parties. At first the proceeding was a contested one but the parties filed a compromise under which they admitted the genuineness of the will and the existence of a sound disposing mind of the testator. The compromise proceeded to divide up the estate into two portions and to put the parties into separate possession of them with power to get mutation of names effected through the Revenue Court. The request was that the Court should decide the case in terms of the compromise and should embody the compromise in its decree.

The learned Judge came to the conclusion that inasmuch as the genuineness of the will and the power of the testator to execute it were admitted and inasmuch as he was satisfied on the evidence produced by the applicants that the will had been validly executed he ordered that a probate with a copy of the will annexed be granted to the applicant. He did not direct that the compromise should either be incorporated in the probate or be annexed to it in the form of a schedule. The objector comes up in appeal and it is contended on his behalf that the Court below should have disposed of the dispute between the parties in strict accordance with the terms of the compromise.

In the first place, it is quite clear that as a proceeding in a contested case will result in a judgment in rem the Court cannot act merely upon the consent of the parties before it so as to shut out an inquiry into the genuineness and due execution of the will itself. The main issue before the Court is the question of the proof of the valid execution of the will and all other matters are outside that inquiry. The Court has to be satisfied as to this issue before it grants probate and it is wholly immaterial whether the parties desire to compromise their dispute or not.

Of course, if the defendant at any stage withdraws his objection, whether under a compromise or otherwise the proceeding may become a noncontentious one, in which case the probate will be granted in the common form. The learned advocate for the objector relies on the case of *Hemanta Kumari Debi* v. *Midnapore Zamindari Co.* (1), which has been followed in *Bai Monghibai* v. *Bai Rambhalaxmi* (2) and *Kamal Kumari Devi* v. *Narendra Nath Mukerji* (3) and contends that the proper course was to introduce the agreement in a schedule attached to the probate. The case before their Lordships of the Privy Council was one relating to a regular suit in which the private rights of the parties to it were in dispute. Furthermore, that was a case before the amendment of the Registration Act when in view of the opinion previously expressed by their Lordships of the Privy Council a decree of the Court could embody the terms of the compromise relating to properties which were other than the subject matter in suit. On the other hand, there are the cases of *Kunja Lal Choudhary* v. *Kailash Chandra Chowdhury* (4) and *Janakbati Thakurain* v. *Gajanand Thakur* (5), where it was remarked that the Court cannot embody the terms of the compromise.

The Registration Act has now been amended and S. 17 (2) sub-head (6) now makes it clear that consent decrees and orders comprising immovable property other than that which is the subject-matter of the suit are no longer exempt from registration. It is therefore quite obvious that any agreement affecting immovable property which is not the subject-matter of the suit cannot be incorporated in an order of the Court because it would require registration.

It also appears that it will be contrary to public policy to introduce into the probate that is granted to the executor terms of a private compromise that might have been arrived at between him and any objector. So long as it is not revoked the probate is conclusive against the whole world and private arrangements between the parties ,in a proceeding would be quite out of place in it.

The form of probate which is prescribed in Sch. 6 attached to the Succession Act does not admit of the incorporation of private terms like the division of the estate of the testator and the putting of each party into separate possession of it. We think that the learned Judge was right in not allowing the private compromise to be embodied in the probate or in the order of the Court. The appeal is accordingly dismissed with costs.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1931 Allahabad 746

SULAIMAN, AG. C. J. AND BAJPAI, J.

Thakur Prasad—Objector—Appellant.

v.

Kanhya Lal Bhargava and *another* — Decree-holder—Respondents.

Execution First Appeal No. 139 of 1931, Decided on 18th May 1931, against decision of Sub-Judge, Mirzapur, D/- 22nd December 1930.

* **Civil P. C. (1908), O. 22, R. 9 — Non-compliance with procedure as to bringing legal representatives on record within three months is mere irregularity so long as decree passed in suit is as between living persons — Execution Court cannot refuse to execute decree on ground if such irregularity is committed—Execution, decree binding.**

No doubt if no application for substitution is filed within the time fixed by law, there is an abatement of the suit ; but that abatement can be set aside on sufficient cause being shown, and the time can be extended under S. 5, Lim. Act. When the Court substitutes the names of the heirs in place of the deceased, it indicates that either the Court believed that the death had taken place within three months of the application or that there was sufficient cause for extension of time. Even if the attention of the Court is not drawn to the circumstance that the death had taken place more than three months before any application for substitution was made the omission would be an irregularity in the procedure adopted by the Court. Non-compliance with the procedure laid down in O. 22, would not involve an utter want of jurisdiction, but would be a mere irregularity, so long as the decree passed is between living persons. The execution Court must execute the decree as it finds it and cannot refuse to execute it on the ground that there was some irregularity committed in the suit before it was passed. [P 747 C 2]

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(1) A.I.R. 1919 P.C. 79=53 I.C. 534=46 I.A. 240=47 Cal. 485 (P.C.).

(2) [1920] 59 I.C. 344.

(3) [1909] 1 I.C. 573.

(4) [1910] 7 I.C. 740.

(5) [1917] 1 Pat. L.J. 377=37 I.C. 12.

A. P. Bagchi—for Appellant.

Sulaiman, Ag. C. J.—Abinash Chandra was the sole plaintiff in a suit for sale on the basis of a mortgage deed. Under a compromise between the parties a preliminary decree for sale was passed on 13th September 1918. Abinash Chandra died some time about 1923 and his sons were substituted in his place as his heirs. They on one occasion applied for the preparation of the final decree, but their application was dismissed for default. Subsequently they transferred their rights to Kanhya Lal who filed a fresh application for the preparation of the final decree on 6th January 1926 against the mortgagors, Sita Ram and others. There was no objection taken and a final decree was passed on 1st July 1926 in favour of Kanhya Lal and against Sita Ram and others. It was after the passing of this final decree that the present appellant Thakur Prasad in execution of a simple money decree against the mortgagors got their supposed interest put up for sale, and he purchased it in 1927.

When Kanhya Lal applied for execution of the decree on 2nd April 1929, objections were filed on behalf of Thakur Prasad, but they were dismissed on 17th December 1929. On a fresh application for execution fresh objections were filed on 11th February 1930 in which it was expressly asserted that Abinash Chandra had died and his heirs had not been brought on the record within three months of his death, and the suit had accordingly abated and the final decree passed was a nullity. On 22nd February 1930, the execution Court dismissed the objection, holding that Thakur Prasad had no locus standi to raise this point under S. 47, Civil P. C., in the execution department.

On a fresh application for execution, Thakur Prasad has again raised the same objection which has been dismissed by the learned Subordinate Judge on the ground that the present objection in view of the previous orders is not now entertainable. The learned advocate for the objector contends that the question of the exact time of the death of Abinash Chandra should be gone into inasmuch as if he had died more than three months before any application for substitution of names was made, the suit had abated and the decree passed in that suit was a nullity.

No doubt if no application for substitution is filed within the time fixed by law, there is an abatement of the suit; but that abatement can be set aside on sufficient cause being shown, and the time can be extended under S. 5, Lim. Act. The fact that the Court substituted the names of the heirs in place of Abinash Chandra indicates that either the Court believed that the death had taken place within three months of the application, or that there was sufficient cause for extension of time. Even if the attention of the Court was not drawn to this circumstance, the omission would be an irregularity in the procedure adopted by the Court below. Non-compliance with the procedure laid down in O. 22 would not involve an utter want of jurisdiction, but would be a mere irregularity, so long as the decree is passed as between living persons.

The appellant cannot get over the fact that the final decree was passed against his predecessors-in-title and in favour of Kanhya Lal at a time when those parties were before the Court and were fully represented. Such a decree, so long as it is not set aside, is not a nullity, and the execution Court certainly cannot go behind it. The remedy of the appellant, if any case of fraud were made out, may be by a separate suit. The execution Court must execute the decree as it finds it and cannot refuse to execute it on the ground that there was some irregularity committed in the suit before it was passed. This is not a case of a decree against a dead person which is of course a nullity, but is a case of a decree passed against living persons who are bound by the decree so long as it is not set aside.

We also think that in view of the previous orders of the execution Court, dated 22nd February 1930, the present objection is barred by the principle of res judicata. The objector had raised the very point that the decree had abated and was not executable, and the execution Court held that he had no locus standi to raise the point in the execution department. That order became final. He is accordingly bound by that order. On both these grounds we are of opinion that the appeal must fail, and it is hereby dismissed under O. 41, R. 11, Civil P. C.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 748

MUKERJI AND BENNET, JJ.

Pateshwari Parsad Pal — Plaintiff — Appellant.

v.

Jai Karan and *another*—Defendants—Respondents.

First Appeal No. 510 of 1928, Decided on 31st March 1931, against decision of Sub-Judge, Basti, D/- 4th September 1928.

(a) **Hindu Law—Alienation — Legal necessity—Raising money by mortgage for speculative litigation even by head of joint family —Mortgage not binding on family.**

Where money is raised by a member of the family by mortgage of family property, even if he be the head of the family, for a speculative litigation, which is to benefit the family only in the case of its success, it cannot be said that the mortgage was created for family necessity: *A. I. R.* 1923 *All.* 298 and *A. I. R.* 1928 *All.* 454 (*F. B.*), *Rel. on.* [P 750 C 1]

(b) **Hindu Law—Joint family — Mortgage by head of family or member for speculative litigation—No benefit to family — Family is not liable under mortgage decree.**

Where money is raised by a member of joint family or by the head by mortgage of family property for speculative litigation which is to the benefit of the family only in the event of its success, the other members of the family are not bound by a decree on the same unless such members obtain a benefit equal to or exceeding in value the amount of decree. [P 750 C 1]

Ram Nama Prasad—for Appellant.

P. L. Banerji and *Harnandan Prasad* —for Respondents.

Mukerji, J.—This appeal has arisen out of a suit brought by the appellant Pateshwari Parsad Pal, a minor, in the following circumstances:

One Mahadeo Parsad Pal had three brothers Bankey, Harihar and Dan Bahadur. Dan Bahadur, who was a stepbrother of Mahadeo Parsad Pal, succeeded to a taluka property, which originally belonged to his father-in-law under a will. Dan Bahadur died sometime in 1906. His widow was Mt. Sukhpal Kunwar and his daughter was Mt. Balraj Kunwar, and Mt. Balraj Kunwar's son was Adya Bakhsh. Mahadeo Parsad Pal, being the eldest of the brothers, believed that he had a substantial claim to the property of Dan Bahadur. The taluka was known as that of Dandikachh. The litigation for the taluka property was a costly affair, and Mahadeo Parsad Pal had not got money. He and his brothers Harihar and Bankey raised some money and fought out a case in the mutation department with Adya Bakhsh, who claimed the property by virtue of a will from his maternal grandfather, Dan Bahadur. In the mutation department Adya Bakhsh was successful, and then Mahadeo Parsad Pal thought of instituting a suit in the civil Court at Partabgarh. To raise money for the litigation he executed the bond of 18th March 1911 in favour of the respondent Jai Karan's father Razawand Singh. By this document, Mahadeo Parsad Pal mortgaged five properties in the District of Basti, which were a part of his ancestral property, and one village of the taluka property to which he was laying claim. At the date of the mortgage Mahadeo Parsad Pal's son, Raj Bahadur, was alive and was an adult. He was not made a party to the mortgage.

A suit was actually filed by Mahadeo Parsad Pal on 17th June 1912. Apparently he required more money, and one Seth Kandhaiya Lal of Jubbulpore advanced some money as a transferee of a part of the taluka property, and he was impleaded in the suit as a co-plaintiff with Mahadeo Parsad, by virtue of an order dated 15th October 1913.

The suit succeeded in the Court of the Subordinate Judge on 2nd May 1914, but it was lost on an appeal by Adya Bakhsh and on an appeal by his mother Mt. Balraj Kunwar (there are two appeals). The learned Judicial Commissioners delivered judgment on 29th June 1917. An attempt was made by Mahadeo Parsad Pal to file an appeal before their Lordships of the Privy Council, and an application was made to the Judicial Commissioners of Lucknow for leave to file an appeal. In the meanwhile, the litigants came to terms, and by an agreement dated 10th August 1922 it was agreed between on the one hand Mahadeo Parsad Pal and Kandhaiya Lal his transferee, and Adya Bakhsh and his mother Balraj Kunwar on the other, that Adya Bakhsh should have one of the properties in the taluka estate absolutely for himself, that he should have a life estate as regards the rest and that on his death, 10 annas share in the property should be taken by Kandhaiya Lal and 6 annas by Mahadeo Parsad Pal. The agreement was placed before the learned

Judicial Commissioners and by their order dated 21st August 1922 the agreement was recorded and was made a part of the decree.

It has happened since that Adya Bakhsh died on 16th February 1928 and Kandhaiya Lal and Mahadeo Parsad Pal have taken possession of the property over which Adya Bakhsh had only a life interest.

Now we go back to what led to the present suit.

Razawand Singh having died, his son Jai Karan, respondent 1, filed a suit in 1923 for the sale of the mortgaged property. To this suit Mahadeo Parsad alone was party. It was decreed ex parte on 29th September 1924. The decree was taken for execution to the district of Basti, because, as we have already stated, five villages in the district of Basti were among the properties mortgaged. Thereupon the plaintiff, who is a son of Raj Bahadur and a grandson of Mahadeo Parsad, instituted the suit out of which this appeal has arisen, to obtain a declaration that the properties in Basti, ordered to be sold by the mortgage decree of 1924, were not liable to be sold being an ancestral property in which the plaintiff had a share.

The defence to the suit was various. It was alleged that the property was the self-acquired property of Mahadeo Parsad Pal, and the plaintiff had no interest in it, that the plaintiff was born after the execution of the mortgage, that the mortgage had been executed for legal necessity, and the plaintiff was bound by the transaction. One of the points taken by the plaintiff was that the mortgage deed had not been properly registered, and in answer to that defendant 1, Jai Karan pleaded that there was a valid registration.

The learned Subordinate Judge held that the property was joint family property, that it was not proved that the plaintiff was alive at the date of the mortgage, that the registration of the document was good, and that there was no legal necessity for the loan. The learned Subordinate Judge however held that the plaintiff had been benefited by the transaction of the mortgage, inasmuch as he would succeed as an heir to his grandfather, and therefore he was bound to pay the debt which the grandfather incurred in order to acquire the property in Partabgarh. The learned Judge accordingly dismissed the suit.

In the present appeal the question of registration has not been re-agitated, nor has the question as to when the plaintiff was born. For respondent 1, it has not been urged that the property in suit is the self-acquired property of Mahadeo Parsad Pal. We therefore take it that the property in suit is the joint family property of the plaintiff and Mahadeo Parsad Pal. It being common ground that Raj Bahadur was alive in 1914, and if it be not proved that he was a consenting party to the mortgage, the plaintiff would be entitled to impeach it. The learned Subordinate Judge made a casual remark that the mortgage deed had been executed with the consent of Raj Bahadur. The learned counsel for respondent 1 tried to support this finding, but he could not point out that he ever had raised the plea in the Court below, that the mortgage had been executed with the consent of Raj Bahadur. It was a question of fact, and as such had to be pleaded specifically. The plaintiff had no notice of such a plea and could not adduce any evidence. Besides the evidence on which the lower Court expressed the opinion that Raj Bahadur was a consenting party to the mortgage does not support the lower Court. The statement of the witness Mangal Parsad, which will be found at p. 15 of the record, that the brothers of Mahadeo Parsad "opined that some mahajan should be searched and a bima should be written to him and civil suit should be fought" does not support a finding that Raj Bahadur was a consenting party to a mortgage on the ancestral property, in the district of Basti. To start with, among the brothers of Mahadeo Parsad was not his son Raj Bahadur. Then the suggestion was that money should be raised on the security (bima) of the property sought to be acquired, and there was no suggestion that money should be raised by mortgage of ancestral and joint family property. We have looked through other portions of the statement of Mangal Parsad and are of opinion that it has not been established that Raj Bahadur was a consenting party to the mortgage. Under the circumstances it is conceded, that it is established law, so far as this Court is concerned, that it is open to the plaintiff to question the validity of the mortgage of 1911.

On the question of legal necessity it is obvious that there was none. We have already mentioned the fact that when the litigation between Mahadeo Parsad Pal and Adya Bakhsh was in the Revenue Court, Mahadeo Parsad Pal and his brothers Bankey and Harihar mortgaged their property to raise a loan to fight out the case. The mortgagee, Bhagwan Das Naik, brought a suit for sale and failed on the contest of the sons of one of the brothers of Mahadeo Parsad Pal. The judgment of this Court will be found in *Bhagwan Das Naik* v. *Mahadeo Parsad Pal* (1). Most of what was said in that judgment would apply with force to the facts of this case. This decision found the approval of the Full Bench case of *Jagat Narain* v. *Mathura Das* (2): see remarks at p. 845 (*of* 26 *A. L. J.*) There can be no doubt therefore that where, as in this case, money is raised by a member of the family, even if he be the head of the family, for a speculative litigation, which is to benefit the family only in the case of its success, it cannot be said that the mortgage was created for family necessity. In this particular case, the benefit, to be acquired as the result of this speculative litigation, was to accrue not to the whole family, namely Mahadeo Parsad Pal, his son and grandson, but to Mahadeo Parsad individually. In the circumstances it is clear that the mortgage of 1911 was not binding on the family estate.

It has however been pointed out that, in the events that have happened, a substantial property, being 6 annas of the taluka of Dandikachh, has been acquired by Mahadeo Parsad Pal, and according to the valuation of Mahadeo Parsad's suit filed against Adya Bakhsh, the six annas property is worth nearly two lakhs of rupees. The plaintiff as the only heir-at-law of Mahadeo Parsad Pal has every chance of succeeding to the share of the taluka. In the circumstances, it has been urged by the learned counsel for respondent 1, that the plaintiff is bound to pay the debt. It was only on this ground that the suit of the plaintiff-appellant was dismissed by the Court below.

As against this argument it may be pointed out that the plaintiff may succeed: (1) if he survives his grandfather, and (2) if the grandfather does not bequeath the property to any other person; and (3) if the grandfather leaves the property unencumbered to the extent to be worth the amount due to respondent 1 under the decree.

We have given all these arguments their proper weight, and have come to the conclusion that it would be highly unjust to allow the plaintiff to succeed unconditionally in this case and to escape payment of the debt which went substantially to help his grandfather to succeed in the litigation, if ultimately the plaintiff succeeds to that property at Partabgarh. We accordingly have decided to grant the plaintiff only a conditional decree leaving it open to him, as it is open to his grandfather, to pay up the decree at any time he likes.

In the result we allow the appeal and grant the plaintiff the following declaration:

The decree No. 290 of 1923, dated 29th September 1924, passed by the learned Subordinate Judge of Partabgarh, in favour of Jaikaran and against Mahadeo Parsad Pal will not be executable against the properties in the district of Basti unless and until the plaintiff succeeds to the property of the taluka of Dandikachh, or a portion of it, as an heir to or donee or legatee or transferee of his grandfather, the property to which the plaintiff succeeds being equal to or more in value than the amount of the decree then due. It will be open to the plaintiff to pay up the decree of respondent 1, Jaikaran, at any time he pleases. We may explain once more the decree which we grant. It is only in the case of plaintiff obtaining a benefit which is equal to or exceeding in value the amount of the decree, that he will be liable to pay the decretal amount due on the property mortgaged. It will be for the Court executing the mortgage decree to decide whether the conditions laid down by us have been fulfilled or not. The plaintiff has substantially succeeded and will have his costs throughout. The temporary injunction issued against Mahadeo Parsad Pal that he is not to alienate his Partabgarh property till the disposal of the appeal is hereby dissolved. Mahadeo Parsad Pal will pay his own costs of this appeal.

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(1) A. I. R. 1923 All. 298=71 I. C. 959=45 All. 390.

(2) A. I. R. 1928 All. 454=116 I. C. 484=50 All. 969 (F. B.).

V.B./R.K. *Order accordingly.*

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* A. I. R. 1931 Allahabad 751

SULAIMAN, AG. C. J. AND BAJPAI, J.

Ram Chandra Brij Lal—Plaintiff—Applicant.

v.

Manohar Das Ram Prasad—Defendant—Opposite Party.

Civil Revn. No. 191 of 1930, Decided on 16th April 1931, against decree of Small Cause Court Judge, Cawnpore, D/- 25th January 1930.

* **(a) Civil P. C. (1908), Sch. 2, Para. 20—Award delivered out of Court—Members of certain committee agreeing that decision by committee on any dispute relating to business or dealings between members would be binding on them—Committee has no powers to leave decision of any matter entirely in the hands of one or more of its members.**

When the members of a certain committee undertake that they would abide by the decision of the committee on any dispute relating to business or dealings between the members, the committee has no power to leave the decision of any matter entirely in the hands of one or more of its members. If the committee does that, the award made by some of the members cannot bind a party who does not acquiesce in the disposal of the dispute in this way and the Court can rightly refuse to file it. [P 752 C 1]

(b) Arbitration—Delegation of duty.

The delegation of ministerial acts and duties can certainly be made by an arbitrator, but unless expressly authorized to do so the arbitrator must exercise his own judgment on the points in dispute and must give his own independent decision. [P 752 C 1]

S. N. Seth—for Applicant.

Ambika Prasad—for Opposite Party.

Sulaiman, Ag. C. J.—This is an application in revision from an order of the Small Cause Court refusing to file an award delivered out of Court. The parties are members of a body called Cawnpore Kapra Committee and they signed the admission forms which stated that they would abide by the rules of the committee and that if there was any dispute relating to business or dealings between the members of the committee and that dispute was put before the committee, the committee would have full right to settle it, and any decision arrived at by the committee would be binding upon them. It further stated that if the signatories do not abide by the rules and the decisions of the committee, it would have the right to strike off their names from the rolls of members.

There was a dispute between the plaintiff and the defendant on account of a claim put forward by the plaintiff to the effect that there was a rule of the committee that if any customer began purchasing articles from another commission agent the latter would be bound to pay the entire amount to the previous commission agent with whom the customer had been dealing. The committee appears to have appointed three persons as arbitrators to decide this matter. When notices were issued to the defendant he first asked for some time, but later on failed to appear and one of the three arbitrators signed an award which was against the defendant. It is this award which was sought to be filed in Court.

It is unnecessary for us to express any opinion on the question whether the rule relied upon by the plaintiff can be said to be in restraint of trade or against public policy. It is equally unnecessary to decide finally in this case whether a general contract entered into between two persons that all future disputes that may arise in connexion with any business transaction whatsoever shall be referred to the arbitration of a particular tribunal, is a binding contract. It may be doubtful whether such a contract can be treated as a matter referred to arbitration within the meaning of para. 20, Sch. 2, Civil P. C.

We accept the contention of the learned advocate for the applicant that unlike paras. 1 and 17, para. 20 does not require that the reference should be in writing. It is clear that the language of that paragraph does not require that there should have been a written reference. Para. 21 also makes it clear that all that is necessary is that the Court should be satisfied that the matter had been referred to arbitration and that an award had been made thereon and that there was no ground or proof which would vitiate the award. Had a writing been necessary it would have been very difficult to hold that merely signing the admission form and agreeing to abide by the rules to be made by the committee, the signatory had entered into a written agreement of reference to arbitration. The present case however can be disposed of on the simple question that there was no agreement to refer the dispute to the arbitration of three individuals, much less to the decision of only one of them. The admission form contained an undertaking by the signatory that he would abide by the decision of the Kapra Committee. There was no authority given to the committee to delegate its power of deciding a dispute to a new tribunal. In the absence of such express authority the committee would not have power to leave the decision of the matter entirely in the hands of one or more of its members. The delegation of ministerial acts and duties can certainly be made by an arbitrator but unless expressly authorized to do so the arbitrator must exercise his own judgment on the points in dispute and must give his own independent decision.

It is next contended on behalf of the applicant that inasmuch as the defendant submitted to the reference his conduct amounted to referring the matter afresh to the arbitration. It however appears that notice was sent to him twice by the secretary of the committee to appear on the dates fixed and produce his evidence. No notice was ever sent by the arbitrators appointed by the committee. It cannot therefore by any stretch of imagination be supposed that he acquiesced in the disposal of his dispute by the three arbitrators. There was accordingly no acquiescence. The application is accordingly dismissed with costs.

P.N./R.K. *Revision dismissed.*

A. I. R. 1931 Allahabad 752 (1)

PULLAN AND NIAMATULLAH, JJ.

(*Panchaiti Akhara Bara Udasi*) *Nanak Sahi Kydganj* — Decree-holder—Applicant.

v.

Naziruddin and *another*—Judgment-debtors—Opposite Parties.

Execution Second Appeal No. 647 of 1930, Decided on 24th April 1931, against decision of Sub-Judge, Allahabad, D/- 21st December 1929.

Agra Tenancy Act (1926), S. 197—Grove on expropriatary tenancy when not shown to be exempt from S. 197 can be sold in execution.

Where the judgment-debtors who are expropriatary tenants fail to show that the grove planted by them on their tenancy land is a grove which is exempt for some reason from the provisions of S. 197, such grove can be sold in execution of a decree. [P 752 C 2]

Haribans Sahai and *Sri Narain Sahai*—for Applicant.

Zafar Mehdi—for Opposite Parties.

Pullan, J.—The only question to decide in this appeal is whether a grove belonging to the judgment-debtors can or cannot be sold in execution of a decree. The judgment-debtors are expropriatary tenants and the grove is situated on their expropriatary tenancy. Under the Agra Tenancy Act, 1926, the interest of a grove holder can be transferred in execution of a decree of a civil or Revenue Court, and "a grove holder" is defined in S. 196 of the Act. The various classes of grove holders mentioned in that section include one who has planted a grove on land held by him as a tenant, and it was for the judgment-debtors to show that this grove planted by them on their tenancy land is a grove which for some reason is exempt from the provisions of S. 197 of the Act. The Courts below appear to have overlooked the new Act and decided the case on the basis of a decision of this Court reported in *Mt Hafian* v. *Chhokko Lal* (1). We find that that case refers to the Agra Tenancy Act 2 of 1901 and is no authority for the rights of a grove holder under the new Act. In our opinion this grove can be sold in execution of a decree. We therefore allow this appeal with costs, set aside the decrees of the Courts below and dismiss the objection with costs.

B.V./R.K. *Appeal allowed.*

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(1) [1927] Rev. Cases 123.

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* A. I. R. 1931 Allahabad 752 (2)

SULAIMAN, AG. C. J. AND KING, J.

(*Kaviraj*) *Baroda Kant Sen*—Applicant.

v.

Court of Wards in charge of Baraon Estate, Allahabad—Opposite Party.

Civil Revn. No. 341 of 1930, Decided on 14th May 1931, against decree of Small Cause Court Judge, Allahabad, D/- 20th February 1930.

* **(a) Limitation Act (1908), Art. 115 — Art. 115 applies to medical practitioner's claim for fees.**

Article 115 applies to a claim by a medical practitioner for the recovery of his fees for attendance on a patient ; 13 *W. R.* 96, *Rel. on.* [P 753 C 2]

* **(b) Limitation Act (1908), S. 15 (2) — S. 15 (2) does not apply to notifying claim under Court of Wards Act (1912), S. 17.**

The notification of the claim under S. 17, Court of Wards Act, is merely an information to the Collector of the particulars of the claim. It is not necessarily a notice of a civil suit on the basis of that claim. S. 15 (2), Limitation Act, which excludes the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment, would therefore not apply to the notifying of the claim under S. 17, Court of Wards Act. [P 754 C 1]

Harnandan Prasad and *Sukumar Dutta*—for Applicant.

Sankar Saran—for Opposite Party.

Sulaiman, Ag. C. J.—This is a civil revision from an order of the Court of Small Causes dismissing the plaintiff's suit for recovery of fees for attendance as a medical practitioner and for the price of the medicines supplied to the late Raja of Baraon whose estate was taken over by the Court of Wards after his death. The suit has been thrown out on the plea of limitation.

In the plaint the plaintiff alleged that he was a practitioner belonging to the Ayurvedic system and attended the Raja during his illness, that he paid visits and supplied medicines to him from 16th December 1924 to 26th March 1926, the total amount coming up to Rs. 640 and that the Raja promised to make prompt payment of the above sum, but did not do so, and died on 7th April 1926. The plaintiff alleged that he notified his claim to the Manager of the Court of Wards and was waiting for his reply, when he was informed ultimately on 30th November 1928 that his claim was disallowed. The plaintiff then served the defendant with a notice under S. 54, Court of Wards Act, and instituted the present suit on 3rd September 1929.

The learned Judge of the Court of Small Causes came to the conclusion that the plaintiff was not entitled to any exclusion of time on account of the inquiry into his claim that remained pending in the Court of Wards and that accordingly his suit was barred by time. The learned Judge did not refer to any particular article of the Limitation Act under which he thought the claim was barred.

The first question is which article applies to the claim The claim, as pointed out above, consists of two parts. One relating to the recovery of the fees due for medical attendance and the other to the price of medicines supplied. As regards the latter claim there can be no doubt that Art. 52 would be directly applicable. The medicines supplied, which had to be paid for, were goods sold and delivered where no fixed period of credit is agreed upon and a suit had to be brought within three years from the date of the delivery of the goods.

As regards the former claim it is difficult to apply Art. 56 which relates to a suit for the price of work done by the plaintiff for the defendant at his request. No special article appears to be applicable to a claim by a medical practitioner for recovery of his fees for attendance on a patient. The residuary Art. 115 which applies to all breaches of contract, would therefore apply, for there was undoubtedly a contract, at least, an implied one, to pay the fee, and the nonpayment of that fee amounted to a breach for which the plaintiff would be entitled to compensation. In *Harish Chander Surmah* v. *Brojonath Chackerbutty* (1) a suit for recovery of compensation for the fees of a medical practitioner was held to lie under the corresponding article of the Limitation Act then in force.

The next question is from what date the period of three years would begin to run. The starting point is :

> ‘When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.”

In the plaint the plaintiff himself alleged that the cause of action for recovery of the visits accrued when the visits were paid. There was therefore an implied contract to pay the fee on each day. As the fee became due immediately a visit was paid, it would follow that nonpayment would amount to a breach of the contract. In any case the plaintiff admits that in the lifetime of the Raja, presumably on a demand being made, he promised to make prompt payment of the sum of Rs. 640, but he did not do so, and died. This implies an admission that a demand was made and there was a promise to pay the fee promptly and that promise was not carried out. It would therefore follow that there was a breach, if not each day, then on the date of the last visit or at any rate when the Raja died, and the period of limitation would begin to run at least from the date of the death of the Raja. The mere fact that the sons of the Raja or the Court of Wards which now represents his estate would be liable under S. 37, Contract

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(1) [1870] 13 W. R. 96.

Act, would not keep the running of the period of limitation in suspense.

The next question is whether the plaintiff is entitled to any exclusion of time so far as the period of two months required for the notice under S. 54 is concerned. That period must be excluded under S. 15 (2), Limitation Act.

The learned counsel for the applicant strongly contends that inasmuch as the Court of Wards made the plaintiff wait, and the refusal was not communicated to him till 30th November 1928 the whole of the period from the date of notifying the claim till that date should be excluded. It is urged that the whole scheme of the Court of Wards Act seems to be that the plaintiff should not sue till it is made known whether his claim has been allowed or disallowed by the Court of Wards. S. 21 of the Act however refers to the stay of proceedings in execution only and not to the institution of suits. Similarly S. 20 merely provides that the decision of the Collector will not be final and can be contested in a civil suit. It does not prohibit the institution of the suit itself. On the other hand the proviso to that section indicates that when there is good or sufficient cause a suit may be filed even without the claim ever having been notified under S. 17. The notification of the claim under the last-mentioned section is merely an information to the Collector of the particulars of the claim. It is not necessarily a notice of a civil suit on the basis of that claim. S. 15 (2), which excludes the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment, would therefore not apply to the notifying of the claim under S. 17. It may be a somewhat unfortunate thing for claimants, but in the absence of any express enactment requiring that the period of limitation should be suspended during the pendency of the inquiry to the claim by the Court of Wards, the period prescribed by Art. 115 must continue to run. The present claim having been brought more than three years after the accrual of the cause of action, even when the two months are excluded, is accordingly barred by time.

Inasmuch as the period of limitation for the suit expired because of the considerable delay caused by the Court of Wards itself in disallowing the plaintiffs claim, we think that the parties should bear their own costs in both Courts. We accordingly allow the revision in part, and, upholding the decree of the Court below, direct that the parties should bear their own costs in both Courts.

P.N./R.K. *Order accordingly.*

* A. I. R. 1931 Allahabad 754

MUKERJI AND BAJPAI, JJ.

Shiam Lal—Defendant—Appellant.

v.

Abdul Salam—Plaintiff—Respondent.

First Appeal No. 145 of 1930, Decided on 24th April 1931, against order of Addl. Sub-Judge, Moradabad, D/- 19th May 1930.

*** Contract Act (1872), S. 73—Actual loss or damage need not be proved to get compensation—Contract Act (1872), S. 125.**

Where a person contracts to indemnify another in respect of any liability which the latter may have undertaken on his behalf such other person may compel the contracting party, before actual damage is done, to place him in a position to meet the liability that may hereafter be cast upon him: 26 *Cal.* 241; 38 *Mad*, 791; 34 *All.* 429; 63 *I. C.* 87, *Ref.* [P 755 C 2]

Panna Lal—for Appellant.

Mushtaq Ahmad—for Respondent.

Mukerji, J.—This is an appeal against an order of remand made under the following circumstances:

The respondent, Abdul Salam, executed a mortgage in favour of three persons, Hari Chand and others, and thereby hypothecated a third share in two shops and other properties on foot of a mortgage bond, dated 18th November 1920. He acquired the remaining two-thirds share in the two shops which we have mentioned, and, later, on 26th July 1924, he sold the two shops to the appellant Shiam Lal, for a sum of Rs. 6,250. Abdul Salam left with the vendee out of the purchase money a sum of Rs. 3,107-2-0 to be paid to Hari Chand and others in order that the mortgage of 1920 might be cleared off. Owing to certain circumstances, which we need not mention and which will be duly enquired into by the Court of first instance, Shiam Lal made no payment to the mortgagees. The mortgagees brought a suit for sale and obtained a decree on 3rd January 1929. This mortgage decree was partly based on a compromise. Shiam Lal agreed with the mortgagees that the latter, in consideration of a sum of Rs. 2,300 paid to them, would release from liability the two shops purchased by Shiam Lal. As the result of this compromise and payment, the money due to the mortgagees was reduced in amount and a decree for sale was passed against the remaining properties of Abdul Salam for the realization of a sum of Rs. 2,758-14-0. Thereupon, Abdul Salam brought the suit out of which this appeal has arisen to recover the sum of Rs. 2,758-14-0 with interest from 3rd July 1929 (after the expiry of the six months' time allowed for payment), in all for recovery of Rs. 2,779 from Shiam Lal.

The Court of first instance dismissed the suit having held that it was premature. The basis of the judgment was that so far the plaintiff has not paid the mortgagees; nor has his property been sold, and therefore the plaintiff had no cause of action to maintain the suit. The learned Subordinate Judge who heard the appeal, was of a contrary opinion, and he set aside the decree of the Court of first instance and remanded the suit for trial on the merits.

In this Court the learned counsel for the appellant has argued that the plaintiff has no cause of action, because he suffered so far, no actual damage.

If we look to the Contract Act, S. 73, we shall find that the construction which the learned counsel for the appellant would put on S. 73 is too narrow. The section reads as follows:

> "When a contract has been broken, the party who suffers by such breach is entitled to receive * * * * compensation for any loss or damage caused to him thereby * * * *."

The learned counsel agrees that by nonpayment of the money due to Hari Chand and others, the mortgagees, his client did commit a breach of the contract, but he says that compensation can be had by Abdul Salam only if he proved any loss or damage. His argument is that a loss or damage can accrue only if the property is sold or the plaintiff has to pay the money to the mortgagees. He went so far as to argue that, if the decree obtained by Hari Chand and others became time barred, the appellant would reap the benefit of the event and the plaintiff cannot recover.

We need not consider whether the plaintiff would be entitled or not to recover the money if the decree of Hari Chand and others became time barred, but we are clear that a loss or damage has already accrued to the plaintiff on account of a decree for sale being passed against the plaintiff.

If we look to the illustrations attached to S. 73 we shall see that the interpretation put by the learned counsel for the appellant is too narrow. The first illustration is where *A* contracts to sell and deliver 50 maunds of saltpetre to *B* at a certain rate. The promise is broken and it is said that *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered. There is no condition laid down in the illustration that in order to enable *B* to recover compensation, *B* should have actually purchased saltpetre and should have actually paid a higher price than he had contracted to pay to *A*. Similar remarks may be made with respect to other illustrations, specially Illus. (f).

The learned counsel for the appellant argued that this view would be in accordance with English law, but it would not be consistent with the Indian law. In India however, we have got some cases including a case decided by our own High Court where the same view has been taken, although S. 73, Contract Act, has not been quoted.

In the case of *Kumar Nath Bhuttacharjee* v. *Nobo Kumar* (1) there was a suit for recovery of damages where damages had actually accrued. In discussing the law at pp. 244 and 245 the learned Judges (including Ameer Ali, J. as he then was) quoted certain cases and remarked as follows:

> "All these cases point substantially to the conclusion that when a person contracts to indemnify another in respect of any liability which the latter may have undertaken on his behalf such other person may compel the contracting party, before actual damage is done, to place him in a position to meet the liability that may hereafter be cast upon him."

The authorities quoted were both English and Indian.

In the case of *Ramalingathudayar* v. *Unnamalai Achi* (2) there was an agreement between two persons, who compromised a case which had been instituted in forma pauperis that if the court-fee was eventually levied by the Government, the plaintiff would pay a sum of Rs. 250 and the balance would be paid by the defendant. The Court subsequently made an order directing the plaintiff to pay the whole court-fee. Thereupon, the plaintiff brought the suit for recovery of the balance after making a deduction of Rs. 250. The question was whether the suit was premature. Their Lordships said:

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(1) [1899] 26 Cal. 241.
(2) [1915] 38 Mad. 791=24 I. C. 873.

> "Assuming in favour of the defendant that his agreement was to pay the balance of the court-fee to the Court and not to the plaintiff, at the date of suit the defendant had committed a breach of his contract and the plaintiff had suffered damage by having her property attached. There was therefore sufficient to give her a cause of action."

It will be noted that in this particular case a decree for sale has been passed against the plaintiff, and a decree for sale is certainly much more effective than a mere order of attachment. In the case of *Raghubar Rai* v. *Jaij Rai* (3) the view was taken by two learned Judges of this Court that a cause of action arose when a breach took place. The learned Judges went somewhat further and said that there could be only one cause of action viz., the breach and, if a subsequent damage actually occurred, that could give no further cause of action. We need not consider how far we would agree with the second proposition of law, but as regards the first proposition of law, there seems to be no reason to doubt its correctness.

The learned counsel for the appellant quoted before us the case of *Sarju Misra* v. *Ghulam Hussain* (4) where two learned Judges of this Court distinguished the case in *Raghubir Rai* v. *Jaij Rai* (3), but that was a case where an actual loss, in the narrower sense of the word, had occurred.

Having regard to the codified law, and having regard to the decided cases, we are of opinion that the plaintiff had a good cause of action and his suit should be tried. The other points that the appellant may have to urge will be heard no doubt by the Court of first instance.

We uphold the order of remand and dismiss the appeal with costs, including counsel's fees in this Court on the higher scale.

K.N./R.K. *Appeal dismissed.*

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(3) [1912] 34 All. 429=14 I. C. 242.
(4) [1921] 63 I. C. 87.

✲ A. I. R. 1931 Allahabad 756

SULAIMAN, AG. C. J. AND SMITH, J.

Abdul Wahid—Judgment-debtor—Appellant.

v.

Tribhawan Das and *others*—Decree-holder and Auction-purchaser — Judgment-debtors—Respondents.

Civil Revn No. 316 of 1930, Decided on 7th May 1931, against order of Dist. Judge, Agra, D/- 17th April 1930.

✲ **(a) Civil P. C (1908), S. 115 (b)—Failure to exercise jurisdiction owing to error of law—Case is still covered by S. 115.**

In most cases a failure to exercise jurisdiction is based on an erroneous view of the law that the Court has no jurisdiction. The mere fact that the failure proceeds on an error of law would not take the case out of S. 115 (b). [P 756 C 1]

(b) Civil P. C. (1908), S. 122—Power of High Court under S. 122 stated.

Under S. 122 the High Court can only regulate the procedure of the subordinate Courts, and cannot take away their jurisdiction. [P 757 C 2]

✲ **(c) Civil P. C. (1908), O. 21, R. 89—Application under R. 89 should be entertained when all requisites under R. 89 are fulfilled—Failure to fix stamp being mere irregularity cannot prevent it**

The failure to affix the stamps to the application for setting aside the sale is nothing more than a mere irregularity, and does not prevent the Court from entertaining an application under R. 89, if all the conditions required by that rule are complied with. [P 757 C 2]

Iqbal Ahmad, *Mukhtar Ahmad* and *Mansur Alam*—for Appellant.

S. K. Dar and *Gopi Nath Kunzru*—for Respondents.

Sulaiman, Ag. C. J.—This is a judgment-debtor's application in revision from an order of the District Judge affirming the order of the Small Cause Court Judge who declined to entertain an application under O. 21, R. 89. After the sale had taken place the judgment-debtor deposited within the period allowed by law the amount specified in the proclamation of sale as well as a sum equal to 5 per cent of the purchase money as required by O. 21, R 89, and applied for the sale to be set aside. He did not at that stage pay the poundage fee. The munsarim reported that the poundage fee ought to have been paid at the time the application was filed. On the very day that this office report was made the appellant applied asking for time to deposit the poundage fee.

The learned Judge remarked:

> "I am sorry it does not lie within my jurisdiction to grant any extension under O. 21,

R. 89. Any deficiency in the deposited amount necessarily involves 1 a rejection of the objection. The application is rejected accordingly."

There is no doubt that the Small Cause Court Judge thought that inasmuch as the poundage fee had not been paid along with the application within 30 days' he had no jurisdiction to grant any extension of time, and he had no option but to reject the application. This was a failure to exercise jurisdiction in case he really had jurisdiction to extend the time.

An appeal was preferred to the District Judge, who considered the applicability of R. 15, Chap. 17 of the General Rules (Civil) made by this High Court for regulating the procedure in the subordinate Courts. He began with the remarks:

> " Admittedly if it is held that it must be paid along with the two other sums mentioned in O. 21, R. 89, no time can be allowed. "

He concluded that the rule was imperative and that the poundage must be paid up in time, and it was contrary to common sense that a judgment debtor should get an indulgence without first paying the Government dues. He " accordingly agreed with the view of the Small Cause Court Judge. " We think that the proper interpretation of the judgment of the learned Judge is that he came to the conclusion that the deposit of the poundage fee within the period of 30 days was a condition precedent to the hearing of the application, and that if that condition was not complied with, the first Court had no jurisdiction to entertain it. If his view of the law were not correct, it would amount to a failure to exercise jurisdiction by the first Court.

Of course, in most cases a failure to exercise jurisdiction is based on an erroneous view of the law that the Court has no jurisdiction. The mere fact that the failure proceeds on an error of law would not take the case out of S. 115 (b), Civil P. C.

Order 21, R. 89, requires the deposit of only two sums: (1) the amount specified in the proclamation of sale and (2) a sum equal to 5 per cent of the purchase money. R. 89 does not in terms require the payment of any poundage fee. R. 92, sub-R. (2), provides that where in the case of an application under R. 89 the deposit required by that rule is made within 30 days from the date of the sale, the Court shall make an order setting aside the sale. It would therefore appear that R. 89 and R. 92 were literally complied with. The High Court had power to amend R. 89 and to add a third item like poundage fee in it. It has however, not done this so far.

The High Court in the exercise of its powers under S. 122 has made certain rules for the guidance of the procedure in the subordinate civil Courts. R. 15, Chap. 17 requires that a poundage fee

> " shall be paid by stamps affixed to the application to set aside the sale. "

The rule is no doubt imperative, and although it does not say in so many words that the fee cannot be paid after the expiry of 30 days, this is implied by the requirement that the stamps should be affixed to the application itself. But the mere fact that the rule is imperative would not necessarily involve the conclusion that a breach of that rule would oust the jurisdiction of the Subordinate Court and make it helpless in the matter. Under S. 122 the High Court can only regulate the procedure of the Subordinate Courts, and cannot take away their jurisdiction. There are many imperative provisions in the Civil Procedure Code, non-compliance with which has been held in numerous cases to amount merely to an irregularity. The failure to affix the stamps to the application for setting aside the sale would also be nothing more than a mere irregularity, and would not prevent the Court from entertaining an application under R. 89, if all the conditions required by that rule are complied with. Had the Court's below refused the application in the exercise of their discretion on the ground that this was not a fit case for showing indulgence, the position would have been different. They have declined to exercise jurisdiction on the supposed ground that none existed. This was clearly a failure to exercise jurisdiction.

Accordingly we allow this application, and setting aside the orders of the Courts below, send the case back to the first Court through the lower appellate Court for disposing of the application on the merits according to law. The costs will abide the event.

B.V./R.K. *Application allowed.*

A. I. R. 1931 Allahabad 758

SULAIMAN, AG. C. J. AND SMITH, J.

Khushi Ram—Plaintiff —Applicant.

v.

Mt. Manta and *others* — Defendants — Opposite Parties.

First Appeal No. 153 of 1930, Decided on 5th May 1931, against order of Sub-Judge, Mainpuri, D/- 11th June 1930.

Jurisdiction— Civil and revenue— Landlord cutting crops and dispossessing tenant — Suit lies in Revenue Court—But if there is no dispossession but mere cutting of crops suit for damages lies in civil Court.

Where the landlord in addition to cutting away the crops sown by the tenant, also dispossesses him of his holding the Revenue Court is the proper forum for the tenant to bring his suit, but if there is no dispossession but mere cutting away of the crops suit for damages is entertainable by civil Court; 58 *I. C.* 511 and 27 *I. C.* 532, *Rel. on.* [P 758 C 2]

Baleshwari Prasad—for Applicants.

M. L. Chaturvedi—for Opposite Parties.

Sulaiman, Ag. C. J.—This is a plaintiff's appeal from an order returning the plaint for presentation to the Revenue Court. The plaintiff alleged in the plaint that he was the subtenant of the plot referred to therein and the defendants improperly and by an act of high-handedness, being actuated by dishonest motive and showing readiness to fight, cut away the crops sown by the plaintiff from his field on 6th October 1928. He claimed damages for the loss of the crops. The defendants in their written statement denied that the plaintiff was the subtenant, and pleaded that the holding had been surrendered long before that date and the crops had not been sown by the plaintiff at all. There was no express plea raised in the written statement that the civil Court had no jurisdiction to entertain the suit. The act of the defendants complained against by the plaintiff amounted, on the allegations of the plaintiff to a criminal offence and the suit was therefore not of a Small Cause Court nature. The first Court on the merits found that the defendants were the landholders and that the plaintiff had not surrendered the holding, and that the crops had been sown by the plaintiff Khushi Ram in kharif 1336-F. It accordingly decreed the claim.

On appeal the lower appellate Court came to the conclusion that this was a case of a dispute between a tenant and a landholder and that it should be settled by the Revenue Court. It declined to decide the question as to who had raised the crops in dispute. From the plaintiff's admission that his crops had been cut away by the defendants, who were found to be the landholders, the lower appellate Court inferred that the plaintiff alleged that his landholders had illegally dispossessed him. We cannot find any admission of the plaintiff that he had been dispossessed from his holding as well.

There is no doubt that if the plaintiff was dispossessed from his holding as a result of the cutting away of the crops which had been sown by him, he might have instituted a suit in the Revenue Court for the recovery of possession of his holding and also for compensation for wrongful dispossession under S. 99, Agra Tenancy Act. If he could have claimed adequate relief through the Revenue Court, then he was bound under S. 230 of the Act to have recourse to that Court. The mere fact that the relief claimed by him is not in form identical with what he might have claimed in the Revenue Court would not under the explanation added to that section make any difference. On the other hand, if the plaintiff was really not dispossessed from his holding at all, but his crops were cut and removed as if moveable property had been taken away from the place and the plaintiff remained in possession of his holding, there would be no necessity for him to bring a suit for obtaining possession of his holding. Under such circumstances a suit for recovery of damages for wrongful dispossession could not be entertained by the Revenue Court and his remedy would lie in the civil Court. A case of the former nature arose in *Chet Ram* v. *Sahaba* (1) in which a learned Judge of this Court held that there having been a dispossession from the holding the Revenue Court was the proper forum. The case of *Ram Saran Das* v. *Hari Kishen Koeri* (2) was a case of the other nature, in which the plaintiff was found to be in possession even after the crops had been cut away and misappropriated. Another learned Judge of this Court held that the suit for damages was not one for compensation for wrongful dispossession.

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(1) [1915] 27 I. C. 532.

(2) [1920] 58 I. C. 511.

It seems to us that in order to find definitely whether the civil Court should grant the plaintiff the relief he asked for it is necessary to ascertain whether he had or had not been dispossessed from his holding after 6th October 1928.

As the legal position was not correctly appreciated by the Courts below, and the case has not been approached from the right standpoint we cannot uphold the order of the lower appellate Court. The case having been disposed of on a preliminary point, we must remand it. Inasmuch as the issue suggested by us is a new issue, the lower appellate Court will be at liberty to allow the parties to produce further evidence. We accordingly allow this appeal, and setting aside the order of the lower appellate Court send the case back to that Court for disposal according to law. We direct that the costs of the appeal should abide the event.

S.N./R.K. *Case remanded.*

A. I. R. 1931 Allahabad 759

MUKERJI, J.

Suraj and *Sons*—Plaintiffs—Applicants.

v.

J. O. Brin and *another* — Defendants —Opposite Parties.

Civil Revision No. 66 of 1931, Decided on 4th May 1931, against decree of Small Cause Court Judge, Allahabad, D/- 10th January 1931.

Document — Construction of — General principle stated—Document held to be one of hire and not of sale.

It is always dangerous to make an attempt to interpret one document with the aid of another and unless a question of principle is involved, it is no use referring to any case as an authority. Every case has to be decided on the language of the agreement and not on abstract principles. In reading a written agreement we have to see what is the import of it and what the parties really meant to do. If we find that the agreement was mainly one of hiring, we have no right to say that it was a case of sale, simply because in another case, a High Court said that the particular case before it was a case of sale: *A. I. R.* 1930 *Bom.* 306 and *A. I. R.* 1929 *Mad.* 884, *Ref.* [P 760 C 1]

K. Verma—for Applicants.

Hari Pal Varshni — for Opposite Parties.

Judgment.—This revision is bound to succeed as in my opinion the learned Judge of the Small Cause Court, has been misled into the decision at which he arrived by a certain Rangoon decision which was based on an older decision which was subsequently overruled by that very Court.

The applicants here were the plaintiffs in the Court below. They brought the suit out of which this appeal has arisen for recovery of five months' hire of a spring bedstead which was the subject matter of an agreement dated 16th February 1930.

The question is what was the import of the agreement whether it was primarily a transaction of hire and ultimately a transaction of sale or whether substantially it was a transaction for sale. Reading the document independently unaided by any authority I have not the slightest doubt that it was primarily a transaction of hire.

The agreement which is short starts with the following words:

> "Received from . . . the undermentioned articles on hire valued at Rs. 150 only."

Then the defendants go on to say that they agreed to pay the hire on certain terms. The first term was that the defendants were to take care of the article. Cl. 2 was that if the defendants failed to pay hire in any month in advance the plaintiffs were entitled to terminate the hiring and to obtain possession of the article. Cl. 3 was that if the defendants ever wanted to terminate the agreement within the period of ten months (which was required to make up the sum of Rs. 150 the price of the article at the rate of Rs. 15 p. m. the hire) they could do so. It was provided that in such a case the defendants should not be entitled to ask for any refund of the hire already paid. Lastly comes Cl. (4) in which it is said that if the defendants paid regularly month by month the hire agreed upon for ten months the defendants would become the owner of the property without any further payment.

On this agreement there can be no doubt that primarily it was a case of hire and there was no obligation on the part of the defendants to continue the hiring for the full period of ten months. They might keep the property for a month or two months and then give it back. It was only in the case of their keeping the property for ten months and regularly paying the instalments that the defendants would become the owner of the property.

It is always dangerous to make an attempt to interpret one document with the aid of another and unless a question of principle is involved it is no use referring to any case as an authority. In the books there will be found numerous cases dealing with what is known as "the hire purchase agreement" but if we look into those cases we shall find that they have been decided on the language employed by the parties. For example we find it clearly mentioned [*Bhimji N. Dalal* v. *Bombay Trust Corporation* (1)] that there the so-called lessee or hirer had no option to cancel the hire agreement and to stop further payment.

The head-note says:

> "When it is clear from the agreement that the party taking the chattel, called the hirer or lessee, has to pay the full amount of consideration mentioned in the agreement even though the payment is by instalments and that amount is sufficient to cover the purchase price of the chattel or when it is clear from the agreement that the "hirer" or "lessee" cannot at any time during the period mentioned in the agreement return the chattel to the other party called the "owner" or "lessor" and absolve himself from the obligation to make further payment the agreement is really an agreement for sale and not for hire."

As I have already stated every case has to be decided on the language of the agreement and not on abstract principles. In reading a written agreement we have to see what is the import of it and what the parties really meant to do. If we find that the agreement was mainly one of hiring as in this particular case we have no right to say that it was a case of sale simply because in another case a High Court said that the particular case before it was a case of sale.

There is a Madras case: *the Auto Supply Co.* v. *Raghunath Chetty* (2), which was decided on the language employed in that particular case and it held that it was a case of hire and even the deposit of more than Rs. 1,000 which was treated as initial payment for rent was not allowed to change the character of the agreement.

I allow the application in revision set aside the decree of the Court below and decree the plaintiff's claim with costs in both the Courts against the respondents.

K.N./R.K. *Revision allowed.*

A. I. R. 1931 Allahabad 760

BANERJI AND KING, JJ.

Nurul Hasan—Non-applicant—Appellant.

v.

Mt. Aisha Bi and *others*—Applicants—Respondents.

First Appeal No. 6 of 1928, Decided on 21st April 1931, against decision of Assistant Collector, Etawah, D/- 20th October 1927.

U. P. Land Revenue Act (1901), S. 111—Question of title determined by competent Court—S. 111 does not apply.

If a recorded cosharer makes an objection involving a question of proprietary title, which question has been determined by a Court of competent jurisdiction then S. 111 does not apply and the question cannot be reopened.

If the objection is that such decision had been obtained by fraud and without objector's knowledge the objector may institute a suit on that ground, but the Revenue Court cannot refer the objector to the civil Court for getting the decree set aside on ground of fraud, because the question whether the decree of the civil Court was obtained by fraud is not a question of "proprietary title" within the meaning of S. 111. [P 761 C 1, 2]

M. H. Faruqi—for Appellant.

Mukhtar Ahmad—for Respondents.

King, J.—This appeal arises out of an application for partition of certain zamindari property. The pedigree of the parties is given at p. 15 of the paper book. Mt. Aisha Bi and others were applicants for partition. Nurul Hasan, one of the non-applicants, made an objection on 7th September 1927, alleging that his sisters Mt. Aisha Bi and Fatima Bi did not get any share in the zamindari property left by the father as there was a custom in the objector's family that the daughters of a deceased person get no share in the zamindari property left by their father. He also alleged in para. 6 of his objection that the decree of the civil Court, relied upon by the applicants for partition, is only a fictitious and ex parte proceeding as against the objector and not binding upon him.

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(1) A. I. R. 1930 Bom. 306=124 I. C. 800=54 Bom. 381.

(2) A. I. R. 1929 Mad. 884=121 I. C. 593=52 Mad. 829.

A reply was made to this objection on behalf of Mt. Aisha Bi. She maintained that her rights had already been declared by a decree of the civil Court, that her name and that of the other applicants had been entered in the revenue papers, and that the objector had no right to raise any objection. The Revenue Court passed an order on 20th October 1927, saying that the applicants are recorded cosharers, and their title is supported by certified copies of the civil Court, and other Court's orders: and that the contention that they have come upon the property by means of fraud does not involve the question of proprietary litle. The Court held that it was not empowered under S. 111, U. P. Land Revenue Act, to reopen the question of title, which had already been decided by the civil Court, and disallowed the objection.

This appeal is against the abovementioned order of 20th October. It has been argued for the appellant that even though the applicants have been declared by a competent civil Court to be entitled to the shares which they claimed, by the decree dated 11th January 1918, this decree was obtained by fraud and it is open to the objector to institute proceedings for having the decree set aside as having been fraudulently obtained, and the Revenue Court should not have stayed the proceedings, directing the objector to file a suit in the civil Court for setting aside the decree.

In our opinion the Court below has taken the correct view of its powers under S. 111. That section lays down that if a recorded cosharer makes an objection involving a question of proprietary title which has not been already determined by a Court of competent jurisdiction, then the Collector may adopt one of three courses for the purposes of getting the question determined. In the present case the provisions of S. 111 did not apply because the question of proprietary title raised before the Revenue Court had already been determined by a Court of competent jurisdiction. It may be open to the objector to institute a suit on the ground that the decree was obtained by fraud and without his knowledge, but this will not bring the question of title within the purview of S. 111. In our opinion, when the question of title has been determined by a Court of competent jurisdiction, then S. 111 is no longer applicable and it is not open to the Revenue Court to refer the objector to the civil Courts for getting the decree set aside on the ground of fraud. The question whether the decree of the civil Court was obtained by fraud is not a "question of proprietary title" within the meaning of S. 111.

We think the order of the Court below is correct and dismiss the appeal with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1931 Allahabad 761

SULAIMAN, AG. C. J. AND NIAMATULLAH, J.

Poran Lal and *others*—Plaintiffs—Applicants.

v.

Rup Chand and *others*—Defendants—Opposite Parties.

Civil Revn. No. 135 of 1930, Decided on 1st April 1931, against decree of 1st Sub-Judge, Saharanpur, D/- 5th February 1930.

(a) **Civil P. C. (1908), Sch. 2, R. 5—Arbitrator cannot be appointed without notice from one party to other.**

Niamatullah, J.—In the absence of notice by one of the parties to the other to appoint an arbitrator, the Court has no power to appoint one arbitrator in place of other: *A. I. R.* 1929 *All.* 144 and 41 *All.* 578, *Ref.* [P 762 C 2]

(b) **Civil P. C. (1908), S. 115—Case is decided within meaning of S. 115, when reference is made to arbitrator whom Court could not appoint.** [P 762 C 2]

On a reference being made to an arbitrator whom the Court has no power to appoint, a "case" should be considered to have been decided within the meaning of S. 115 so as to empower the High Court to interfere in revision *A. I. R.* 1921 *All.* 1, *Ref.* [P 763 C 1]

(a) **Civil P. C. (1908), S. 115 and Sch 2, R. 5—Court appointing arbitrator without notice to other party—There is material irregularity in procedure and S. 115 applies.**

Sulaiman, Ag. C. J.—If the procedure laid down in R. 5, Sch. 2, as regards the giving of notice and the opportunity to the other party to be heard is not followed, the Court has no power to appoint a new arbitrator. The rule as to notice and the opportunity to the oppoiste party to be heard is a rule of procedure and the failure to comply with it would not amount to want of jurisdiction but the act of the Court would be illegal and there would be material irregularity in procedure so as to bring the case within the scope of S. 115. [P 764 C 1]

B. E. O'Conor and *Akhtar Husain Khan*—for Applicants.

Iqbal Ahmad and *K. C. Mital*—for Opposite Parties.

Niamatullah, **J.**—This is an application for revision by the plaintiffs and arises out of a suit brought by them for partition of family property. The parties agreed, on 8th June 1929, to refer the dispute between them to the arbitration of four persons, including one Madho Ram as an umpire. Accordingly an application was presented on 24th June 1929 asking for a reference to the aforesaid arbitration. Accordingly the matter was so referred. Madho Ram refused to act. By an order, dated 23rd August 1929, the Court directed the parties to nominate another arbitrator in place of Madho Ram. Before any nomination could be made by the parties, the plaintiffs applied, on 2nd September 1929 praying that the arbitration be superseded. The Court rejected this application and appointed one Babu Bimal Prasad as an arbitrator by an order dated 3rd September 1929. The order itself merely appointed B. Bimal Prasad as an arbitrator, but it was construed by the lower Court as amounting to a reference to B. Bimal Prasad as the sole referee. It should be mentioned that the arbitrators other than Madho Ram had neglected to act as arbitrators, though they had not positively refused to act as such. B. Bimal Prasad also refused to act as an arbitrator on 5th September 1929. By an order dated 7th September 1929, the Court appointed Mr. Girraj Bahadur as an arbitrator, directing the parties to pay Rs. 150 as his remuneration. On 28th November 1929 the plaintiffs applied for revocation of the reference, expressing their unwillingness to proceed with the arbitration; but that application was rejected. On 9th December 1929 the plaintiffs again applied for the revocation of reference. This was also rejected. On 16th January 1930, the plaintiffs took objection to the legality of the appointment of Mr. Girraj Bahadur as arbitrator. The application was rejected. Some proceedings took place before the arbitrator after 16th January 1930. The present application for revision was filed in this Court on 7th March 1930. It appears that the award was made by Mr. Girraj Bahadur on 12th March 1930, and filed in due course in the Court below.

One of the grounds taken in revision has reference to the power of the Court to appoint Mr. Girraj Bahadur without previous notice having been given by the defendants to the plaintiffs to nominate an arbitrator as required by R. 5, Sch. 2, Civil P. C. It is not in dispute that no notice was given by the defendants to the plaintiffs to appoint an arbitrator in place of either Madho Bam or B. Bimal Prasad. It is argued that Mr. Girraj Bahadur was appointed in continuation of proceedings following the order of the Court dated 23rd August 1929, by which time was given to the parties to nominate an arbitrator. It is said that B. Bimal Prasad refused shortly after his nomination and the appointment of Mr. Girraj Bahadur by the Court must be considered to be part of the proceedings started by the Court's order dated 23rd August 1929. I am unable to take this view of the matter. The Court had to fill up the vacancy by the refusal of Madho Ram to act; and when the parties neglected to make a nomination for which an opportunity was given to them by the order dated 23rd August 1929, the Court appointed B. Bimal Prasad. This marked the termination of one stage of the proceedings. It could not at that time be anticipated that B. Bimal Prasad would refuse, as he subsequently did on 5th September 1929. The Court should have adopted the procedure laid down by R. 5 after B. Bimal Prasad refused to act as an arbitrator. In the absence of notice by one of the parties to the other to appoint an arbitrator, the Court had no power to appoint Mr. Girraj Bahadur in place of B. Bimal Prasad. This view was taken by a Bench of this Court in *Jagannath Sahu* v. *Chhedi Sahu* (1) and alsoin *Abdul Gani* v. *Din Dayal* (2). I am clearly of opinion that the Court had no power to appoint Mr. Girraj Bahadur to act as arbitrator without the formalities required by R. 5, Sch. 2, Civil P. C. being observed.

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(1) A. I. R. 1929 All. 144=115 I. C. 611=51 All. 501.

(2) [1919] 41 All. 578=50 I. C. 655.

It is argued that no case has been decided within the meaning of S. 115, Civil P. C. and therefore no revision can lie. The argument implies that the stage when a case is decided has not yet arrived and will arrive in future when a decree is passed on the foot of the award. I think that the order of the Court dated 7th September 1929 appointing Mr. Girraj Bahadur as the arbitrator and making a reference to him, does amount to a case decided within the meaning of S. 115, Civil P. C. To take any other view would be to put a premium on unnecessary proceedings in which a large number of witnesses may be examined by the parties and the award which the arbitrator might eventually make may be declared by the Court to have been made by the arbitrator who had been illegally appointed and had in consequence no jurisdiction. I am therefore of opinion that on a reference being made to an arbitrator whom the Court had no power to appoint, a "case" should be considered to have been decided within the meaning of S. 115 so as to empower this Court to interfere in revision.

It has been argued by the learned advocate for the respondent that great delay occurred in applying for revision and that the applicants had acquiesced in the appointment of Mr. Girraj Bahadur by taking part in the arbitration proceedings before him. I have already referred to no less than two applications having been made by the applicants for revocation of the reference, both of which were dismissed by the Court. Finally they objected specifically to the appointment of Mr. Girraj Bahadur though the objection made no reference to R. 5, Sch. 2, Civil P. C. In view of these circumstances, it cannot be said that the applicants acquiesced in either the appointment of Mr. Girraj Bahadur or the decision of the case by arbitration. It is quite clear that the plaintiffs were throughout anxious to have the matter decided by the Court and to have the arbitration superseded. No case of acquiescence, in my opinion, has been made out; and if the appointment of Mr. Girraj Bahadur was invalid so as to make an award made by him to be considered illegal the applicants are entitled to have the appointment of Mr. Girraj Bahadur set aside by this Court in revision instead of waiting till such time that an award is made and a decree based thereon is passed by the Court.

It has been pointed out that the application for revision is directed against the Court's order of 5th February 1930, rejecting the plaintiffs' application, dated 16th January 1930 which prayed

> "that the arbitration proceedings may be declared null and void and the case may be heard or any other arbitrator with the consent of the parties may be duly appointed,"

which order at any rate does not amount to a case decided within the meaning of S. 115. It is not necessary to decide whether the order dated 5th February 1930 is one which can be the subject of an application for revision; as I am clear that the Court's order, dated 7th September 1929 by which Mr. Girraj Bahadur was appointed an arbitrator and a reference was made to him, is an order which the Court had no power to pass. Accordingly the whole proceedings subsequent to that order must be considered to be tainted with illegality. Consequently if the order of 7th September 1929 can be revised, as I think it can be, all proceedings following that order must necessarily fall through. In this view of the case I allow this application in revision, set aside the order of the Court dated 7th September 1929 and direct it to proceed according to law.

Sulaiman, Ag. C. J.—This revision purports to be against an order refusing to declare that the arbitration proceedings are null and void. The order is either in the exercise of the discretion of the Court or is a decision that in law the arbitration is not void. I am clearly of opinion that no revision would lie from this order. But as pointed out by my learned brother, it has been brought to our notice that the earlier order of 7th September 1929 is open to serious objection. I would therefore agree to that order being set aside unless there is any estoppel against the applicants.

No doubt the application is filed rather late, i. e., about six months after the passing of that order; but it cannot be said that the applicants acquiesced in it and that their conduct amounted to estoppel. On several occasions they protested against the arbitration and ap-

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plied to the Court for its revocation. It is quite clear to my mind that if there has been a grave illegality or material irregularity, it would be open to the applicants to challenge the award on that ground even after a decree in terms of it has been passed. It would therefore be a saving of time, labour and money if on being satisfied that the decree will have to be set aside, we were to interfere even at this stage. In the case of *Jagannath Sahu* v. *Chhedi Sahu* (1), it has been held by a Bench of this Court that the appointment of a new arbitrator which is not authorized is a case decided within the meaning of S. 115, Civil P. C. As the Full Bench case in *Pudhu Lal* v. *Mewa Ram* (3) is not directly against this view, I am not prepared to differ.

It may be assumed in favour of the respondents that the Court had power to appoint one arbitrator in place of the four when they neglected to act; and it may therefore be assumed that the appointment of B. Bimal Prasad was not necessarily irregular. But when B. Bimal Prasad refused to act, the Court without waiting for the defendants to serve a notice on the plaintiffs or without giving time to the parties to appoint a fresh arbitrator, proceeded to appoint Mr. Girraj Bahadur as the sole arbitrator and fixed a fee for him. This was on 7th September 1929.

There is certainly authority for the view that if the procedure laid down in R. 5, Sch. 2, as regards the giving of notice and the opportunity to the other party to be heard, is not followed, the Court has no power to appoint a new arbitrator. It is however not necessary for me to decide in this case whether the Court would be acting without jurisdiction and its order would be ultra vires if that procedure had not been followed. It may well be said with equal force that the rule as to notice and the opportunity to the opposite party to be heard is a rule of procedure, and the failure to comply with it would not amount to want of jurisdiction. I have however no doubt in my mind that the act of the Court would be illegal and there would be material irregularity in procedure so as to bring the case within the scope of S. 115.

As pointed out by my learned brother, there were several irregularities in this case. Not only was no notice served by the defendants on the plaintiffs calling upon them to nominate an arbitrator in place of the one who had refused to act but there was even no opportunity given to the plaintiffs to be heard. It has been contended on behalf of the respondents that inasmuch as on a previous occasion the plaintiffs had failed to nominate an arbitrator and the Court had to appoint B. Bimal Prasad the subsequent proceedings consequent upon the refusal of B. Bimal Prasad in which the Court appointed Mr. Girraj Bahadur must be considered to have been in the same continuation. This contention cannot be accepted. When the Court passed a definite order appointing B. Bimal Prasad on 3rd September 1929, the previous proceedings came to an end; and a fresh right to serve notice on the opposite party arose when B. Bimal Prasad in his turn also refused to act. I therefore agree that it was the duty of the Court to wait for a week after the service of a fresh notice or at any rate, to give sufficient time to the parties to nominate an arbitrator in place of B. Bimal Prasad before it formally appointed Mr. Girraj Bahadur. Another irregularity was that no formal application was made to the Court by the defendants requesting the Court to appoint some one as arbitrator on the ground that the plaintiffs had failed to nominate one. As already pointed out, no date was fixed for the disposal of this matter and the parties were not heard before the order appointing Mr. Girraj Bahadur was passed. The order therefore has been both unfair and unjust to the plaintiffs, and I agree that it ought to be set aside.

By the Court.—The application in revision is allowed to this extent: that the order of 7th September 1929 is set aside and the case is sent back to the Court below with direction to proceed under R. 5, Sch. 2, Civil P. C., and to dispose of the case according to law. The Court should consider whether it should supersede the arbitration or whether it should allow time to the parties to serve the necessary notice and then appoint an arbitrator in case they fail to do so. Under the circumstances of the case the parties should bear their own costs of this revision.

B.V./R.K. *Revision allowed.*

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(3) A. I. R. 1921 All. 1=43 All. 564=63 I. C. 15 (F.B.).

A. I. R. 1931 Allahabad 765

Sulaiman, Ag. C. J. and Bajpai, J.

Mohd. Ahsan Ali Khan and *others*—Objectors—Appellants.

v.

Syed Ibrar Husain and *others*—Respondents.

First Appeal No. 117 of 1930, Decided on 18th May 1931, against order of Dist. Judge, Meerut, D/- 20th February 1930.

Civil P. C. (1908), Ss. 47 and 2—Scheme under S. 92 providing for appointment of new trustee by committee with approval of District Judge—Order of District Judge approving of appointment is not order under S. 47 so as to be appealable.

Where a scheme settled under S. 92 provides that in the event of a vacancy occurring by death, retirement, resignation or removal of a trustee a new trustee should be appointed by the committee with the approval of the District Judge, an order of the District Judge approving of such an appointment cannot be treated as a decree under S. 47 read with S. 2 so as to make it appealable, nor can such order fall within the purview of S. 115 since the District Judge in considering that the committee had appointed the best available person to act as trustee must be deemed to have exercised the discretion vested in him and he cannot be said to have acted either without jurisdiction or with ay illegality or material irregularity in the exercise of his jurisdiction: *A. I. R.* 1925 *P. C.* 155 and *A. I. R.* 1916 *P. C.* 132, *Rel. on.* [P 766 C 1]

K. N. Katju, Sri Narain Sahai and *S. Majid Ali*—for Appellants.

Iqbal Ahmad, M. A. Aziz and *M. L. Chaturvedi*—for Respondents.

Sulaiman, Ag C. J.—This appeal has been filed by the dismissed trustees from an order of the District Judge approving of the appointment of another trustee to fill a vacancy in pursuance of a scheme settled by the High Court in a suit under S. 92, Civil P. C. Under the scheme that was settled it was provided that in the event of a vacancy occurring by death, retirement, resignation or removal a new mutawalli should be appointed by the committee with the approval of the District Judge. This was ordered on 26th April 1916.

A vacancy occurred on account of the resignation of the previous trustee. The committee considered various names and appointed one person as trustee. The learned Judge asked the committee to reconsider the claims of the various available candidates and finally approved of the appointment of Mr. Zaidi as the trustee.

The learned advocate for the appellants contends that the order passed by the District Judge was an order in execution of the decree originally passed, and therefore was a decree within the meaning of S. 47, Civil P. C. and is appealable as such. By way of precaution a prayer has been added in the memorandum of appeal that, if no appeal lies, it should be treated as an application in revision.

We are satisfied that the order passed by the Court below was not an order under S. 47, Civil P. C., and therefore no appeal lies. No doubt under the scheme the appointment of the trustee was subject to the approval of the District Judge but the District Judge could not act suo motu without the committee having moved in the matter in the first instance. The power given to the Judge to approve of the appointment or to disapprove of it cannot be treated as an executable part of the scheme settled by the High Court so as to make the present application one in execution.

In the case of *Sevak Jeranchod Bhogilal* v. *Dakor Temple Committee* (1) a scheme had been settled for the management of a temple which provided for the appointment of a temple committee empowering the committee to make rules for the guidance of its business and for the management of the temple. These rules when sanctioned by the District Judge were to have the same force as if they were part of the scheme. The committee framed a set of rules which with certain alterations were ultimately sanctioned by the District Judge. Certain parties who felt aggrieved by the rules as sanctioned presented an application to the High Court for their modification. It was held by their Lordships of the Privy Council that no appeal lay to the High Court against the order of the District Judge sanctioning these rules as the said order was not passed under S. 47, Civil P. C. We think that the principle underlying this decision applies to this case as well. The approval given to the appointment by the District Judge cannot be treated as a decree within the meaning of S. 47 read with S. 2, Civil P. C., so as to make it appealable.

The next question is whether a revision lies from the order of the District Judge. The answer to that question would depend on whether the order passed by the Judge was in his judicial or administrative capacity. It is quite obvious that if instead of the District Judge, the District Magistrate or some other person had been appointed as the final referee with whose approval the appointment had to be made it could hardly be said that the act of the referee would be a judicial act. At the same time there may be a scheme of which certain parts when carried out may involve a judicial act of the District Judge. In the present case we do not think it necessary to finally decide this point because we are satisfied that even if a revision were to be allowed there are no grounds for interference. The learned Judge was not bound to accept the wishes of the founder of the wakf in the choice of the trustee. The trust was for public purposes, and, as observed by their Lordships of the Privy Council in *Mahommed Ismail Ariff* v. *Ahmad Moolla Dawood* (2) the District Judge may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created, and he may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution. The learned Judge in this case in considering that the committee had selected the best available person to act as trustee was exercising the discretion vested in him and cannot be said to have acted either without jurisdiction or with any illegality or material irregularity in the exercise of his jurisdiction. The case therefore does not fall within the purview of S. 115, Civil P. C.

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(1) A. I. R. 1925 P. C. 155=87 I. C. 313.(P.C.).

We accordingly reject this appeal with costs.

V.B./R.K. *Appeal dismissed.*

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(2) A. I. R. 1916 P. C. 132=35 I. C. 30=43 I. A. 127=43 Cal. 1085 (P. C.).

A. I. R. 1931 Allahabad 766 (1)

SULAIMAN, AG. C. J. AND BAJPAI, J.

Kodai Misir and *others*—Applicants.

v.

Reyazul Haq and *others* — Opposite Parties.

Civil Revn. No. 102 of 1930, Decided on 11th March 1931, against decree of Munsif, Azamgarh, D/- 21st December 1929.

Civil P. C. (1908), S. 151—Clerical mistake in plaint—Mere filing of appeal against does not oust jurisdiction of Court to correct it.

The mere fact of an appeal being filed from the decree does not oust the jurisdiction of the Court to correct a clerical mistake in the plaint and the decree under S. 151. [P 766 C 2]

Janaki Prasad—for Applicants.

Man Mohan Banerjee and *R. N. Mukerji*—for Opposite Parties.

Judgment.—Under a sale-deed a one anna, 13 gandas odd share was transferred. A suit for pre-emption was brought professedly to pre-empt the whole property transferred, but the share entered in the plaint was stated to be one anna 3 gandas, odd. A decree followed which repeated the extent of the share as given in the plaint. An appeal was preferred to the District Judge and was pending, when the plaintiff discovered the mistake. He applied to the first Court for the amendment of the plaint and the decree on the ground of clerical error under S. 151, Civil P. C. The Court was satisfied that there was a mistake and amended the plaint and the decree.

There can be no question that the Court had jurisdiction to correct the mistake. It is argued on behalf of the applicant that inasmuch as an appeal was pending from that decree the jurisdiction of the first Court had been ousted. We are unable to accept this contention. The mere fact of an appeal being filed does not oust the jurisdiction of the Court. Of course where the decree of the first Court has been affirmed by an appellate Court it becomes merged in the appellate Court's decree, but that is a quite different case altogether. We therefore see no reason for interference and dismiss the revision with costs.

R.M./R.K. *Petition dismissed.*

A. I. R. 1931 Allahabad 766 (2)

BANERJI AND KING, JJ.

Raghu Lal and *others*—Appellants.

v.

Babu Arjun Singh and *others*—Respondents.

Second Appeal No. 301 of 1928, Decided on 12th January 1931, against decision of 2nd Addl. Sub Judge, Gorakhpur, D/- 3rd November 1927.

Civil P. C., O. 41, R. 4— Person, not party to first appeal, cannot prefer second appeal.

When one of the parties to a suit is no party to the first appeal, it is not competent for the defendants or the plaintiffs who are not parties to the appeal in the Court below to file a second appeal: *A. I. R.* 1924 *All.* 873; and *A. I. R.* 1926 *P.C.* 34 *Ref.* [P 767 C 1]

Shiva Prasad Sinha and *N. Upadhya*—for Appellants.

K. N. Katju—for Respondents.

Bannerji, J.—This is a defendants' appeal under the following circumstances. Satnarain Lal and Dewan Lal, defendants 1 and 2, had executed a promissory note on 12th November 1925 in favour of the plaintiffs Arjun Singh and Sarwan Singh. A suit for recovery of the money due on the promissory note was instituted by Arjun Singh and Sarwan Singh against Satnarain Lal, Dewan Lal and five other members of the family who were brothers and nephews of the two executants of the promissory note. The Court of first instance passed a decree against all the defendants. Three of the defendants, namely, Satnarain, Dewan Lal and Jagdeo Lal, presented an appeal to the learned District Judge of Gorakhpur alleging that the appeal was on behalf of all the defendants, but the other defendants, four in number, were not made parties to the appeal. The learned Additional Subordinate Judge who heard the appeal dismissed the appeal of Satnarain Lal and Dewan Lal and allowed the appeal of Jagdeo Lal. He was asked to dismiss the plaintiffs' suit against the other defendants also but he declined to accede to the request. Thereupon Satnarain Lal, Dewan Lal, Raghu Lal, Hazari Lal and Baldeo Lal have filed the present appeal to this Court. A preliminary objection is taken to the hearing of this appeal by Raghu Lal, Hazari Lal and Baldeo Lal on the ground that they not having appealed and not having been parties to the appeal before the Court below are not competent to prefer a second appeal. As regards the appeal of Satnarain and Dewan Lal it is urged that no ground has been taken in the memorandum of appeal on their behalf.

We have come to the conclusion that the preliminary objection must be allowed. In our opinion when one of the parties to a suit is no party to the first appeal, it is not competent for the defendants or plaintiffs who are not parties to the appeal in the Court below to file a second appeal. To permit such an appeal would really amount in effect to permitting an appeal against the decree of the trial Judge. A similar view was taken in the case of *Balkaran Lal* v. *Malik Namdar*, *A. I. R.* 1924 *All.* 873. Reference may also be made to the case of *Mahmed Khaleel Shirazi* and *Sons* v. *Les Tanneries Lyonnaises* (1). We therefore dismiss this appeal with costs.

K.N./R.K. *Appeal dismissed.*

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(1) A. I. R. 1926 P.C. 34=94 I. C. 767=53 I. A. 84=49 Mad. 435 (P. C.).

* A. I. R. 1931 Allahabad 767

MEARS, C. J. AND SEN, J.

Chhita—Appellant.

v.

Mt. Jaffo and *others*—Respondents.

First Appeal No. 42 of 1930, Decided on 27th January 1931, against order of Sub-Judge, Muttra, D/- 3rd December 1929.

* **Civil P. C. (1908), O. 3, R. 4—Name of pleader through oversight omitted from body of vakalatnama—There is no valid appointment—Defect cannot be cured either by oral evidence which is inadmissible or by circumstance that pleader has endorsed his acceptance in writing on back of vakalatnama— Interpretation of statutes, Intention of legistature.**

It is obviously the intention of the legislature that the authority of the pleader to act should be contained in an instrument in writing and that the appointment of the pleader could not be made verbally. The word "shall" in O. 3, R. 4, indicates that the rule is of an imperative character. Where the name of the pleader has, through oversight, been omitted from the body of the vakalatnamah, there is no valid appointment; and the defect in the instrument could not be cured either: (1) by production of parol evidence, which is inadmissible, or (2) by the circumstances, that the pleader had endorsed his acceptance in writing on the back of the vakalatnama. Where the legislature insists upon the execution of a formal document there can be no appointment unless the formality has been duly complied with; and the written authority in favour of a definite individual or individuals by name cannot be dispensed with on the ground that the enacted rule is mere technical rule of procedure: 6 *A. L. J.* 110=36 *All.* 46 and *A. I. R.* 1930 *All.* 112, *Rel. on.* [P 768 C 2]

S. C. Das—for Appellant.

N. P. Asthana and *Baij Nath Sahai*—for Respondents.

Sen, J.— A plaint was presented in the Court of the Munsif of Muttra by one Babu Bishambhar Nath, on behalf of Mt. Jaffo and others. The plaint was accompanied by a vakalatnama, which was duly signed by the plaintiffs. Through haste or by oversight, the executants of the vakalatnama omitted to enter the name of Babu Bishambhar Nath in the body of this instrument. The blank space in the vakalatnama in which the name of the pleader should have been written had not been filled in. Babu Bishambhar Nath however had endorsed the acceptance of the vakalatnama on the back of this document.

At a late stage of the case this defect was discovered by a pleader for Chitta, defendant. He objected that there was no valid plaint in Court, as that document had been presented by an unauthorized person.

This objection was sustained by the Munsif. He ordered

> "the case to be struck off the file with the direction that the plaint be returned to the vakil for proper presentation."

A formal order was drawn up, which did not exactly agree with the operative part of the judgment and was inaccurate. It run as follows:

> "It is ordered and decreed that this case be struck off the list of pending cases. The plaint be returned to the pleader for the plaintiffs for presentation to a competent Court."

It may be observed that the plaint was to be returned to Babu Bishambhar Nath but he was not the pleader for the plaintiffs. The suit moreover had not been instituted in the wrong Court. The plaint was lodged in the Court of the Munsif of Muttra which was the correct forum.

The plaintiffs appealed; and their appeal was heard by the Subordinate Judge of Muttra. He considered that the Munsif had returned the plaint on a view which was narrow and technical; and upon this ground alone he reversed the order of the Munsif and remanded the case to him for trial on the merits.

The defendant has appealed to this Court from the order of remand and it has been contended that the Subordinate Judge was not justified in oversetting the Munsif, that the plaint had not been validly presented in the Court of the Munsif and that the order of remand was bad in law.

Order 3, R. 4, Civil P. C., provides:

> "(1) No pleader shall act for any person in Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person."

It was obviously the intention of the legislature that the authority of the pleader to act should be contained in an instrument in writing and that the appointment of the pleader could not be made verbally. The word "shall" in the aforesaid rule indicates that the rule is of an imperative character. Where the name of the pleader had, through oversight, been omitted from the body of vakalatnama, there was no valid appointment; and the defect in the instrument could not be cured either: (1) by production of parol evidence which was inadmissible; or (2) by the circumstances, that the pleader had endorsed his acceptance in writing on the back of the vakalatnama. Where the legislature insists upon the execution of a formal document, there can be no appointment unless the formality has been duly complied with; and the written authority in favour of a definite individual or individuals by name cannot be dispensed with on the ground that the enacted rule is mere technical rule of procedure.

We are of opinion that Babu Bishambhar Nath was not validly appointed and that the plaint lodged by him was unauthorized. We are fortified in our view of law by the principle laid down by this Court in *Pokhpal Singh* v. *Dambar Singh* (1); *Muhammad Ali Khan* v. *Jasram* (2) and *Muhammad Qamar Shah Khan* v. *Muhammad Salamat Ali Khan*, *A. I. R.* 1930 *All.* 112.

The result is that we allow this appeal, set aside the order of remand and restore the order of the Court of first instance in so far as it directs the return of the plaint to the pleader who presented it. The appellant is entitled to his costs of this Court and of the Courts below.

P.N./R.K. *Appeal allowed.*

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(1) [1909] 6 A. L. J. 110*n*.

(2) A. I. R. 1914 All. 536=36 All. 46=23 I. C. 464.

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